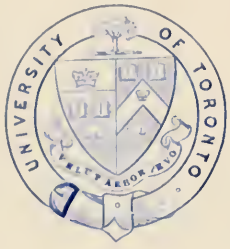

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BUTTERWORTHS'

Ten Years' Digest

OF

REPORTED CASES,

1898—1907.

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1898 TO 1907.

DIGEST OF REPORTED CASES DECIDED IN THE SUPREME AND OTHER COURTS DURING THE YEARS 1898 TO 1907,

INCLUDING

COPIOUS SELECTION OF REPORTED CASES DECIDED IN THE IRISH AND SCOTCH COURTS, WITH LISTS OF CASES DIGESTED, OVERRULED, CONSIDERED, ETC.

ISSUED UNDER THE GENERAL EDITORSHIP OF

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BUTTERWORTHS'

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REPORTED CASES,

1898—1907.

GAME.

I. Game.
(*a*) Ground Game 1
(*b*) Licences 2
(*c*) Trespass and Poaching . . 4
II. Sporting Rights, &c. . . . 5

I. GAME.

(a) Ground Game.

1. *Agreement by Occupier to Alienate his Right to Kill and Take—Advantage in Consideration — Claim for Compensation — Invalidity—Ground Game Act*, 1880 (43 & 44 Vict. *c.* 47), *s.* 3.]—By the Ground Game Act, 1880, s. 3, "Every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this Act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void." The landlord's agent, with a view to induce the tenant of two farms to leave the ground game on the farms unshot and undisturbed for the landlord's benefit, promised that in the event of the tenant so doing the landlord would compensate the tenant for all damage done to the plaintiff's crops by the ground game.

Held—that as the agreement purported to alienate the right to kill and take the ground game which was given the tenant by the Act, and to give him an advantage in consideration of his forbearing to exercise such right within sect. 3, it was absolutely void, and the tenant could not claim compensation under it.

Sherrard *v.* Gascoigne, [1900] 2 Q. B. 279; 69 [L. J. Q. B. 720; 48 W. R. 557; 82 L. T. 850; 16 T. L. R. 432—Div. Ct.

2. *"Occupier of Land"—Right of Owner Occupying his Land to Kill Ground Game—Ground Game Act*, 1880 (43 & 44 Vict. *c.* 47), *s.* 1.]—The owner of the whole of an estate let a portion of it for a term of twenty-one years, reserving to himself, subject to the Ground Game Act, 1880, the right to kill game and rabbits. The owner then let to the plaintiff the house on the estate, together with the sporting rights over the whole estate, for five years. The owner then sold to the defendant the land comprised in the lease for twenty-one years, together with a wood adjoining. The lease for twenty-one years was surrendered to the defendant. The defendant entered into possession, occupied the land, and trapped the rabbits. The plaintiff brought an action against him for so doing.

Held— (A. L. Smith, L.J., dissenting)—that the object of the Ground Game Act, 1880, was to protect all occupiers of land of whatever tenure against injury to their crops from ground game, and that the defendant, though a landlord who owned and occupied his own land and had no tenants whatever, was entitled under the Act to kill the ground game, notwithstanding that his predecessor in title had conveyed the sporting rights to another person.

Decision of Wright, J. ([1899] 2 Q. B. 436; 68 L. J. Q. B. 970; 81 L. T. 358; 15 T. L. R. 496), affirmed.

Anderson *v.* Vicary, [1900] 2 Q. B. 287; 69 [L. J. Q. B. 713; 48 W. R. 593; 83 L. T. 15; 16 T. L. R. 421—C. A.

(b) Licences.

And see Revenue.

3. *Gun—Penalty for carrying or using Without a Licence—Exemption in Favour of Occupier of Lands—Rabbits—Vermin—The*

Licences—*Continued.*

Gun Licence Act, 1870 (33 & 34 Vict. *c.* 57), *s.* 7 (4).]—Y. had no licence to carry or use a gun. He carried a gun for the purpose only of killing rabbits on lands of which he was occupier. He killed a rabbit on his lands with the gun.

Held—that rabbits are not vermin in the sense of the Gun Licence Act, and that Y. had contravened the Statute and incurred the penalty.

Lord Advocate *v.* Young, (1898) 62 J. P. 199; [25 R. 778; 35 Sc. L. R. 589—Ct. of Sess. (First Div.)

4. *Licence to Deal—Game Act*, 1831 (1 & 2 Will. 4, *c.* 32), *s.* 18—*Mode of Raising Questions of Law as to Grant of Licence.*]—Licensing justices not being a Court cannot state a case for the opinion of the High Court upon questions of law arising before them in the matter of granting a licence. Nor can such questions be determined on mandamus to hear and determine where the justices have dealt with them to the best of their ability.

Reg. *v.* Bird, Ex parte Jones, (1898) 62 J. P. 309; [19 Cox, C. C., 180—Div. Ct.

5. *Licence to Kill—Licence to Deal—Selling Game Without—Buying or Obtaining Game from Person not Authorised to Kill and Deal—Game Act*, 1831 (1 & 2 Will. 4, *c.* 32), *ss.* 25, 28—*Game Licences Act*, 1860 (23 & 24 Vict. *c.* 90), *ss.* 6, 13—*Game Laws Amendment (Scotland) Act*, 1877 (40 & 41 Vict. *c.* 28, *s.* 10.]—A complaint charged C. with a contravention of sect. 25 of the Game Act, 1831, in so far as "he, not having obtained a licence to kill game, and not being licensed to deal in game," did sell game to S.

A complaint charged S. with a contravention of sect. 28 of the same Act, in so far as "he, being licensed to deal in game," did buy or obtain game from C., who was "not authorised to sell game for want of a licence to kill game, and for want of a licence to deal in game."

Held—that the complaints were relevant or sufficient.

Rex *v.* Clark, Rex *v.* Smith, (1901) 65 J. P. [247—Lord Stormonth-Darling, Ct. of Ex. (S.)

6. *Licence to Kill—Several Persons having no Licence to Kill Game firing at and Killing a Pheasant—Conviction—Game Licences Act*, 1860 (23 & 24 Vict. *c.* 90), *s.* 4.]—The four respondents were summoned for killing game without a licence. It appeared that they all went to kill rabbits in a wheatfield that was being cut in August. A pheasant got up, and three of them, who had no licence to kill game, fired at it and killed it. The justices dismissed the summons, on the grounds (1) that the respondents went there with the intention of killing rabbits and not game, and (2) that as the particular person who killed the pheasant could not be identified, they ought to be acquitted.

Held—that the case must be remitted to the justices to convict the three respondents who were proved by the evidence to have shot at the pheasant.

Hunter *v.* Clark and Others, (1902) 66 J. P. [247; 18 T. L. R. 366—Div. Ct.

(c) Trespass and Poaching.

7. *Night Poaching—Third Offence—Three or more Persons by Night entering Land for Purpose of Taking or Destroying Game—Night Poaching Act*, 1828 (9 Geo. 4, *c.* 69), *ss.* 1, 9.]—Sect. 1 of the Night Poaching Act, 1828, under which a person can be convicted of entering land by night with any instrument for the purpose of taking or destroying game, and by which if he shall "so offend a third time," the punishment is increased, refers to a previous conviction under that section, and does not include a previous conviction under sect. 9 of having entered land armed and accompanied by two other persons for the purpose of taking or destroying game.

Rex. *v.* Lines, [1902] 1 K. B. 199; 71 L. J. K. B. [125; 50 W. R. 303; 66 J. P. 24; 85 L. T. 790; 18 T. L. R. 176; 20 Cox, C. C. 142—C. C. R.

8. *Trespass—Leave and Licence—Evidence—The Game Act*, 1861 (1 & 2 Will. 4, *c.* 32), *s.* 30.]—By the Game Act, 1861, sect. 30, if any person trespass in the daytime in pursuit of game, he shall on conviction forfeit £5, "provided always that any person charged with any such trespass shall be at liberty to prove by way of defence any matter which would have been a defence to any action at law for such trespass."

The appellant received leave from the wife of the occupier to hunt rabbits, and then coursed a hare. The sporting rights were not in the occupier.

Held—that the appellants had not brought themselves within the proviso, and it was not until they had done so that it was necessary to prove strictly—*e.g.*, by producing the deed that the landlord had the right as against the occupier to take game.

Quære, whether the wife could give such leave as she had.

Taylor *v.* Jackson, [1898] 62 J. P. 424; 78 L. T. [555; 19 Cox, C. C. 62—Div. Ct.

9. *Trespass — Prosecution by Gamekeeper as Common Informer* (27 Geo. 3, *c.* 35 (Ireland)).]—A complaint for penalties for trespass in pursuit of game lies at the suit of a common informer.

Middleton v. *Gale* ((1838) 8 A. & E. 155; 3 N. & P. 372; 1 W., W. & H. 352; 2 Jur. 819); and *Morden* v. *Porter* ((1860) 7 C. B. (N.S.) 641; 28 L. J. M. C. 213; 6 W. R. 262; 1 L. T. (N.S.) 403) followed.

Rex *v.* Tyrone Justices, [1902] 2 Ir. R. 78—[K. B. Div.

Trespass and Poaching—*Continued.*

10. *Trespass—"Pursuit of"*—Bonâ-fide *Claim of Right—Game Act,* 1831 (1 & 2 Will. 4, *c.* 32), *s.* 30.]—Trespass and pursuit of game under the Game Act, 1831, is not a mere question of *bonâ-fide* belief of right, but the person must show that he had some reasonable ground for so believing, in order to oust the jurisdiction of the justices.

Mann *v.* Nurse, (1901) 17 T. L. R. 569—[Div. Ct.

11. *Trespass—"Search or Pursuit of Game"—Intention to Kill at the Time—Game Act,* 1831 (1 & 2 Will. 4, *c.* 32), *s.* 30.] By sect. 30 of the Game Act, 1831, it is unlawful for any person to trespass by entering or being, in the daytime, upon any land in search or pursuit of game.

The appellant, having been convicted under this section, on appeal contended that the conviction was bad, because he went upon the land for the purpose of raising a question of right, and no evidence was offered that he had gone upon the land with intent to search for or kill game at the time.

Held—(dismissing the appeal), that the justices were right in convicting, and that the words "search" and "pursuit" in the section could not be limited to searching and pursuing with an intent to kill at the time.

Stiff *v.* Billington, (1901) 65 J. P. 424; 49 [W. R. 486; 84 L. T. 467; 17 T. L. R. 430; 19 Cox, C. C. 680—Div. Ct.

12. *Trespass—Shot Fired at Game on Land of Another—Game Dead and Removed at Time of Search—Interval Between Killing and Entry on Land for Search—Game Act,* 1831 (1 & 2 *Will.* 4, *c.* 32), *s.* 30.]—R. standing in his own land shot at and killed a grouse sitting in the land of another person, but did not then enter upon the land to pick up the dead bird; some hours after he had shot the bird he went on to the land where it had been shot for the purpose of picking it up and there searched for the bird, which had previously been picked up and removed by a gamekeeper.

Held—that the two acts, the shooting of the bird and the subsequent going on to the land in search of it, were sufficiently connected to form one transaction, and that R. was therefore guilty of trespassing upon the land in search or pursuit of game within sect. 30 of the Game Act, 1831.

Horn *v.* Raine, (1898) 62 J. P. 420; 67 [L. J. Q. B. 533; 78 L. T. 654; 19 Cox C. C. 19—Div. Ct.

II. SPORTING RIGHTS, ETC.

And see Landlord and Tenant, 24—26.

13. *Lease—Lease of Shootings—Obligation of Landlord—Fencing Plantations.*]—In the case of a lease of the house on a small residential estate together with the shooting there is no implied obligation on the part of the lessor to fence the plantations effectually so as to exclude stock.

Patrick *v.* Harris' Trustees, (1905) 6 F. 985—[Ct. of Sess.

14. *Reservation of Rights—Right of Entry—Incidental Rights.*]—A landlord entitled to the exclusive right of fishing and to a right of entry for that purpose under sect. 5 of the Land Law (Ireland) Act, 1881, has as incidental thereto the right of doing all things necessary for the exercise of his rights.

He may have a right to enter and cut useless and injurious weeds, but not to embank and pile the river, or to lay rocks in the river bed as shelter for fish.

Caldwell *v.* Kilkelly, [1905] 1 Ir. R. 434—[Barton, J.

15. *Reservation of Rights—Tenant Interfering with Exercise of Such Rights*—Bona fides.]—Where fishing rights are reserved to a landlord—at any rate where they are so reserved by sect. 5 of the Land Law (Ireland) Act, 1881—the tenant will be restrained from erecting a paling or other obstruction which will interfere with the reasonable exercise of such fishing rights, and is not a *bonâ fide* exercise of the tenant's right to cultivate and manage the land.

Boyle *v.* Holcroft, [1905] 1 Ir. R. 245—[Barton, J.

16. *Reservation of Exclusive Right—Severability—Validity—Ground Game Act,* 1880 (43 & 44 Vict. *c.* 47), *s.* 3.]—A lease of a farm contained a reservation to the lessor of "the exclusive right . . . to enter upon the said farm for the purpose of sporting or otherwise."

Held—that the reservation was severable and was not wholly void as being in contravention of the Ground Game Act, 1880, and that a person who with the permission of the tenant was shooting partridges on the farm was liable to be convicted of trespassing in pursuit of game.

Stanton *v.* Brown, [1900] 1 Q. B. 671; 69 [L. J. Q. B. 301; 64 J. P. 326; 48 W. R. 333; 16 T. L. R. 156—Div. Ct.

17. *Shooting Rights—Hiring at a Certain Rent per Annum—Notice to Determine—"Reasonable Notice."*]—By a memorandum of agreement a landlord agreed to let and the defendants to hire pheasant shooting at a certain rent per annum, payable half-yearly. From Lady Day, 1896, the defendants continued to enjoy the shooting rights until the landlord, early in the year 1901, verbally informed them that the arrangement was revoked as from 25th March.

Held—that the defendants were entitled to "reasonable notice," expiring at Lady Day; and that the verbal notice given in February, or at the latest in the early part of March, after the end of the shooting season, was reasonable and sufficient.

Sporting Rights, etc.—*Continued*

Lowe *v.* Adams [1901], 2 Ch. 598; 70 L. J. Ch. [783; 50 W. R. 37; 85 L. T. 195; 17 T. L. R. 763—Cozens-Hardy, J.

18. *Shooting Rights—Profit à Prendre—Agreement Not Under Seal.*]—By a written agreement, not under seal, dated July 30th, 1898, C., an owner in fee, agreed to let to the plaintiffs certain lands, reserving, except as thereinafter provided, the exclusive right to game and the exclusive right of shooting upon the demised premises, for one year, from May 1st, 1898, and so on from year to year, till the letting should be determined, at the yearly rent of £45. He thereby further agreed that the plaintiffs should for the term of ten years from the date of the agreement have the right of shooting over the demised and other lands, and full authority to use proper means for the preservation of the game on the said lands. The lands consisted mainly of mountain in his own occupation and also of holdings in the occupation of yearly tenants. These tenants held under agreements in writing, not under seal, made in 1868, which gave them the exclusive right of grazing on the mountain, and reserved to the landlord the exclusive right to the game and the exclusive right of shooting and sporting. Some of these tenants interfered with the plaintiffs' shooting. In an action for an injunction, it was contended for the defendants—first, that the right of shooting over the tenants' holdings was not validly reserved to C., as the agreements were not under seal, and, secondly, that the agreement made between C. and the plaintiffs, not being under seal, was invalid as regards the sporting rights.

Held—first, that the right of shooting was validly reserved; secondly, that the grant of the right of shooting was not a mere licence, but a demise of a profit *à prendre*, and that the agreement was valid.

Radcliff *v.* Hayes, [1907] 1 Ir. R. 101—M. R.

GAMING AND WAGERING.

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II. Games and Gaming Houses . . 13
III. Betting Houses and Betting . 15
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And see Bankruptcy, 236; Conflict of Laws, 1; Criminal Law, 211; Insurance, 80; Pleading, 12.

I. GAMING CONTRACTS.

1. *Action on Bill of Exchange—Paid by Acceptor—Recovery of Amount so Paid.*]—C. and W. were engaged in transactions null and void under the Gaming Act, 1845. In respect of such transactions C. drew a bill which was accepted by W. C. indorsed it to the C. bank, who sued W. and recovered the money. In an action to recover the money so paid from C.,

Held—that W. could not recover.

Crawley *v.* White, (1898) 78 L. T. 167; 14 [T. L. R. 247—Kennedy, J.

2. *Action on Promissory Note—Partly in Consideration of Bets, Partly in Consideration of Loan—Illegal Consideration.*]—The defendant owed to a commission agent £4 in respect of bets, and borrowed £5; he gave a promissory note for £9.

Held—that the giving of a bill for £9, coupled with the statement, "I owe you £9," could not prevent the £4 forming part of the consideration; and that, as part of the consideration was illegal, no action could be maintained on the note.

Kershaw *v.* Evans, (1907) 51 Sol. Jo. 27— [C. A.

3. *Action on Cheque—Cheque given for Illegal consideration—Gaming Act,* 1835 (5 & 6 Will. 4, *c.* 41), *s.* 1.]—Under sect. 1 of the Gaming Act, 1835, a cheque given by the drawer to the payee in payment of a bet lost on a horse-race is to be deemed to have been given for illegal consideration.

Woolf *v.* Hamilton [1898], 2 Q. B. 337; 67 [L. J. Q. B. 917; 79 L. T. 49; 14 T. L. R. 499; 47 W. R. 70—C. A.

4. *Agreement to share Proceeds of Bet—Null and Void Contract—Gaming Act,* 1845 (8 & 9 Vict. *c* 109), *s.* 8.]—It was agreed that the plaintiff and defendant should jointly take from a bookmaker the odds of £100 to £7 in the proportion of three-quarters for the defendant and one quarter for the plaintiff, against a horse named Fabulist for the Liverpool Autumn Cup. The horse won the race, and, the bet having been taken in the defendant's name the bookmaker gave him a cheque for £100 on settling day. It appeared from the plaintiff's evidence that the defendant entered into the arrangement with him after having made the bet with the bookmaker.

Held—that the arrangement was void under the Gaming Acts.

Higginson v. *Simpson* ((1877) 2 C. P. D. 76; 46 L. J. C. P. 192; 25 W. R. 303; 36 L. T. 17) followed.

Thomas *v.* Smith, (1902) 18 T. L. R. 69— [Channell, J.

5. *Betting Debts—Compromise of Claim—Consideration—Gaming Acts,* 1845 (8 & 9 Vict. *c.* 109), *s.* 18; and 1892 (55 & 56 Vict. *c.* 9), *s.* 1.]—The defendant, who had lost £120 to the plaintiff in respect of bets on horse-races, was written to by the plaintiff's solicitor asking for payment of the amount. The defendant thereupon offered to pay "£30 within a fortnight and £30 within a month in full satisfaction of the account."

Gaming Contracts—*Continued.*

This offer was accepted. The plaintiff knew that the original claim was unenforceable, and there was no evidence that he threatened to sue or to take any step to the detriment of the defendant. In an action to recover the £60,

HELD—that upon the facts there was no consideration for the promise to pay that sum, and that, therefore, the action would not lie.

CHAPMAN *v.* FRANKLIN, (1905) 21 T. L. R. 515—[Div. Ct.

6. *Contract or Agreement by Way of Gaming or Wagering — Money Paid in Respect of—Gaming Act*, 1845 (8 & 9 Vict. *c.* 109—*Gaming Act*, 1892 (55 & 56 Vict. *c.* 9), *s.* 1.]—A bankrupt paid the defendant a sum of money on the understanding that the defendant was to use it for backing horses at races upon their joint account.

HELD—that the agreement between the bankrupt and the defendant was a contract or agreement by way of gaming or wagering, and therefore the money paid by the bankrupt to the defendant was paid "in respect of" a contract or agreement rendered null and void by the Gaming Act, 1845.

Tatam v. *Reeve* ([1893] 1 Q. B. 44; 62 L. J. Q. B. 30; 57 J. P. 118; 41 W. R. 174; 67 L. T. 683; 5 R. 83—Div. Ct.) followed.

Decision of Darling, J. ([1900] 16 T. L. R. 169) reversed.

SAFFERY *v.* MAYER, [1901] 1 Q. B. 11; 70 [L. J. Q. B. 145; 64 J. P. 740; 49 W. R. 54; 83 L. T. 394; 17 T. L. R. 15—C. A.

8. *Outside Broker — Contract — Sale or Gaming—Gaming Act*, 1845 (8 & 9 Vict. *c.* 109), *s.* 18.]—The plaintiff signed an application form headed "Prudential" operation for dealing in Atchison and Topeka Common. The form was addressed to the defendants, outside dealers, and by it the plaintiff agreed "to accept the amount of stock you may sell to me." The defendants sent plaintiff an advice note which contained the following words:—"Plus ⅛ if stock is taken up." The result of the transaction showed a balance in the plaintiff's favour of £179 7s. 6d., which he sued for.

HELD—that the words "I agreeing to accept the amount of stock you may sell to me" showed clearly that the person signing the form was bound to accept stock which had been bought; that the advice note must be read with the application form which preceded it; and that the transaction was not a bet.

In re Gieve ([1899] 1 Q. B. 794; 68 L. J. Q. B. 509; 47 W. R. 441; 80 L. T. 438; 15 T. L. R. 251; 6 Manson, 136—C. A. No. 14 *infra*) distinguished.

PHILP v. BENNETT & Co., (1902) 18 T. L. R. 129 —Bigham, J.

9. *Plea of Gaming Acts—Depriving Successful Defendant of Costs—"Good Cause"—Ord.* 65, *r.* 1.]—The fact that a man, when sued in respect of betting transactions, pleads and relies on the Gaming Acts is no "good cause," within the meaning of R. S. C., Ord. 65, r. 1, for depriving him of his costs.

Decision of Ridley, J., reversed.

GRANVILLE & Co. *v.* FIRTH, (1903) 72 L. J. K. B. [152; 88 L. T. 9; 19 T. L. R. 213—C. A.

10. *Recovery of Deposit—Persons "Using" Office for Betting—"Any such Person Aforesaid"—Betting Act*, 1853 (16 & 17 Vict. *c.* 119), *ss.* 1, 3, 4, 5.]—The defendant used a house in London for the purpose of correspondence relating to bets on horse-races, and of receiving money in connection therewith. The plaintiff placed a sum of money to the defendant's credit at his bank to be used by the defendant for the purpose of making bets on behalf of the plaintiff. Bets were from time to time made by the defendant, acting on the telegraphed instructions of the plaintiff, with varying results. The plaintiff sued to recover the amount of the deposit, and the defendant alleged that the money had been used in executing betting commissions for the plaintiff, and that the plaintiff's losses had exhausted the deposit, and that he was not liable.

HELD—that sect. 5 of the Betting Act, 1853, applied, and that the plaintiff was entitled to recover.

VOGT *v.* MORTIMER, (1906) 22 T. L. R. 763—[Joyce, J.

11. *Stakeholder—Agreement to Pay Winner—Personal Liability.*]—By an agreement in writing between the plaintiff and claimant, two competitors, and the proprietor of a sporting paper, the plaintiff matched his mare to trot ten and a half miles in thirty minutes or under for a sum of £500 a side, to be deposited with the proprietors of a sporting paper, who were to pay over to the winner "a sum of money equal to the amount of the stakes actually deposited after deducting commission."

HELD—that as both competitors claimed the stakes, it was a proper case for interpleading, and that there was no personal liability in the stakeholder to pay over the amount of the stakes out of his own pocket, independently of the stakes which he in fact had in his possession.

DOWSON *v.* MACFARLANE, (1899) 81 L. T. 67; 15 [T. L. R. 497—C. A.

12. *Stakeholder—Recovery of Money Deposited with Stakeholder—Money "Paid"—Gaming Act*, 1845 (8 & 9 Vict. *c.* 109), *s.* 18—*Gaming Act*, 1892 (55 & 56 Vict. *c.* 9), *s.* 1.]—Money deposited with a stakeholder to abide the event of a boxing match is not "money paid under or in respect of a contract made void by 8 & 9 Vict. c. 109, s. 18," and may

Gaming Contracts—*Continued.*

be recovered by the depositor from the stakeholder if he has given the latter notice not to part with it.

O'Sullivan v. *Thomas* ([1895] 1 Q. B. 698; 64 L. J. Q. B. 398; 59 J. P. 134; 43 W. R. 269; 15 R. 253—Div. Ct.) approved.

Burge *v.* Ashley and Smith, Ld., [1900] 1 [Q. B. 744; 69 L. J. Q. B. 538; 48 W. R. 438; 82 L. T. 518; 16 T. L. R. 263—C. A.

13. *Stockbroker — Deposit of Money as "Cover"—Right of Depositor to Recover—Gaming Act*, 1845 (8 & 9 Vict. c. 109), *s.* 18.]—Money was deposited with a stockbroker as "cover" in respect of gaming transactions in stocks and shares. The transactions resulted in money becoming due from the stockbroker to the depositor, who claimed repayment of the amount which he had deposited.

Held—that the depositor could recover the amount which he had deposited as "cover."

Decision of Wright, J. ((1898) 67 L. J. Q. B. 334; 78 L. T. 170; 14 T. L. R. 242) varied.

Re Cronmire, Ex parte Waud, [1898] 2 Q. B. [383; 67 L. J. Q. B. 620; 78 L. T. 483; 5 Manson, 30; 14 T. L. R. 376; 46 W. R. 679 —C. A.

14. *Stockbroker — Differences—Cover—Delivery or Acceptance—Gaming Act*, 1845 (8 & 9 Vict. c. 109), *s.* 18.]—Where contracts between a broker and his customer for the sale and purchase of stocks and shares contained provisions that the price should be one-eighth more if the stock was taken up, or one-eighth less if it was delivered,

Held—that the existence of an option for the customer to demand delivery or payment in cash did not of itself prevent the Court finding that the contract was really one for the payment of differences only.

Universal Stock Exchange v. *Strachan* ([1896] A. C. 166; 65 L. J. Q. B. 429; 60 J. P. 68; 44 W. R. 497; 74 L. T. 468) followed.

And held—that the provisions as to price showed that the contract was for differences only, and that such an agreement was void, as being "by way of gaming or wagering," within the meaning of sect. 18 of the Gaming Act, 1845.

In re Grieve, Ex parte Trustee, [1889] 1 Q. B [791; 68 L. J. Q. B. 509; 47 W. R. 441; 80 L. T. 438; 15 T. L. R. 251; 6 Manson, 136— C. A.

15. *Turf Commission Agent—Account Rendered—Evidence of Money Received—Right of Principal to Recover.*]—The plaintiff sued to recover a sum of money shown due to him from the defendant for certain bets which he had instructed the defendant to make for him. The defendant, who carried on business as a turf commission agent, pleaded the Gaming Acts. At the trial the defendant did not appear.

Held—that the plaintiff was entitled to judgment, as the rendering of a commission account was *primâ facie* evidence that the money had been received by the defendant on behalf of the plaintiff.

Catigi *v.* McGregor, (1907) 51 Sol. Jo. 266— [Channell, J.

16. *Turf Commission Agent—Action for Proceeds of Bet—Evidence of Bet and Receipt of Proceeds.*]—The plaintiff brought an action to recover £120 alleged to have been received by the defendants as agents of the plaintiff, being the proceeds of a bet made and won by them on his behalf. At the trial the plaintiff proved that he received an advertisement from the defendants offering to execute betting commissions for him. The plaintiff telegraphed to the defendants to put £20 on a horse which won a race at 6 to 1, but he had never received the money. To the plaintiff's telegram that he had not received the week's account the defendants replied, "Awaiting report of inquiry, continue business." The jury returned a verdict for the plaintiff for £120, and judgment was entered accordingly.

Held—that there was no evidence that the defendants had made the bet, or that they had received any money in payment of the bet, and that the defendants were entitled to have judgment entered for them.

Pritchard *v.* Doughton, Lovyck & Co., (1900) [16 T. L. R. 377—C. A.

17. *Turf Commission Agent—Bets Lost but not Paid—Indemnity—"Any Sum of Money Paid"—Gaming Act*, 1892 (55 & 56 Vict. c. 9), *s.* 1.]—The plaintiff, a turf commission agent, was instructed by the defendant to make bets for him in his own name with other persons. The plaintiff, for the purpose of carrying on his business, was a member of various betting clubs, and frequented racecourse enclosures, from which he would be excluded if he made default in payment of bets. The plaintiff made the bets in his own name on behalf of the defendant, and lost. The plaintiff requested the defendant to indemnify him in respect thereof. The plaintiff had not paid the bets.

Held—that the words of sect. 1 of the Gaming Act, 1892, "any sum of money paid," could not be limited to sums of money actually paid; they included money to be paid as well as that which had actually passed; that the plaintiff could not by postponing paying the bets get money from the defendant which he never could have got if he had paid them; and that the plaintiff was not entitled to recover the sums in question as damages on account of the breach of an implied contract to indemnify him.

Levy *v.* Warburton, (1901) 70 L. J. K. B. 708; [17 T. L. R. 462—Div. Ct.

II. GAMES AND GAMING HOUSES.

18. *Automatic Machine—Game of Skill and Chance—Equal Chances in Favour of the Operator—Gaming House Act,* 1854 (17 & 18 Vict. *c.* 38), *s.* 4.]—The appellant was a tobacconist, and kept in his shop an automatic machine, which was worked as follows: Having placed a penny in the slot, the operator pulled down a spring by means of a knob, and then suddenly released the knob, whereupon the spring flew up and the penny was projected into one of five compartments. If the penny found its way into either of two compartments it was returned to the operator; if it fell into either of two other compartments it was retained by the machine; if it fell into the fifth, or centre, compartment the operator won a ticket entitling him to receive a 3d. cigar, or its value, from the appellant.

Held—that this was a game of chance, and that the appellant was rightly convicted under the Gaming House Act, 1854.

Thompson *v.* Mason, (1904) 68 J. P. 270; 90 [L. T. 649; 20 T. L. R. 298; 20 Cox, C. C. 641—Div. Ct.

19. *Automatic Machine—Element of Skill—Gaming House Act,* 1854 (17 & 18 Vict. *c.* 38), *s.* 4.]—A shopkeeper was convicted under sect. 4 of the Gaming House Act, 1854, for having opened, kept, and used his shop for the purpose of unlawful gaming being carried on therein, upon the following facts: He had in the shop a penny-in-the-slot machine, proved to have been used on the day in question by a number of men and boys: a person, having inserted a penny in the slot, drew back a spring, and then, by releasing it again, shot the penny up to the top of the machine; if, in falling, the penny found its way into the "bull's-eye," the operator received a check entitling him to sweets, &c., worth 2d.; if it fell into either of two other divisions of the machine it was returned to the operator; if, however, it fell into any of the four remaining divisions, it was retained by the machine. Some of the persons mentioned won, and others lost.

Held—that the conviction was right.

Fielding *v.* Turner, [1903] 1 K. B. 867; 72 [L. J. K. B. 542; 67 J. P. 252; 51 W. R. 543; 89 L. T. 273; 19 T. L. R. 404; 20 Cox, C. C. 531—Div. Ct.

20. *Automatic Machine—Element of Skill in Game—Player whether Successful or not receiving an Article of some Value.*]—In a prosecution for keeping an automatic machine which involved the manipulation by the players of a cup for the purpose of intercepting a ball, which ball was propelled by a spring so as to fall within reach of the cup as it bounded from various points in its downward course, the magistrates found that, although a certain amount of success in working the machine could be acquired by practice, yet to an ordinary member of the public its working depended on chance.

Held—that the machine was an implement for playing a game at hazard; and that it was none the less so because a player, even if unsuccessful, received an article of some value in return for the penny deposited by him in the machine.

Ogilvie *v.* Benigno, (1906) 7 F. 82—Ct. of [Justiciary.

21. *Faro—"Banker" who has "Bought the Bank"—Gaming House Act,* 1854 (17 & 18 Vict. *c.* 38), *s.* 4.]—A "banker" who has "bought the bank," and is playing in a house at the game of faro, which is an unlawful game, by 12 Geo. 2, c. 28, s. 2, is a person assisting in conducting the business of a house, etc., open, kept or used for the purpose of unlawful gaming within sect. 4 of the Gaming House Act, 1854.

Derby *v.* Bloomfield and Another, (1904) 68 [J. P. 391; 91 L. T. 99; 20 T. L. R. 549; 20 Cox, C. C. 674—Div. Ct.

22. *Billiards — "Pool"—Game of Skill played for Money—Suffering Gaming on Licensed Premises—Licensing Act,* 1872 (35 & 36 Vict. *c.* 94), *s.* 17.]—The respondent, a licensed person, suffered the game of "pool" to be played for small money stakes on a billiard table in the licensed premises.

Held—that the respondent had committed the offence of suffering gaming on the licensed premises under the Licensing Act, 1872, s. 17.

Craig *v.* Boyan, [1901] 2 Ir. R. 429.

23. *Licensed Premises—Suffering Gaming—Offence Proved—Whether Offence can be said to be of a Trifling Nature—Licensing Act,* 1872 (35 & 36 Vict. *c.* 94), *s.* 17—*Summary Jurisdiction Act,* 1879 (42 & 43 Vict. *c.* 49), *s.* 16.]—The offence of unlawfully suffering gaming on licensed premises contrary to sect. 17 of the Licensing Act, 1872, may, under some circumstances, be of a trifling nature within the meaning of sect. 16 of the Summary Jurisdiction Act, 1879.

Ex parte Marshall, (1907) 71 J. P. 501— [Div. Ct.

24. *Unlawful Gaming—Unlawful Game—What is, a Question of Law*—17 & 18 Vict. *c.* 38, *s.* 4; 42 & 43 Vict. *c.* 49, *s.* 17.]—A person does not commit the offence of opening, keeping, or using a house or room for the purpose of unlawful gaming, if he and his friends merely occasionally and casually play games therein, even if such games be unlawful.

The question whether a game is or is not unlawful, is a question of law on which a specific direction should be given to the jury.

Reg. *v.* Davies, [1897] 2 Q. B. 199; 18 Cox, [C. C. 618; 66 L. J. Q. B. 513; 76 L. T. 786; 13 T. L. R. 405—C. C. R.

25. *Whist Drive — Suffering Gaming on Licensed Premises—Game of Skill Played for Prizes—Licensing Act,* 1872 (35 & 36 Vict. *c.*

Games and Gaming Houses—*Continued.*

94), *s.* 17.]—A club hired a room in licensed premises for the purpose of the members, and friends introduced by them, playing a *bonâ-fide* game, called a whist drive, for prizes given by members of the club or their friends. No person was allowed by the rules to win a prize which he or she had given. The licensee knew of the purpose for which the room was hired.

Held—that the licensee had not suffered gaming to be carried on upon the licensed premises contrary to sect. 17, sub-sect. 1, of the Licensing Act, 1872.

Lockwood *v.* Cooper, (1903) 72 L. J. K. B. 690; [67 J. P. 307; 52 W. R. 48; 89 L. T. 306; 19 T. L. R. 610; 20 Cox C. C. 539—Div. Ct.

And see Intoxicating Liquors, 102.

III. BETTING HOUSES AND BETTING.

And see Bankruptcy, 162.

26. *Advertisement of Coupon Competition—Legality—Betting Act,* 1853 (16 & 17 Vict. *c.* 119), *ss.* 1, 7—*Betting Act,* 1874 (37 & 38 Vict. *c.* 15), *s.* 3.]—The defendants agreed to print and publish a sporting newspaper for the plaintiff. The plaintiff called upon the defendants to print as part of the paper a supplement announcing a horse-racing competition, the name of the horse which would win a certain race to be written on a coupon, and a coupon, together with a sum of money, so filled in, to be sent to a house abroad. A prize was offered to the person who correctly named the winner. The defendants refused to print and publish the paper with the supplement, on the ground that, by so doing, they would be committing an offence against sect. 7 of the Betting Act, 1853, and sect. 3 of the Betting Act, 1874.

Held—that if the plaintiff's business had been carried on within the jurisdiction, the act of the defendants in advertising the business would not have constituted any offence against either the Betting Act, 1853, or the Betting Act, 1874; the only kind of bets there dealt with are bets made with persons physically resorting to the betting house, and that consequently there was no excuse for the defendants' refusal to perform their contract.

Stoddart *v.* Argus Printing Co., [1901] 2 [K. B. 470; 70 L. J. K. B. 711; 65 J. P. 694; 49 W. R. 666; 85 L. T. 110; 17 T. L. R. 549—Div. Ct.

See No. 36, *infra.*

27. *Advertisement of Office or Place kept open for Betting Purposes*—Mens rea—*Betting Act,* 1853 (16 & 17 Vict. *c.* 119), *ss.* 1, 7.]—In order to bring an advertisement within sect. 7 of the Betting Act, 1853, it must appear by reasonable inference from the advertisement itself that it has reference to one of the two classes of transactions rendered illegal by sect. 1, viz., keeping a place to which people resort for the purpose of betting, and keeping a place for the receipt of money by or on behalf of the owner for such purpose. In judging of the meaning of the advertisement impeached, the magistrate must pay no regard to what in fact is the nature of the business as elicited by an answer to the advertisement.

The following advertisement, though suspicious in appearance, and in fact proved to refer to betting, was held not sufficient to justify a conviction: "Topping and Spindler, Flushing, Holland.—The Derby, Ascot Stakes, Royal Hunt Cup, Northumberland Plate, &c.—The Continental Sportsman. Also Year-book and Ready Reckoner, free on receipt of address. Telegraphic instructions can be sent to London. All letters to be addressed Topping and Spindler, Flushing, Holland. Postage, 2½d. Postcards, 1d."

Ashley and Smith, Ld. *v.* Hawke, (1903) 67 [J. P. 361; 19 T. L. R. 581; 89 L. T. 538; 20 Cox, C. C. 558—Div. Ct.

28. *Agent receiving Betting Slips—Admissibility of Evidence—Betting Act,* 1853 (16 & 17 Vict. *c.* 119), *ss.* 1, 3.]—The defendant was indicted for offences against the Betting Act, 1853, committed on November 13th. He had been arrested in a public-house (the licensee of which pleaded guilty to using the said house for the purpose of betting), and upon him were found (1) lists of the names of persons and the amounts due to them upon bets, (2) betting slips containing the names of horses, the amounts for which they were to be backed, and the names of the persons backing them. In the parlour of the public-house were found a large number of betting slips of the same character as those found on the defendant.

Evidence was admitted to show that betting slips similar to those found on the defendant and to those found on the premises on November 13th had previously to that date been frequently received from customers at the public-house by the licensee, and had been forwarded on by him to the defendant, and also to show that the lists found on the defendant were an epitome of slips received by him from the licensee on occasions prior to November 13th.

Held—that such evidence was admissible.

Rex *v.* Mean, (1905) 69 J. P. 27; 21 T. L. R. 172 [—C. C. R.

29. *Club Members Betting* inter se—*Defendants Generally Acting as Bookmakers—Evidence to go to Jury—Betting Act,* 1853 (16 & 17 Vict. *s.* 119)—*Gaming Act,* 1845 (8 & 9 Vict. *c.* 109.]—Evidence was given that betting was carried on on certain club premises; but it appeared that the members of the club did not ordinarily bet with one another indiscriminately, but that they were divided into two classes, the defendants gene-

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rally being the bookmakers laying the odds, and the other members of the club betting with them

HELD—that there was some evidence on which the jury could convict the defendants of offences under the Betting Act, 1853, and under the Gaming Act, 1845.

Where transactions are proved against a defendant which are capable of an innocent explanation, and the defendant could have given it, and there is *primâ facie* evidence that he is acting illegally, the jury may draw their own conclusions from the fact that the defendant does not give evidence on his own behalf.

REX *v.* CORRIE AND ANOTHER, (1904) 68 J. P. 294; [20 T. L. R. 365—C. C. R.

30. *"House, Building, Room or Place"—Common Stair—Local Act.*]—A common passage leading to a common stair is not a "house, building, room or place" within the meaning of the Local Act prohibiting the keeping and using of betting houses, and imposing a penalty on the owner, or keeper, or person having the management or care thereof

WRIGHT *v.* SMITH, (1905) 6 F. (Just. Cas.) 18—[Ct. of Justiciary.

31. *Newspaper Office—Sale of Newspaper with Coupon—Coupon Competition—Betting Act,* 1853 (16 & 17 Vict. *c.* 119), *s.* 1.]—The proprietor of a newspaper issued with each copy of the paper a coupon so that the purchaser might fill in the names of the probable winners of certain football matches, a prize of £20 being given for the most accurate forecast. No money was paid except the price of the newspaper, and any competitor desiring to send in more than one estimate could do so by obtaining additional copies of the paper. By far the greater number of copies were sold to the public through agents and not at the newspaper office. The appellant purchased copies of the newspaper at the newspaper office and filled in and returned the coupons to the office.

HELD—that, if the money was in fact received for the coupons and not merely for the newspaper, the proprietors had committed the offence under sect. 1 of the Betting Act, 1853, of having opened, kept, and used an office for the purpose of money being received in consideration of an undertaking to pay money on a contingency relating to a game.

Caminada v. *Hulton* ((1891) 60 L. J. M. C. 116; 55 J. P. 727; 39 W. R. 540; 64 L. T. 781; 17 Cox, C. C. 307—Div. Ct.) discussed.

HAWKE *v.* HULTON, (1906) 22 T. L. R. 169—[Div. Ct.

32. *Office used for the Purpose of Money being received on Undertakings to pay Money on Horse Races—Coupon Competitions—Betting Act,* 1853 (16 & 17 Vict. *c.* 119), *s.* 1.]—The defendant was the occupier of an office, and having issued a newspaper, which contained one free coupon, allowed persons to send in extra coupons, or extra choices, on payment of a penny for each choice. The money received by the defendant at the office in respect of the coupons was received as a consideration for her promise to pay the prizes according to the terms set out in the newspaper, the prizes being dependent on the competitors filling up the coupons correctly with the names of the winners of a horse-race.

HELD—that the transaction came within the precise words of the Betting Act, 1853, s. 1.

Decision of Channell, J. ((1900) 64 J. P. 729), affirmed.

REG. *v.* STODDART, [1901] 1 Q. B. 177; 70 [L. J. Q. B. 189; 64 J. P. 774; 49 W. R. 173; 83 L. T. 538; 17 T. L. R. 55; 19 Cox, C. C. 587; 20 Cox, C. C. 111—C. C. R.

33. Coupons were issued in connection with a newspaper from an office in London kept by the appellant. The coupons, which could be obtained on application free of charge, were to be filled in by the competitors in a wagering competition, and when so filled in were to be sent in postal orders to an office in Holland. These postal orders were not payable in Holland, and had to be returned to England to be cashed. The money so sent in by competitors was eventually received by the appellant.

HELD—that an offence had been committed under sect. 1 of the Betting Act, 1853, notwithstanding that the money was received from the competitors abroad, and that the appellant had been rightly convicted.

STODDART *v.* HAWKE, (1901) 50 W. R. 93; 18 T. [L. R. 22; [1902] 1 K. B. 353; 71 L. J. K. B. 133; 66 J. P. 68; 85 L. T. 687—Div. Ct.

Approved in *Lennox* v. *Stoddart, infra.*

34. The defendant kept an office substantially for the purpose of the receipt of deposits on bets, which he proposed to make with depositors residing in England. He desired to get those deposits before and to hold them at the time when he made bets. For this purpose he devised a system of what he called sporting coupon competitions. He issued these coupons from a "newspaper" office. The would-be competitors had to get one of the coupons which were issued from his office, and send it, together with the proper amount of money in proportion to the selections made, to Middleburg on the Continent, and that, on that being done, he would bet with them, and retain as deposit the money which was so lodged with his agents abroad in the first instance, but which would from there come back to him in this country.

HELD—that the issuing of these coupons from the office in this country was really a

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material and necessary step for the purpose of the receipt of the money by the defendant, and therefore that there was a use of this office for the purpose of money being received within the terms of sect. 1 of the Betting Act, 1853; that the Betting Act, 1853, is not confined to what are called bets in the ordinary sense of the word; and that sect. 5 of the Betting Act, 1853, is not repealed by sect. 1 of the Gaming Act, 1892.

Stoddart v. *Hawke*, [1902] 1 K. B. 353; 71 L. J. K. B. 133; 66 J. P. 68; 50 W. R. 93; 85 L. T. 687; 18 T. L. R. 23—Div. Ct. *supra*) approved of.

Decision of Darling, J. (*sub nom. Davis* v. *Stoddart*, 50 W. R. 397; 18 T. L. R. 260), affirmed.

Lennox *v.* Stoddart; Davis *v.* Stoddart, [1902] [2 K. B. 21; 71 L. J. K. B. 747; 66 J. P. 469; 87 L. T. 283; 18 T. L. R. 585—C. A.

35. At the office in question there was printed and published weekly by the appellant Mackenzie a paper called *Football Chat;* upon the last page of that paper appeared what was called an advertisement of a football skill competition; that competition was clearly illegal within the decided cases. The coupons were to be filled up, cut out of the paper, and sent by post with the money to "*Football Chat*, Middleburg, Holland," an office occupied by T.; the names of the winners and the results of the competition were to be advertised in due course, and the prizes paid on a certain day; the sole address was "*Football Chat*, Middleburg, Holland," and the paper was printed and published at the appellant's office in Bedford Street. The magistrate held that T. was a person using the office at Bedford Street, and that he used it for the purpose of money being received by himself as the consideration for his promises to pay money on the result of football matches. He also found that the appellant permitted the uses by T. and that he opened and kept the office for the purpose of the user by T. He further found that the appellant derived benefit from the insertion of the coupon advertisements and lists of winners, for which he received considerably more than for ordinary advertisements, but that he did not share in the profits of the coupon competitions. The judgment did not proceed, upon the ground that the competitions were in reality conducted on the appellant's behalf. There was no evidence of the existence of any independent newspaper undertaking. The appellant was convicted.

Held—that there was ample evidence to justify the conclusion at which the magistrate arrived; and that the appellant was liable under sect. 3 of the Betting Act, 1853, for permitting an illegal thing to be done.

Mackenzie *v.* Hawke, [1902] 2 K. B. 216; 71 [L. J. K. B. 561; 66 J. P. 696; 87 L. T. 122; 18 T. L. R. 550; 51 W. R. 233, 236, 239; 20 Cox, C. C. 305, 314—Div. Ct.

36. Two special cases were stated by a metropolitan police magistrate which recapitulated the facts stated in the previous case, and the findings were also repeated. The two appeals involved practically the same point, although the summonses were taken out under different statutes. The first, which was under sect. 7 of the Betting Act, 1853, charged the respondent with causing an advertisement to be published, whereby it appeared that the office was used for the purpose of making bets or wagers. The second summons raised, with a slight addition, the same point as to what are called tipsters' advertisements, and was taken out under sect. 3, sub-s. 1, of the Betting Act, 1874.

Held—as to the first summons—that by sect. 7 of the Act of 1853, it is made an offence to publish any advertisement whereby it is made to appear that an office or place is used for the purpose of making bets or wagers "in manner aforesaid," which means in sect. 1 of the Act of 1853, that the respondent was liable to be convicted under the summons under sect. 7.

Held as to the second summons—that sect. 3, sub-s. 1, of the Act of 1874, when referring to "such bet or wager," must not be confined to bets made with persons resorting to a house or place kept for the purpose of betting; and that the respondent was liable to be convicted of an offence under sect. 3, sub-s. 1, of the Act of 1874.

Reg. v. *Stoddart* ([1901] 1 Q. B. 177; 70 L. J. Q. B. 189; 64 J. P. 774; 49 W. R. 173; 83 L. T. 538; 17 T. L. R. 55; 19 Cox, C. C. 587—C. C. R. *supra*, No. 32) followed.

Stoddart v. *Argus Printing Co.* ([1901] 2 K. B. 470; 70 L. J. K. B. 711; 65 J. P. 694; 49 W. R. 666; 85 L. T. 110; 17 T. L. R. 549—Div. Ct. *supra*, No. 26) dissented from.

Hawke *v.* Mackenzie (Nos. 1 & 2), [1902] 2 K. [B. 225; 71 L. J. K. B. 565; 66 J. P. 709; 87 L. T. 127; 18 T. L. R. 550; 51 W. R. 233, 236, 239; 20 Cox, C. C. 305, 314—Div. Ct.

37. *House—Persons Found Therein—Jurisdiction of Magistrate to Require such Persons to Enter into Recognisances*—33 *Hen.* 8, *c.* 9, *s.* 14—*Gaming Act*, 1845 (8 & 9 Vict. *c.* 109), *s.* 3—*Betting Act*, 1853 (16 & 17 Vict. *c.* 119), *s.* 11.]—Persons who are arrested under sect. 11 of the Betting Act, 1853, in a house which is a betting house within the meaning of that Act, may be brought before a magistrate, and the magistrate has jurisdiction, under sect. 14 of 33 Hen. 8, c. 9, to require such persons to enter into recognisances "no more to play, haunt, or exercise from thenceforth" at any gaming house, although the only evidence against such persons is that they were found in such betting house.

Murphy *v.* Arrow, [1897] 2 Q. B. 527; 18 Cox, [C. C. 662; 62 J. P. 38; 66 L. J. Q. B. 865; 77 L. T. 435; 14 T. L. R. 13; 46 W. R. 94—Div. Ct.

Betting Houses and Betting—*Continued.*

38. *"Place"—Betting Act,* 1853 (16 & 17 Vict. *c.* 19), *ss.* 1 *and* 3.]—The appellant, a professional bookmaker, on the day of a certain horse-race, stationed himself at a particular spot on a piece of ground called the Pit Heap, with his back against the hoarding of a skittle alley, and there made bets on the race with all who chose to bet with him. The Pit Heap was a vacant and unenclosed space, to which the public were allowed free and unrestricted access from various sides, and on the day in question a large crowd were assembled there. The appellant remained all the time on the same spot, but it was not in any way circumscribed or fenced in or otherwise distinguished.

Held—that the appellant was using a place for the purpose of betting with persons resorting thereto within the meaning of sect. 3 of the Betting Act, 1853.

McInaney *v.* Hildreth, [1897] 1 Q. B. 600; 18 [Cox, C. C. 604; 61 J. P. 325; 66 L. J. Q. B. 376; 76 L. T. 463; 13 T. L. R. 284—Div. Ct.

39. *"Place"—Beerhouse Saloon—Betting Houses Act,* 1853 (16 & 17 Vict. *c.* 119), *s.* 3—*Licensing Act,* 1872 (35 & 36 Vict. *c.* 94), *s.* 17, *sub-s.* 2.]—A professional betting man went day by day, between the hours of 12 noon and 3 p.m., to a beerhouse. He generally sat in the part of the house known as the saloon, and there conducted the business of ready-money betting, receiving bets and stakes, and paying the bets when won. The proprietor and licensee of the beerhouse was aware of and consented to what the betting man did, but the latter paid no rent. Besides the betting business, the ordinary business of a public-house was carried on in the saloon. The betting man had no interest in the latter business, neither had the licensee of the beerhouse any interest in the betting business.

Held—that the betting man used the beerhouse for the purpose of betting with persons resorting thereto, and was therefore guilty of an offence against sect. 3 of the Betting House Act, 1853, and that the licensee was guilty of an offence against sect. 17, sub-sect. 2, of the Licensing Act, 1872.

Belton *v.* Busby, [1899] 2 Q. B. 380; 68 [L. J. Q. B. 859; 63 J. P. 709; 47 W. R. 636; 81 L. T. 196; 15 T. L. R. 458—Div. Ct.

40. *"Place"—"Conducting Betting Therein"—Burgh Police (Scotland) Act,* 1892 (55 & 56 Vict. *c.* 55), *s.* 407.]—The public were admitted on payment of one penny into an enclosure 1,100 square yards in extent. The enclosure contained some quoiting pitches which were used to a certain extent.

A servant of the lessee of the enclosure directed persons entering to the spot where A. was making bets, and also handed to them cards containing betting regulations. A. was neither owner nor lessee of the enclosure.

Held—that the enclosure was a "place," and A. a person "conducting gaming or betting therein" within the meaning of the Burgh Police Act, 1892.

Clark *v.* Dykes, (1906) 8 F. (J. C.) 43— [Ct. of Justiciary.

41. *"Place"—Archway—Trespasser Using* —16 & 17 Vict. *c.* 119, *s.* 1.]—The "place" mentioned in sect. 1 of the Betting Houses Act, 1853 (16 & 17 Vict. c. 119) is not necessarily a place *ejusdem generis* with house, office, or room, and "using" in the same section does not mean only using as of right. A passage or archway may, therefore, be a place within the meaning of the statute, and a person using it for the purpose of betting, even though he be a trespasser, may properly be convicted of using a place for the purpose of betting.

Hawke v. *Dunn* ((1897) 1 Q. B. 579) approved.

Powell v. *Kempton Park Racecourse Company* ([1897] 2 Q. B. 242) distinguished.

Reg. *v.* Humphreys, [1898] 1 Q. B. 875; 62 J. P. [409; 67 L. J. Q. B. 534; 78 L. T. 360; 14 T. L. R. 340; 46 W. R. 543—C. C. R.

42. *"Place" — Place Enclosed but not Covered — Person Conducting Betting — Burgh Police (Scotland) Act,* 1892 (55 & 56 Vict. *c.* 55), *s.* 407.]—A space of ground enclosed by walls, but not roofed in, which was entered by a door with a lock and was fitted up for use as a quoiting ground, was primarily used for betting purposes.

Held—that it was a "place" used as a betting house; and that a person who was not the tenant of the place, but who conducted the betting there, was rightly convicted for so doing under sect. 407 of the Burgh Police (Scotland) Act, 1892.

Flannagan *v.* Hill, (1906) 7 F. 26— [Ct. of Justiciary.

43. *"Place"—Public-house Bar — Betting Act,* 1853 (16 & 17 Vict. *c.* 119), *s.* 3.]—A bookmaker habitually frequented a public-house bar at stated hours for the purpose of a ready-money betting business with persons resorting thereto; he took no refreshment there, and had no interest in the business or tenancy of the house, nor did he occupy any specific part of the bar; but he carried on the business there with the publican's permission.

Held—he was rightly convicted of "using the bar for the purpose of betting with persons resorting thereto."

Belton v. *Busby* ([1899] 2 Q. B. 380; 68 L. J. Q. B. 859; 63 J. P. 709; 47 W. R. 636; 15 T. L. R. 458—Div. Ct., No. 39, *supra*) followed).

Tromans *v.* Hodkinson, [1903] 1 K. B. 380; 71

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[L. J. K. B. 21; 67 J. P. 30; 51 W. R. 286; 87 L. T. 549; 19 T. L. R. 19; 20 Cox, C. C. 360—Div. Ct.

44. *"Place" — "Public-house Bar" — Whether Permission of Publican must be Proved—Betting Act*, 1853 (16 & 17 Vict. *c.* 119), *ss.* 1, 3.]—Where a bookmaker frequents the bar of a public-house for the purpose of carrying on his business, he cannot be convicted of using the place for betting unless some evidence is given that he does so with the consent of the publican; but such consent may be inferred by a jury from the fact that the conduct has gone on for some days, and that the publican was aware of it.

Rex v. Deaville, Rex *v.* Simpson, [1903] 1 [K. B. 468; 72 L. J. K. B. 272; 67 J. P. 82; 51 W. R. 604; 88 L. T. 32; 19 T. L. R. 223; 20 Cox, C. C. 389—C. C. R.

45. *"Place" — Resorting — Evidence — Betting Act*, 1853 (16 & 17 Vict. *c.* 119), *s.* 1.] —The defendant was convicted of unlawfully using a yard and garden ground at the back of certain houses for the purpose of betting with persons resorting thereto, and for the purpose of receiving money as the consideration for an undertaking by him to pay money on the contingency of horse-races. It was proved that one of the houses was at the time in question occupied by the defendant's father, who carried on a fruiterer's business there. It was in the middle of a row of eight other similar small houses, each of them having a front door opening into Q. Street. This row of houses backed on to a piece of enclosed land which formed a common yard and garden ground for the whole row, and the same piece of land was crossed by a footpath which ran immediately behind the row of houses, and upon which path the back doors of the premises opened. Upon the garden ground was some shedding, also occupied by the defendant's father. The grounds at the back of this row were approached from Q. Street by an entry at the side of the father's house. Evidence was given that on July 12th thirty-nine persons were seen to go up this entry between 1 and 1.45 p.m., and about 3 p.m. a bet was made with the defendant, who was sitting against the wall in the garden behind the house On July 13th seventy-two persons were seen to go up this entry between 1 and 2.15 p.m., and the defendant was seen to come down the entry and a bet was made with the defendant on that day in the yard at the rear of the house. On July 14th, between 1 and 1.50 p.m., fifty persons were seen to go up the entry, and a bet was made with the defendant, and he paid the winnings of a bet made the day before. On each of these days some person was seen to be keeping a look-out.

Held—that there was evidence of "resorting" and "user" within the meaning of the Betting Act, 1853, and that there was evidence that the defendant used a "place" within the meaning of the said Act.

Rex *v.* Russell, (1905) 67 J. P. 247—C. C. R.

46. *"Place" — Uncovered Inclosure on Racecourse—Betting Act*, 1853 (16 & 17 Vict. *c.* 119), *ss.* 1, 2, 3.]—The keeping of an uncovered inclosure at a racecourse, to which bookmakers and others resort, and in which betting takes place, with the knowledge and without the interference of the owners of the racecourse, is not contrary to the provisions of the Betting Houses Act, 1853. What is prohibited is the opening, keeping, or using a place for a betting business.

Hawke v. Dunn ([1897] 1 Q. B. 579; 66 L. J. Q. B. 364; 61 J. P. 292; 45 W. R. 359; 76 L. T. 355; 13 T. L. R. 281) overruled.

Powell *v.* Kempton Park Racecourse Co., [1899] A. C. 143; 68 L. J. Q. B. 392; 63 J. P. 260; 47 W. R. 585; 80 L. T. 538; 15 T. L. R. 266; 19 Cox, C. C. 265—H. L. (E.)

47. *"Place"—Wooden Structure—Localisation of the Business of Betting—Betting Act*, 1853 (16 & 17 Vict. *c.* 119), *ss.* 1, 3.]—On a certain part of the inclosed ground upon which a race meeting was being held a bookmaker erected a structure, consisting of four legs or supports, made of bamboo, fastened together. On the top there was a board, on which from time to time the bookmaker wrote the odds offered against the different horses, and, lower down, a canvas screen or banner, some distance off the ground, bearing the bookmaker's name. Throughout the day the bookmaker stood upon a box or stool close to the structure, shouting the odds and betting with persons upon the ground.

Held—that the bookmaker was a person using a place for the purpose of betting with persons resorting thereto, within the meaning of the Betting Houses Act, 1853, there being a sufficient localisation of the business of betting at the spot where he stood.

Brown *v.* Patch, [1899] 1 Q. B. 892; 68 [L. J. Q. B. 588; 63 J. P. 421; 47 W. R. 623; 80 L. T. 716; 15 T. L. R. 312—Div. Ct.

48. *Penalty—Adjudging no Portion thereof shall be paid to the Informer—Corrupt Practice—Discretion of Magistrate—Metropolitan Police Courts Act*, 1839 (2 & 3 Vict. *c.* 71), *s.* 34—*Betting Act*, 1853 (16 & 17 Vict. *c.* 119), *s.* 9.]—The respondent was convicted and fined by a magistrate under the Betting Act, 1853, and the magistrate found as a fact that the informer, the present appellant, was not guilty of corrupt practices. An application was made that a portion of the penalty should be paid to the informer. The magistrate exercised his discretion under sect. 34 of the Metropolitan Police Courts Act, 1839, and adjudged that he should not receive any part of the penalties.

Held—that there was no ground for inter-

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fering with the magistrate's decision, as sect. 34 of the Act of 1839 in terms applies to any Act thereafter to be passed, notwithstanding sect. 9 of the Betting Act, 1853, enacts that "one-half of every pecuniary penalty which shall be adjudged to be paid under this Act, shall be paid to the informer."

Hawke *v.* Mackenzie (No. 3), [1902] 2 K. B. [234; 71 L. J. K. B. 570; 66 J. P. 712; 87 L. T. 131; 18 T. L. R. 550; 51 W. R. 233, 236, 239; 20 Cox, C. C. 305, 314, 324—Div. Ct.

49. *Street Betting — "Frequenting" — "Loitering about."*]—A man who is proved to have "loitered about O. Street and the adjoining streets" for forty minutes for the purpose of betting is rightly convicted of "frequenting and using O. Street for the purpose of betting."

Lang *v.* Walker, (1904) 5 F. (J. C.) 8—[Ct. of Just.

50. *Street Betting — "Frequenting and using"—Evidence of.*]—It was proved that a bookmaker remained in a certain street for twenty minutes, during which time he transacted betting business with various persons.

Held—that this evidence justified a conviction for "frequenting and using" the street for the purpose of betting contrary to a bye-law.

Davies *v.* Jeans, (1905) 6 F. (Just. Cas.) 37—[Ct. of Justiciary.

IV. LOTTERIES.

51. *Keeping a Place for Exercising a Lottery—Isolated User—Gaming Act,* 1802 (42 Geo. 3, *c.* 119), *s.* 2.]—The respondents were charged under sect. 2 of the Gaming Act, 1802, with keeping a certain place for the purpose of exercising a lottery therein. The evidence showed that they had used the place for drawing a lottery on only a single occasion.

Held—that they had committed no offence under the section, which is aimed at the habitual user of a place.

Martin *v.* Benjamin and Another, [1907] 1 [K. B. 64; 76 L. J. K. B. 81; 71 J. P. 30; 96 L. T. 197; 23 T. L. R. 53—Div. Ct.

52. *Newspaper—Distribution of Medals Gratuitously — Winning Prizes Announced in Newspaper—Gaming Act,* 1802 (42 Geo. 3, *c.* 119).]—The proprietor of a weekly penny newspaper caused a quantity of medals to be distributed gratuitously, each medal bearing a number, and an intimation that it might entitle the holder to a prize. One of the medals selected arbitrarily carried a right to a prize, and the number of this medal was announced in the newspaper. The persons distributing the medals were never employed to see the paper, and a copy of the paper was never sold from the office with one of the medals. Anyone who asked for a medal was given one. A file of the paper was kept at the office, which could be inspected free of charge, by any person to see if he had won a prize, and there was no condition that a person holding a medal must purchase a copy of the paper to entitle him to a prize, the object of the scheme being to advertise the paper and increase its circulation.

Held—that, as many medal holders bought copies of the paper, the scheme was a lottery within the Gaming Act, 1802, although nothing was charged for the medals to individuals.

Willis *v.* Young, [1907] 1 K. B. 448; 76 [L. J. K. B. 390; 71 J. P. 6; 96 L. T. 155; 23 T. L. R. 23—Div. Ct.

53. *Newspaper—Sale of Newspaper Containing Scheme for the Sale of Chances in a Lottery—Lotteries Act,* 1823 (4 Geo. 4, *c.* 60), *s.* 41.]—The appellant was the printer and publisher of a newspaper which announced that for a certain period in certain issues of the paper spots of varying size and shape would appear, and that any person who should cut out from the paper and send to the office that portion of the paper containing the spots which turned out to be declared the winning spots would receive a prize.

Held—that the scheme was a lottery within sect. 41 of the Lotteries Act, 1823, and that the appellant was liable to be convicted under that section of having published a proposal or scheme for the sale of chances in a lottery, though the purchaser paid no money beyond the sum paid for the newspaper.

Hall *v.* M'William, M'William *v.* Bottomley, [(1901) 65 J. P. 742; 85 L. T. 239; 17 T. L. R. 561—Div. Ct.

54. *Prize Competition — Prediction of Number of Births and Deaths in London During a Week—Chance—Element of Skill.*] —A newspaper proprietor advertised in his paper that a prize of £1,000 would be given to the person who correctly predicted the number of births (male and female) and deaths in London as disclosed by the Registrar-General's returns during the week in which the particular number of the paper was published. Each prediction had to be written on a voucher printed in the paper, and forwarded to the proprietor. Competitors were not limited to one prediction.

Held—that the competition was not a lottery, as it did not depend entirely upon chance.

Hall *v.* Cox, [1899] 1 Q. B. 198; 68 L. J. Q. B. [167; 47 W. R. 161; 79 L. T. 653; 15 T. L. R. 82—C. A.

55. *Sweepstake — Contingency of Horse-race—Betting Act,* 1853 (16 & 17 Vict. c.

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119), *s.* 1.]—To subscribe to a sweepstake is not to bet; the organiser of a sweepstake, therefore, does not commit an offence against the Betting Act, 1853, even though the sweepstake may have reference to a horse-race.

A publican received subscriptions for a sweepstake on a horse-race. Before the date fixed for the drawing of the sweepstake the police seized the documents relating to the subscriptions, and consequently no drawing took place. The publican was indicted and convicted under the Betting Act, 1853, for using his house for the purpose of money being received by him, as and for the consideration for promises and agreements to pay thereafter money on certain events relating to a horse-race.

Held—that the conviction was wrong.

Semble, a sweepstake is a lottery, and therefore illegal.

Reg. *v.* Hobbs, [1898] 2 Q. B. 647; 62 J. P. 474, [551; 67 L. J. Q. B. 928; 79 L. T. 160; 14 T. L. R. 573; 47 W. R. 79; 19 Cox, C C. 154 —C. C. R

56. *Sweepstakes on Result of Horse Race—Lottery for Profit—Gaming Act*, 1802 (42 Geo. 3, *c.* 119), *s.* 2.]—The respondent, a holder of licensed premises, arranged for a sweepstakes on the result of a horse-race. All the amount of the subscriptions was returned in prizes, but it was one of the conditions of the sweepstakes that the prize-winners should pay for certain amounts of beer to be consumed on the premises, and the prizes, less the cost of such beer, were paid over by the respondent.

Held—that such sweepstakes was a lottery within the meaning of sect. 2 of the Gaming Act, 1802.

Semble, the decision would have been the same, even if there had been no condition requiring the winners to spend money on the premises.

Hardwick *v.* Lane, [1904] 1 K. B. 204; 73 [L. J. K. B. 96; 68 J. P. 94; 52 W. R. 591; 89 L. T. 630; 20 T. L. R. 87; 20 Cox, C. C. 576—Div. Ct.

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GAS.

Gas Companies and Supply of Gas.

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And see Arbitration, 27; Easements, 2; Highways; Metropolis; Public Health, 10, 11, 12.

(a) In General.

1. *Injury to Gas Company's Property—Remedy by Action—Summary Remedy—Gasworks Clauses Act*, 1847 (10 & 11 Vict. *c.* 15), *s.* 20.]—A gas company's common law remedy by action for damages for injury to their property is not ousted by the summary remedy provided by sec. 20 of the Gasworks Clauses Act, 1847.

Crystal Palace Gas Co. *v.* Idris & Co., (1900) [64 J. P. 452; 82 L. T. 200; 16 T. L. R. 180—Div. Ct.

2. *Nuisance—Escape of Gas from Mains in Highway—Contamination of Water—Liability—Gasworks Clauses Act*, 1871 (34 & 35 Vict. *c.* 41), *s.* 9.]—The plaintiffs were the owners and the occupiers of houses whose sole water supply was derived from a well 210 yards distant from them. The water was brought to the houses by means of a pipe, which, for a distance of about 200 yards, was laid under the surface of the highway. The defendant company's mains, which were laid under the surface of the road, leaked so as to contaminate the water in the pipe with coal-gas and create a nuisance.

Held—that the defendant company had no statutory authority to create a nuisance, and that it was no answer to say that the gas mains were well laid, and that in the course of time some escape or diffusion was unavoidable, nor to say that the plaintiff's water pipe was defective, nor that the plaintiff's water supply was otherwise unfit for domestic purposes.

Batcheller *v.* Tunbridge Wells Gas Co., (1901) [65 J. P. 680; 84 L. T. 765; 17 T. L. R. 765—Farwell, J.

3. *Nuisance—Rights of Light and Support—Statutory Powers—"Running Silt"—Subsidence — Injunction — Damages — Gasworks Clauses Act*, 1847 (10 & 11 Vict. *c.* 15), *s.* 29—*Gasworks Clauses Act*, 1871 (34 & 35 Vict. *c.* 41), *ss.* 9, 11.]—The defendant gas company were incorporated by Act of Parliament passed in 1867 for the purpose of taking over and carrying on existing gasworks. The Gasworks Clauses Act, 1847, was incorporated with the Act. By an Amendment Act which incorporated the Gasworks Clauses Act, 1871, they were authorised by agreement to purchase or take on lease and use such of certain lands, including the site of a gasholder, the subject of this action, as they might require for the purpose of their undertaking. The gas company were erecting the gasholder on part of their premises adjoining the plaintiff's cottages. In excavating their land for such purpose they penetrated an underground stratum of quicksand, or sand loaded with stagnant water, geologically known as "running silt," which extended under the plaintiff's land, and thereby withdrew the running silt from the ground on which the plaintiff's cottages stood, causing subsidence of the ground and injury to the cottages. The plaintiff claimed damages and an injunction against the company. The company also had resolved

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to raise the gasometer so as to obstruct the plaintiff's ancient lights.

HELD—that the nuisance clauses contained in Gasworks Clauses Acts, 1847, 1871, rendered the decision in *London, Brighton, and South Coast Railway Co.* v. *Truman* ((1885) 11 App. Cas. 45; 55 L. J. Ch. 354; 50 J. P. 388; 34 W. R. 657; 54 L. T. 250) inapplicable, and that the company had committed an actionable nuisance entitling the plaintiff to damages; that an injunction ought to be granted against carrying the gasometer so high as to obstruct the access of light to the plaintiff's cottages; and that the plaintiff's rights could not be adequately protected or vindicated by damages.

Decisions of *Martin* v. *Price* ([1894] 1 Ch. 276; 63 L. J. Ch. 209; 42 W. R. 262; 70 L. T. 202; 7 R. 90) and *Shelfer* v. *City of London Electric Lighting Co.*, ([1895] 1 Ch. 287; 64 L. J. Ch. 216; 43 W. R. 238; 72 L. T. 34; 12 R. 112) applied.

That the company had no right to take away the soil of the plaintiff in land which they had not taken under the statute.

Judgment of North, J. ([1898] 2 Ch. 614; 67 L. J. Ch. 666; 63 J. P. 137; 47 W. R. 222; 79 L. T. 478; 14 T. L. R. 567), affirmed.

JORDESON *v.* SUTTON, SOUTHCOATES AND DRYPOOL [GAS CO., [1899] 2 Ch. 217; 68 L. J. Ch. 457; 63 J. P. 692; 80 L. T. 815; 15 T. L. R. 374—C. A. (Vaughan Williams, L.J., dissenting).

4. *Prescribed Rate of Dividend—Income Tax—Maximum Dividend—Gas Company—Income Tax paid by Company—Ashton Gas Act*, 1877 (40 & 41 Vict. *c.* clxxxvi.), *s.* 16—*Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 60, *Sched. A, r.* 3, *sub-r.* 3.]—By sect. 16 of the Ashton Gas Act, 1877, the profits of the Ashton Gas Company to be divided among the shareholders in any year were not to exceed the rate of 10 per cent. per annum on the ordinary capital of the company.

HELD—that the dividend to be paid in any year to the shareholders ought to be calculated as including and not excluding the income tax thereon.

Decision of the C. A. ([1904] 2 Ch. 621; 73 L. J. Ch. 673; 68 J. P. 477; 53 W. R. 49; 20 T. L. R. 601) affirmed.

THE ASHTON GAS CO. *v.* THE ATTORNEY-GENERAL, [1906] A. C. 10; 75 L. J. Ch. 1; 70 J .P. 49; 93 L. T. 676; 22 T. L. R. 82; 13 Manson, 35—H. L. (E.).

5. *Price of Gas—Statutory Provisions for Audit of Accounts—Right of Private Consumer to Enforce.*]—Where an Act of Parliament provided that, under certain circumstances, the price of gas supplied to a city by a gas company should be reduced, and empowered the Corporation of the City to check the annual audit of the company's accounts, and ascertain whether they were complying with the Act,

HELD—that a private consumer had no right of action against the company for non-compliance with the provisions of the Act.

JOHNSTON *v.* TORONTO CONSUMERS' GAS CO., [1898] A. C. 447; 67 L. J. P. C. 33; 78 L. T. 270—P. C.

6. *Sale of Undertaking to District Council at a Price to be Assessed—Goodwill—Contract—Construction—Principle of Assessment.*]—A gas company supplied gas in a district, a portion of which was not within their statutory limit of supply. By an agreement made between the gas company and the council of such district, it was agreed that the company should sell and the council should purchase all and singular the works, pipes, mains, meters and other gas apparatus, and all other the real and personal property (if any) and all effects of the company of whatsoever kind laid down or situate within the district, freed and discharged (as between the company and the council) from all debts, outgoings and liabilities, and all easements, rights, powers, authorities and privileges (if any) enjoyed or exercisable by the company, at a price to be agreed upon, or, in default of agreement, to be determined by arbitration.

The agreement further provided that in the case of arbitration, and in the event of the council not continuing to take a supply of gas in bulk from the company, the arbitrators should take into consideration in fixing the purchase money the value of any mains or pipes laid down by the company outside the district of the council for the purpose of supplying gas within the district of the council, which by reason of the sale would be rendered useless to the company.

By a second agreement, terminable upon twelve months' notice, it was agreed that the council should take a supply of gas in bulk from the company.

HELD—that the purchase-money was to be assessed on the basis that the sale was a sale of a part of the gas company's undertaking as a going concern, including goodwill.

HELD—further, that the arbitrator should take into consideration the contingency of the district council not continuing to take a supply of gas from the company, and should assess compensation in respect of the mains and pipes outside the district of the council provided by the company for supplying gas within such district upon that basis.

Decision of Bray, J. (69 J. P. 158; 3 L. G. R. 160), reversed.

IN RE HUCKNALL URBAN DISTRICT COUNCIL AND [SOUTH NORMANTON, &C., GAS CO., LTD., (1905) 69 J. P. 329; 3 L. G. R. 704—C. A.

7. *Sale of Gas Works to Municipality—Valuation—"Works, Plant, Appliances and Property"—Franchise and Goodwill—Ten per cent. for Expropriation — Voluntary Agreement to Purchase.*]—A gas company agreed voluntarily to sell to a municipality at a valuation price its "works, plant, appli-

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ances and property used for light, heat and power purposes." By the agreement "all franchises" were to be surrendered to the purchasers.

HELD—that in fixing the price the valuers could not consider (1) the value of the franchise, goodwill and rights of the company during the remainder of the period for which their charter rights were indefeasible; or (2) the 10 per cent. provided for by their special Act in the event of expropriation.

Decision of C. A. for Ontario (5 Ont. L. R. 348) affirmed.

KINGSTON LIGHT, HEAT AND POWER CO. *v.* KINGSTON CORPORATION, (1904) 20 T. L. R. 448—P. C.

8. *Supply of Gas—Arrears due from Outgoing Tenant—Right to Cut off Gas—Right to Sue Incoming Tenant—Gas Light and Coke Company's Act,* 1872 (35 & 36 Vict. *c.* xxiii.), *s.* 18—*Gasworks Clauses Act,* 1847 (10 & 11 Vict. *c.* 15), *s.* 16—*Metropolitan Gas Act,* 1860 (23 & 24 Vict. *c.* 125), *s.* 39.]—A tenant of premises whose gas rate to the plaintiff company was in arrear sold his lease and the goodwill of his business to the defendant.

HELD—that, upon the true construction of sect. 16 of their special Act, the company could not recover the arrears from the defendant, although he was "continuing the trade or business of the outgoing tenant . . . and had paid . . . a consideration for so doing"; but that they could refuse to supply him with gas unless he chose to pay such arrears.

Gas Light and Coke Co. v. *Mead* ((1876) 45 L. J. M. C. 71—Div. Ct.) approved.

Decision of the C. A. ([1903] 1 K. B. 593; 72 L. J. K. B. 308; 67 J. P. 192; 51 W. R. 565; 88 L. T. 314; 19 T. L. R. 307) reversed.

CANNON BREWERY CO., LD. *v.* GAS LIGHT AND COKE CO., [1904] A. C. 331; 73 L. J. K. B. 747; 68 J. P. 461; 52 W. R. 657; 91 L. T. 110; 20 T. L. R. 543; 2 L. G. R. 949—H. L. (E.).

9. *Supply of Gas—Payment of Arrears—Receiver for Debenture-holder—"Incoming Tenant"—Right to Cut Off Supply—Gas Works Clauses Act,* 1847 (10 & 11 Vict. *c.* 15), *s.* 16—*Gas Light and Coke Company's Act,* 1872 (35 & 36 Vict. *c.* xxiii.), *s.* 18.]—The plaintiff was receiver appointed by the Court in an action by a debenture-holder against a limited company, upon whom the defendants had served notice that unless a sum due to them in respect of the supply of gas to certain of their premises were paid the supply of gas would be cut off under sect. 16 of the Gas Works Clauses Act, 1847. The plaintiff moved for an injunction to restrain the defendants from so doing as he considered himself exempt, as an incoming tenant, from the penalty of being cut off for default previously to his occupancy by virtue of sect. 18, the defendants' special Act of 1872.

HELD—that the receiver was not in occupation of or the incoming tenant of the premises; and that the injunction must be refused.

HUSEY *v.* GAS LIGHT AND COKE CO., (1902) 18 [T. L. R. 299—Eady, J.

10. *Testing Gas—"Daily" Test—Testing on Sundays—Injunction—Parties—South Metropolitan Gas Light and Coke Company's Act,* 1869 (32 & 33 Vict. *c.* cxxx.), *s.* 7; *South Metropolitan Gas Light and Coke Company's Act,* 1876 (39 & 40 Vict. *c.* ccxxix.)—*Gas Light and Coke and other Gas Companies' Acts Amendment Act,* 1880 (43 & 44 Vict. *c.* clxxxi.), *ss.* 7, 9, 15.]—By a gas company's special Act provision was made for the testing of their gas, and the word "day" was defined as meaning twenty-four hours reckoned from 9 a.m. of one day to 9 a.m. of the next day. A later special Act provided that a gas examiner "shall at each testing place make daily" a series of tests.

HELD—that such provisions applied to testing on Sundays as well as on week-days. The fact that no testing had taken place on Sundays under former Acts containing similar provisions is not sufficient to show that the Legislature intended to exclude Sundays when re-enacting in an amending Act those provisions as to testing. Such an implication from previous practice can only be made where it is reasonable to do so.

Yewens v. Noakes ((1880) 6 Q. B. D. 530; 50 L. J. Q. B. 132; 45 J. P. 468; 28 W. R. 562; 44 L. T. 128—C. A.) considered.

HELD ALSO—that the L.C.C., as the testing authority, could without joining the A.-Gen. claim an injunction to restrain the company from interfering with their gas testers on Sunday.

Decision of Joyce, J. ([1903] 2 Ch. 532; 72 L. J. Ch. 536; 67 J. P. 341; 52 W. R. 45; 88 L. T. 623; 19 T. L. R. 441), affirmed.

LONDON COUNTY COUNCIL *v.* SOUTH METROPOLITAN GAS CO., [1904] 1 Ch. 76; 73 L. J. Ch. 136; 68 J. P. 5; 52 W. R. 161; 89 L. T. 618; 20 T. L. 83; 2 L. G. R. 161—C. A.

(b) Mains, Pipes, and Lamps.

11. *Lamp-post — Damage — Carelessness — Evidence—Gasworks Clauses Act,* 1847 (10 & 11 Vict. *c.* 15), *s.* 20.]—On a summons against the appellant for unlawfully and "carelessly" damaging a lamp-post under sect. 20 of the Gasworks Clauses Act, 1847, the magistrates found that there was evidence of "carelessness" and made an order against the appellant.

HELD—on the facts, that although the word "accidentally" was not in the summons there was sufficient evidence of carelessness to justify the order, as the kind of carelessness referred to in the section is something short of what may be called negligence, and is almost equivalent to pure accident.

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Burgess v. *Morris* ([1897], 61 J. P. 553; 77 L. T. 97—Div. Ct.) approved.

Ashton *v.* Eccles Corporation, (1907) 71 J. P. [55—Div. Ct.

12. *Opening up of Road—Negligent Reinstatement by Local Authority Causing Damage—Liability of Gas Company—Gasworks Clauses Act*, 1847 (10 & 11 Vict. *c.* 15), *s.* 10—*Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 114.]—The defendants, a gas company, under their statutory powers opened up a street. The local authority, acting under sect. 114 of the Metropolis Management Act, 1855, reinstated the street. By the negligence of a servant of the local authority a hole was left in the road into which the plaintiff stepped and was injured. An action was brought by the plaintiff for damages against the defendants for negligence in not properly filling up and levelling the road, and alternatively in neglecting to keep the road in good repair, and to prevent a subsidence, as provided by sect. 10 of the Gasworks Clauses Act, 1847.

Held—that the defendants were not liable.

Cressy *v.* South Metropolitan Gas Co., (1906) [70 J. P. 405; 94 L. T. 790; 4 L. G. R. 1049—Div. Ct.

13. *Opening Surface of Bridge—Powers of Gas Company—Gasworks Clauses Act*, 1847 (10 Vict. *c.* 15), *ss.* 6, 7.]—Sect. 6 of the Gasworks Clauses Act, 1847, authorises a gas company to open the surface of a bridge, dig a trench, and lay pipes resting on the bridge. A bridge is not a building within sect. 7 of the Act.

Taff Vale Ry. Co. *v.* Cardiff Gas Light & [Coke Co., (1907) 71 J. P. 350; 23 T. L. R. 528; 5 L. G. R. 993—Eady, J.

14. *Pipes — Communication Pipe under Highway—Liability to Repair—Whether on Company or Consumer—Waterworks Clauses Act*, 1863 (26 & 27 Vict. *c.* 93), *s.* 17.]—The local Acts of the Colne Valley Water Company incorporate the Waterworks Clauses Acts, 1847 and 1863. A communication pipe connecting a main of the company with the premises of a consumer lay under a highway.

Held—that the liability to repair the pipe was on the company and not on the consumer, as the water company had, and the consumer had not, the power to open the road for the inspection and repair of the pipe; and that this was so, even if the property in the pipe was in the consumer.

Chapman v. *Fylde Waterworks Co.* ([1894] 2 Q. B. 599; 64 L. J. Q. B. 15; 59 J. P. 5; 71 L. T. 539; 43 W. R. 1—C. A.) applied.

Colne Valley Water Co. *v.* Hall, (1907) 71 [J. P. 173; 96 L. T. 395; 5 L. G. R. 260—Div. Ct.

Affirmed, on the ground that there was no evidence as to the ownership of the pipe (52 Sol. Jo. 57; 72 J. P. 25; 6 L. G. R. 115)—C. A.

15. *Street Lighting—Obligation of Company—Lamp on Wall in Private Passage not Dedicated to the Public Use—Pipe Requisite from Main to Lamp—Power to Require Gas Company to Lay Pipe in Passage—Liverpool Improvement Act*, 1842 (5 & 6 Vict. *c.* cvi.), *ss.* 152, 156—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 150, 161—*Gasworks Clauses Act*, 1847 (10 & 11 Vict. *c.* 15), *ss.* 6, 7—*Gasworks Clauses Act*, 1871 (34 & 35 Vict. c. 41), *ss.* 24, 27, 36.]—The Lighting Committee of the Corporation of Liverpool placed a gas lamp on the top of a blank wall within fifty yards of the gas main of the respondents, who were undertakers within the meaning of the Gasworks Clauses Act, 1871. The blank wall adjoined a narrow passage which had never been dedicated to public use, but was owned by two owners of adjoining houses, who maintained and repaired it at their own expense. The respondents were required by the Lighting Committee under sect. 24 of the Gasworks Clauses Act, 1871, to supply gas to the lamp. The respondents on proceeding to lay a connection pipe from their main through the passage to the lamp were stopped by persons said to be the owners of the passage. Thereupon a summons was taken out by the appellant, the city lighting engineer, under sect. 36 of the Gasworks Clauses Act, 1871, charging the respondents with neglecting to supply gas to a public lamp. At the hearing one of the two owners stated that he and his co-owner objected to the laying of the connection pipe. The magistrate dismissed the summons.

Held—that the magistrate was right in dismissing the summons, as the respondents had no right to lay down the pipe in the passage by reason of the provisions of sect. 7 of the Gasworks Clauses Act, 1847. The appellant should have proceeded against the owners or occupiers of the premises adjoining the passage, requiring them to provide proper means of lighting under sect. 150 of the Public Health Act, 1875.

Bellamy *v.* Liverpool United Gas Light Co., [(1904) 68 J. P. 540; 2 L. G. R. 1182—Div. Ct.

GIBRALTAR.

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GIFTS.

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And see Choses in Action.

I. IN GENERAL.

1. *Delivery*—Indicia *of Title—Passing of Property—Church Organ — Parties.*] — A parishioner bought an organ and lent it to a mission church, which was vested in trustees upon trust that it should be used for public worship under the direction of the vicar. The latter gave to the parishioner a letter acknowledging that the organ was only lent. The plaintiff was the organist of the church, and the owner of the organ told him in his room that he wished to give him the organ, handing to him the vicar's letter and the receipt for the purchase-money as *indicia* of title; subsequently, when in the church, he placed his hand upon the organ, and in the plaintiff's hearing told a third person that he gave, or had given it, to the plaintiff. In consequence of disputes as to the ownership, the plaintiff now claimed a declaration of his title against the vicar and churchwardens.

Held—(1) that the trustees need not be made defendants.

(2) that the delivery of the *indicia* of title formed a complete and valid gift of the organ to the plaintiff; and (3) that the gift, if not then complete, was completed in the church.

Chaplin v. *Rogers* ((1800) 1 East 192); *Cochrane* v. *Moore*, ((1890) 25 Q. B. D. 57; 59 L. J. Q. B. 377; 38 W. R. 588; 63 L. T. 153—C. A.); and *Kiplin* v. *Ratley* ([1892] 1 Q. B. 582; 56 J. P. 565; 40 W. R. 479; 66 L. T. 797—Div. Ct.) discussed.

Rawlinson *v.* Mort and Others, (1905) 93 [L. T. 555; 21 T. L. R. 774—Bray, J.

2. *Innocent Misrepresentation of Donees Common Mistake—Gift Voidable in Equity —Election by Donors not to Avoid Gifts.*]—The committee of a charitable institution wrote to their subscribers, and represented to them that the institution was in a position to obtain a testator's gift if subscribers would come forward with their subscriptions before a specified date. On the footing and the faith of that representation of fact, subscribers gave their money. After the subscriptions had been obtained the committee found that they had made a mistake, and that they were not at the time when they obtained the subscriptions in a position to obtain the gift. The committee informed the subscribers of this, and at the same time informed them that there was in the will a deferred gift. The subscribers allowed the committtee to apply their subscriptions to this deferred gift.

Held—that the subscribers, when the mistake was discovered, could have got their money back, if they had chosen to demand it; and, having the right to do that, they elected to have their money applied to meet the deferred legacy. The gifts were voidable in equity, but the subscribers elected not to avoid them.

Statement of James, L.J., in *Wilson* v. *Thornbury* ((1875), L. R. 10 Ch. 239, 249; 23 W. R. 329; 32 L. T. 350, 352) not followed in part.

In re Glubb; Bamfield *v.* Rogers, [1900] 1 Ch. [354; 69 L. J. Ch. 278; 82 L. T. 412—C. A.

II. DONATIO MORTIS CAUSÂ.

(a) Subject Matter.

3. *Cheques—Letter requesting that a Person should keep Cheques and see that certain Persons had the Money — Intestacy as to Cheques.*] — The day before her death a testatrix instructed E. H. to write to S. to say that she, the testatrix, wished E. H. to send three inclosed cheques for S. to keep for her, and in case of her death then to see these persons had the money. The cheques were duly sent and kept.

Held—that a cheque was not the proper subject-matter of a *donatio mortis causâ;* that the testatrix had merely attempted to make a will by means of an unattested document; and that the testatrix's executor was not at liberty to pay the amount of the three cheques.

Re Davis; Griffiths *v.* Davis, (1902) 86 L. T. [889—Farwell, J.

4. *Gift of Cheque to take Effect if Donor Died—Overdrawn Account—Non-payment in Donor's Lifetime—No* Traditio.]—On February 19th, B. was very ill and in expectation of death. His niece was called to his room. She went and he told her that he must at once draw a cheque in favour of E. The niece got the cheque-book and filled up a cheque in E.'s favour for £300, and B. signed it. He told his niece to give it to E., which she did. E. presented the cheque on February 23rd at B.'s bankers for payment where his account was overdrawn. The bank manager did not pay the cheque, but whether he declined to pay because he doubted the signature was genuine, or because the account was overdrawn, was disputed. B. died on February 25th and the cheque was never paid.

Held—that it was to be inferred that the gift was to take effect if B. died; that as a fact the mind of the manager was that he would "lend" the money to pay the cheque if he found that the signature was right; that there was no contract on the manager binding him to lend; that no right had been acquired by E., but an expectation only; and that there was no valid *donatio mortis causâ*, as there had been no such *traditio* as was required in order to give E. a right to the amount of the cheque on the death of the donor.

Hewitt v. *Kaye* ((1868) L. R. 6 Eq. 198; 37 L. J. Ch. 633; 16 W. R. 835) and *In re Beak's Estate* ((1872) L. R. 13 Eq. 489; 41 L. J. Ch. 470; 26 L. T. (N.S.) 281—V.-C. B.) followed.

Bromley v. *Brunton* ((1868) L. R. 6 Eq. 275; 37 L. J. Ch. 902; 16 W. R. 1006; 18 L. T.

Donatio Mortis Causa—*Continued.*

(N.S.) 628) and *In re Dillon* ((1890) 44 Ch. D. 76; 59 L. J. Ch. 420; 38 W. R. 369; 62 L. T. 614—C. A.) explained.

In re Beaumont; Beaumont *v.* Ewbank, [1902] [1 Ch. 889; 71 L. J. Ch. 478; 50 W. R. 389; 86 L. T. 410—Buckley, J.

5. *Post Office Savings Bank—Investment—Certificate for Government Stock—Validity.*]—The testatrix, being in expectation of death, expressed a desire that in the event of her death her sister should have all her money in the Post Office Savings Bank, including a sum which the bank had invested in Government Stock, and the testatrix, three days before her death, delivered to her sister a desk containing her Post Office Savings Bank book and an investment certificate issued to the testatrix by the Post Office Savings Bank for £50 10s. Local Loans 3 per cent. Stock, and she gave her the key of the desk.

Held—that there was a good *donatio mortis causâ* of the balance of £130 odd standing to the credit of the testatrix at the Post Office Savings Bank at the date of her death; that there was not a good *donatio mortis causâ* of the £50 10s. Local Loans 3 per cent. Stock.

In re Weston; Bartholomew v. *Menzies* ([1902] 1 Ch. 680; 71 L. J. Ch. 343; 50 W. R. 294; 86 L. T. 551; 18 T. L. R. 326—Byrne, J. *infra*, followed.

In re Andrews; Andrews *v.* Andrews, [1902] [2 Ch. 394; 71 L. J. Ch. 676; 50 W. R. 569; 87 L. T. 20; 18 T. L. R. 646—Kekewich, J.

6. *Share Certificates of Building Society—Post Office Savings Bank Book—Receipt—Book Containing Terms of Contract.*]—The Court found as a fact that the evidence established a valid and binding *donatio mortis causâ* by the deceased of his shares in the Hearts of Oak Permanent Building Society and of a sum of money in the Post Office Savings Bank, if the certificates of shares and the savings bank book could be proper subject-matter of a *donatio mortis causâ*.

Held—that the certificates of the building society shares were not the proper subject-matter of a *donatio mortis causâ*.

Moore v. *Moore* ((1874) L. R. 18 Eq. 474; 43 L. J. Ch. 617; 22 W. R. 729; 30 L. T. (N.S.) 752—V.-C. Hall) followed.

Held also—that as the savings bank book was not a mere receipt, but must have been produced whenever any money was deposited or withdrawn, and contained the terms of the contract as to payment of interest and withdrawal, as well as other material terms of the contract between the depositor and the Savings Bank Department, it was a good subject-matter for *donatio mortis causâ*.

Moore v. *Darton* ((1851) 4 De G. & Sm. 517; 20 L. J. (N.S.) 626—Knight-Bruce, V.-C.) and *In re Dillon* ((1890) 44 Ch. D. 76; 59 L. J. Ch. 420; 38 W. R. 369; 62 L. T. 614—C. A.) followed.

In re Weston; Bartholomew *v.* Menzies, [1902] [1 Ch. 680; 71 L. J. Ch. 343; 50 W. R. 294; 86 L. T. 551; 18 T. L. R. 326—Byrne, J.

(b) Validity.

7. *Essentials—Possession — Dominion.*]—In order to constitute a valid *donatio mortis causâ* the donor must not merely part with the possession of, but also with the dominion over, the thing given.

Held — that there had not been a valid *donatio mortis causâ*.

In re Dash; Solicitor to the Treasury *v.* [Lewis, [1900] 2 Ch. 812; 69 L. J. Ch. 833; 48 W. R. 694; 83 L. T. 139; 16 T. L. R. 559 —Stirling, J.

8. *Handing over Box containing Share Certificates and Personal Ornaments—Retention of Key.*]—A testatrix shortly before her death had intrusted a parcel containing a box to the care of a friend, and had requested this friend to carry out her instructions. At a subsequent interview the testatrix drew the friend's attention to a small key with a label attached thereto, saying, "If I die that will be sent to you." On the day of the testatrix's death the key with the label was received by the friend, and the box was found to contain share certificates and valuables, with a paper giving directions as to the persons to whom the testatrix desired the contents of the box to be given.

Held—that, inasmuch as the testatrix had retained the key, she had not parted with her dominion over the property contained in the box, and consequently that the handing over of the box did not constitute a valid *donatio mortis causâ* of its contents.

Johnson, In re; Sandy *v.* Reilly, (1905) 92 [L. T. 357—Farwell, J.

GOODWILL.

See Partnership; Sale of Goods.

GROUND GAME.

See Game.

GROUND RENTS.

See Landlord and Tenant; Real Property and Chattels Real; Sale of Land.

GROWING CROPS.

See Agriculture; Bills of Sale; Landlord and Tenant; Sale of Land.

GUARANTEE.

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II. Discharge of Surety 45

And see Bill of Exchange, 21, 25, 26, 28; Insurance, 18; Mortgages.

I. IN GENERAL.

1. *Condition—Breach of Condition—Effect of.*]—The London and Midland Bank sued the defenders for payment of a sum of £1,000 with interest. The action was brought on a guarantee by the defenders contained in a letter as follows:—"In satisfaction of a bill dated 28th September, 1897, for a sum of £1,000 now overdue, drawn by Acceles, Ld., and accepted by Glasgow Trust, Ld., any sum received on account of said bill being held to be in part satisfaction of this guarantee." The bill had been indorsed to the said bank for value. This guarantee was fenced by a condition that no payment of the said sum of principal and interest should be demanded by said bank before two calendar months from the date thereof.

Held—that the guarantee had not fallen in consequence of a demand for payment having been made by the bank before the expiration of the two months stipulated in the guarantee.

London and Midland Bank, Ld. *v.* Forrest, [(1900) 2 F. 179.

2. *Construction—Bond — Consistency between Condition and Recital.*]—The respondent and other persons signed a letter addressed to the appellants purporting to be a continuing guarantee to the appellants by an association, for overdrafts to the extent of £2,500. More than two years afterwards the respondent and the other persons gave to the appellants a joint and several bond in the penal sum of £4,000. The condition of the bond was prefaced by the following recital: "Whereas" the association, "in addition to the sum of £2,500 and interest and charges secured by the" guarantee, "are desirous of obtaining credit advances and accommodation from" the appellants.

The respondent was sued both on the guarantee and on the bond.

Held—that the bond was not a bond only for the excess of advances over £2,500, but it was to secure the repayment of all moneys according to an account current to be made up from the books of the bank, as there was no inconsistency whatever between the condition of the bond and the recital by which the condition was introduced.

Australian Joint-Stock Bank *v.* Bailey, [1899] [A. C. 396; 68 L. J. P. C. 95—P. C.

3. *Construction — Indemnity — Improvement of Street—Purchase of Property by Local Authority—Agreement to Repay to Vendor Compensation payable by him to Owner of Adjoining Property—Costs of Action brought against Vendor to Settle such Compensation.*]—The London County Council purchased part of the site of plaintiff's property under the London County Council (Improvements) Act, 1899, and agreed to repay to the plaintiff any damages he might have to pay to the owner of adjoining property for injury which might be done to certain ancient lights on such adjoining property by rebuilding plaintiff's premises on that part of the site which was not purchased.

At the date of the agreement an action was pending by the said owner of the adjoining property against the plaintiff in respect of the ancient lights and other matters.

Held—that the agreement to repay such damages was not an indemnity against the costs of such action, and that, in the absence of any encouragement to continue the defence of the action, the defendants were not liable to the plaintiff for such costs.

Potter *v.* London County Council, (1906) 70 [J. P. 35; 4 L. G. R. 346—Lord Alverstone, C. J.

4. *Construction — Mortgage — Covenant by Surety—Insurance of Security—Loss—Liability of Insurers and Surety—No Right to —Contribution.*]—By a mortgage deed a public-house was mortgaged to a bank to secure £4,000 and interest, and further moneys to become due under the covenants therein contained, and the mortgagor and D. covenanted to pay the £4,000 and interest and such further sums as should become due. There was a proviso that D., who was a surety, should not be liable for more than £1,000 and interest. The mortgagor also covenanted to insure the security in the name of the bank with the assurance company, and to do no act by which the assurance should become void or voidable. A policy was issued to secure the money due under the mortgage. The mortgagor having made default, the bank and the assurance society realised the security and there was a loss of less than £1,000. The assurance society contended that D. was liable for the whole of the loss.

Held—that upon the true construction of the documents the society was not a co-surety with D., but a surety for both D. and the mortgagor, and that therefore D. could not call on the society to contribute towards the loss, but must bear the whole of it.

Decision of Eady, J. ([1903] 2 Ch. 670; 72 L. J. K. B. 732; 52 W. R. 93; 89 L. T. 62), reversed.

Re Denton; Licences Insurance Corporation *v.* Denton, [1904] 2 Ch. 178; 73 L. J. Ch. 465; 52 W. R. 484; 90 L. T. 698—C. A.

5. *Continuing Guarantee—Statute of Limitations—Banking Account—Interest—Appropriation of Payments.*]—The defendant became guarantor to certain bankers of a customer's banking account, "with interest,

In General—*Continued.*

commission, and other banking charges," the guarantee to be a "continuing guarantee," not to be withdrawn except after a six months' notice in writing by the guarantor. No advances were made by the bankers to the customer after a date more than six years before they commenced an action on the guarantee; but after that date at various times the customer made the bankers payments on account. At the end of each half year, the bankers debited the customer's account with the amounts then owing to them as interest, commission, &c., and carried forward the total amount as principal due from him at the commencement of the next half year.

In an action against the guarantor,

Held—that as regards the advances made to the customer the claim of the bankers was barred by the Statute of Limitations.

But held also, that, as regards interest, commission, and bank charges becoming due within six years before the action brought, the statute afforded no defence. The rule as to the appropriation of payments to interest before principal is not applicable to money due on a banking account, where, according to the custom of bankers, the interest due and unpaid at the end of each half year has been converted into principal.

Parr's Banking Co., Ld. *v.* Yates, [1898] 2 [Q. B. 460; 67 L. J. Q. B. 851; 79 L. T. 821; 47 W. R. 42—C. A.

6. *Fidelity Bond—Breach of Duty—Action Against Sureties—Amount of Loss.*]—The defendants guaranteed to the extent of £300 that the clerk to the plaintiffs would duly and faithfully discharge all and every the duties of his office. The plaintiffs passed a resolution to increase the salary of the clerk, such increased amount to include remuneration for conducting all future guardians' elections and proceedings connected therewith. The clerk sent the resolution for the approval of the Local Government Board, but, intentionally, and without the knowledge of the guardians, omitted the last portion of it The increase was sanctioned, and the clerk received the larger salary and payments in respect of elections for some years before the omission was discovered.

Held—that the clerk had not duly and faithfully discharged the duties of his office. That, as the resolution passed by the guardians had never been approved by the Local Government Board, the payments in excess of the old salary were *ultra vires*, and that therefore the plaintiffs were entitled to recover under the policy of guarantee.

Bramley Union (Guardians) *v.* Guarantee [Society, (1900) 64 J. P. 308; 16 T. L. R. 263 C. A.

7. *Fidelity Bond — Determination of Liability by Notice or Death—Express Stipulation.*]—Where a bond is given by way of security for the due performance, by an agent and receiver, of his duties and obligations as part of the consideration for the appointment to the office or employment by another to whom the guarantee is given, the law requires the guarantor, in case he desires the guarantee to be determinable by notice or by his own death, to have it expressly so stipulated.

Gordon v. *Calvert* ((1828) 2 Sim. 253; 4 Russ. 581; 29 R. R. 94) followed

In re Crace; Balfour *v.* Crace, [1902] 1 Ch. [733; 71 L. J. Ch. 358; 86 L. T. 144; 18 T. L. R. 321—Joyce, J.

8. *Fidelity Bond—Guarantee for Servants' Honesty—Costs of Prosecuting Servant—Order for Restitution of Property—Deducting Costs of Prosecution from Value of Property Recovered.*]—The defendant guaranteed the honesty of a servant of the plaintiffs up to £250. The servant, while in the plaintiffs' employment, acting in concert with a confederate, from time to time stole a quantity of the plaintiffs' cigars of the value of £269. The servant and the confederate were prosecuted by the plaintiffs and convicted, and an order was made for the restitution of the stolen property. Under the order £114 worth of the cigars was recovered. The net costs incurred by the plaintiffs, after giving credit for the amount allowed by the county, in tracing the guilty parties and prosecuting them, amounted to £98.

Held—that, in the circumstances, it was a reasonable course to prosecute so as to recover the stolen cigars, and that, therefore, the costs incurred by the plaintiffs should be deducted from the value of the cigars recovered before giving the defendant credit for it under his guarantee.

Hatch, Mansfield & Co., Ld. *v.* Weingott, [(1906) 22 T. L. R. 366—Jelf, J.

9. *Guarantee—Letter constituting—Acceptance by Conduct.*]—The defendant wrote to Messrs. Jay, Limited, requesting them to send a competent person to her widowed sister to take her order for mourning, and in a second letter stated: "Kindly keep my enclosed card as a guarantee for Mrs. Sala's (her sister's) personal order, should you require it." The plaintiffs sent one of their assistants to Mrs. Sala and supplied her with goods to the amount of £121 16s. 9d., but for these she failed to pay, and the plaintiffs thereupon sued the defendant, relying on the above statement as constituting a sufficient guarantee.

Held—that the plaintiffs were entitled to recover; that there was abundant evidence to show that the letter was far more than a mere offer of a guarantee; that it was a contract of guarantee, and was so understood by the plaintiffs and the defendant, and that the plaintiffs had supplied the goods on the faith of it.

In General—*Continued.*

Jays, Ltd. *v.* Sala, (1898) 14 T. L. R. 461—[Mathew, J.

10. *Indemnifying Bail—Illegal—Contrary to Public Policy.*]—It is just as much contrary to public policy for a third party to indemnify a bail as it is for the prisoner himself to do so.

Consolidated Exploration and Finance Co. *v.* [Musgrave, [1900] 1 Ch 37; 69 L. J. Ch. 11; 48 W. R. 298; 81 L. T. 747; 16 T. L. R. 13—North, J.

11. *Indemnity—Extent of—Costs of an Appeal—Costs of Action—How to be Taxed.*]—A sub-contractor who had agreed to be answerable for all accidents, &c., and to indemnify and bear harmless the principal contractor, was brought in as a third party to, and defended an action against such contractor, arising out of an accident upon the work; the sub-contractor was ordered to pay the plaintiff's costs of the action.

Held—that in the absence of special circumstances he was only liable to pay party and party costs; and that he was not liable to indemnify the contractor against the costs of an appeal of which he had notice, but which he had not authorised or encouraged.

Maxwell *v.* British Thompson-Houston Co., [Ld., Blackwell & Co., 3rd parties, [1904] 2 K. B. 342; 73 L. J. K. B. 644—Kennedy, J.

12. *Indemnity—Extent of—Construction of Reservoir—Water Company and Contractor—"Damage to Property of any Description whatever. . . . Caused by . . . Execution of the Works"—Waterworks Co. held Liable for Extraordinary Traffic—Recovery from Contractor.*]—In a contract for the construction of a reservoir, which included the supply of all materials, labour and scaffolding, made between a water company and a contractor, there was an indemnity clause making the contractor responsible for "injury or damage to person and property of any description whatever which may be caused by or result from the execution of the works."

The company had to pay a sum of money to the rural district council in respect of the damage caused by extraordinary traffic, which the contractor had conducted on the highways in bringing materials to the site of the reservoir.

Held—that the company had a remedy under the contract against the contractor since this was damage to property, and also damage caused by or resulting from the execution of the works within the meaning of the indemnity clause.

Croydon Rural District Council *v.* Sutton [District Water Co., Ewart Third Party, (1907) 71 J. P. 513; 6 L. G. R. 35—Div. Ct.

13. *Indemnity—Loss of Deeds—Indemnity against Supposed Copy proving Defective—Extent of Indemnity—Natural and Proximate Result.*]—R. bought land subject to restrictive covenants under a building scheme; he resold to B., and, as the deeds were mislaid, he agreed to indemnify B. against all "costs, damages and expenses" which he might incur by reason of the copies produced proving to be erroneous.

The copies in fact omitted a covenant restricting the owner from building within four feet of the boundary; and another owner successfully claimed an injunction ordering B. to remove an infringing building erected by him, and restraining him from future infringements.

R. was brought in as a third party.

Held—that R. was liable to pay to B.:

(*a*) the diminution in value of the plot caused by the existence of the covenant;

(*b*) the costs of the plaintiff (paid by B.) and of B. so far as they related to reasonable defences; but not,

(*c*) costs of unreasonable or hopeless defences raised in the action by B., nor

(*d*) the wasted expense of building and removing the building, for (upon the facts) B. had actual notice of the real terms of the deed before he began to build.

Hooper *v.* Bromet, Raphael, 3rd party, (1904) [90 L. T. 234—C. A.

14. *Indemnity—Mortgage of Insurance Policy—Covenant by Principal and Surety to pay Interest and Premiums—Indemnity by Principal to Surety—Bankruptcy of Principal—Liability of Surety—Right to Prove.*]—A mortgagor mortgaged his life policy to secure repayment of a loan which he covenanted to repay on a certain day, and he and a surety covenanted jointly and severally to pay interest so long after the said day as any principal money remained due and to keep the policy on foot. The mortgagor agreed to indemnify the surety.

In the mortgagor's bankruptcy the mortgagee proved for the principal debt, less the amount at which he valued the policy.

The surety claimed, under his agreement for indemnity, to prove for the estimated amount of his future liability for interest and policy premiums.

Held—that the liability was gone, and that he could not prove under either head.

In re Moss, Ex parte Hallet, [1905] 2 K. B. [307; 74 L. J. K. B. 764; 53 W. R. 558; 92 L. T. 777; 12 Manson, 227—Div. Ct.

15. *Memorandum in writing—"Promise to Answer for the Debt of Another"—Statute of Frauds* (29 Chas. 2, *c.* 3), *s.* 4.]—If the Court can find that there is a main contract, the object of which is not to answer for the debt of another, that contract is not within sect. 4 of the Statute of Frauds, even though incidentally it may result in a liability to answer for the debt of another.

The plaintiff had supplied goods to a syndicate. The syndicate did not pay what was

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due to them for the goods, and the plaintiffs recovered judgment against them and placed a writ of *fi. fa.* in the hands of the sheriff to realise the amount of their judgment. The sheriff found that the works of the syndicate had been stopped and their place of business closed, and he did not take possession. The defendant, a director of the syndicate and large shareholder, verbally promised the plaintiff's agent that he would indorse some bills for the amount of the judgment debt.

Held—that the defendant's promise was "a promise to answer for the debt of another" within sect. 4 of the Statute of Frauds, and no action would lie.

Decision of Mathew, J., reversed.

Harburg India Rubber Comb Co. *v.* Martin, [1902] 1 K. B. 778; 71 L. J. K. B. 529; 50 W. R. 449; 86 L. T. 505; 18 T. L. R. 428—C. A.

II. DISCHARGE OF SURETY.

16. *Co-Sureties—Giving Time to Debtor by One Co-Surety—Payment by Co-Surety—Contribution.*]—The plaintiffs and the defendant, who were directors of a company, gave a joint and several bond to secure the repayment of an advance made to the company upon a second mortgage, and by the bond it was agreed that the plaintiffs and defendant, as between themselves and the mortgagees, should be taken to be principal debtors, and that they should not, nor should either of them, be released by reason of time being given to the company, or by any forbearance, act, or omission of the mortgagee or his assigns. The company was subsequently wound up and a new company formed to take over the business, subject to the mortgages; and the plaintiffs, without the assent of the defendant, paid off the mortgage debt due under the bond to the mortgagee, who was pressing for payment, obtained a transfer of the second mortgage to themselves, the new company covenanting to pay to them the principal sum thereby secured, and entered into an agreement with the new company that the mortgage should not be enforced or the mortgage money called in for six months. The course adopted by the plaintiffs in dealing with the mortgage security was in the best interests of all concerned. In an action by the plaintiffs to recover from the defendant his proportion of the amount so paid by them under the bond,

Held—that the plaintiffs were entitled to recover.

Greenwood *v.* Francis, [1899] 1 Q. B. 312; 68 [L. J. Q. B. 228; 47 W. R. 230; 79 L. T. 624; 15 T. L. R. 125—C. A.

17. *Co-Sureties—Signature of Three out of Four Sureties—Liability of the Three Signing.*]—A guarantee to a bank for an overdraft was, on its face, intended to be a joint and several guarantee by four guarantors. Three out of the four signed the guarantee, but the fourth did not sign, though willing to do so, and then died.

Held—that the three who signed were not liable to the bank on the guarantee.

National Provincial Bank of England *v.* [Brackenbury, (1906) 22 T. L. R. 797—Walton, J.

18. *Debenture—Guarantee of Interest—Dissolution of Company—Bankruptcy of Guarantor — Debenture-holder's Right to Prove in Bankruptcy for Future Interest.*]—R. was the holder of a debenture for £3,000 in a limited company. The debtor for good consideration guaranteed to R. the regular payment of interest upon this debenture until repayment of the principal sum.

The company went into liquidation and was dissolved, R. having only received about £1,000 of the £3,000.

The debtor paid interest on the debenture until he became bankrupt.

Held—that R. might prove in his bankruptcy for the estimated value of the future interest, the bankrupt's liability not being released by the company's dissolution, which was due to the act of the law and not of the creditor.

In re Fitz George, Ex parte Robson, [1905] [1 K. B. 462; 74 L. J. K. B. 322; 53 W. R. 384; 92 L. T. 206; 12 Manson, 14—Bigham, J.

19. *Fidelity Bond—Change of Duties and Office—Alterations not Notified to Surety—Release of Surety.*]—The defendants in 1897 became sureties for B. upon his appointment as "clerk and storekeeper" to an asylum. Subsequently the offices were separated, and B. was continued at a less salary as clerk, receiving compensation for the loss of his emoluments as storekeeper. No notice of these changes was given to the sureties.

Held—that the defendants were relieved from liability under their bond.

Holme v. *Brunskill* ((1878) 3 Q. B. D.; 47 L. J. Q. B. 610; 38 L. T. 838—C. A.) applied.

R. *v.* Herron and Another, [1903] 2 I. R. 474—[K. B. Div.

20. *Fidelity Bond—Default of Employé—Necessity for Giving Notice of Default to Guarantor.*]—S. became surety to an insurance company for J., one of the company's agents. On September 25th J. confessed to the company's manager that he had embezzled £25, and he was thereupon suspended. On October 8th he absconded. On October 11th the company gave information to the police and also to S.

Held—that the company had failed to give notice to S. of J.'s default within proper time, and were barred from claiming against S. under the bond of guaranty.

Discharge of Surety—*Continued.*

Snaddon *v.* London, Edinburgh, and Glasgow [Assurance Co., (1903) 5 F. 182—Ct. of Sess.

21. *Fidelity Bond—Rate Collector—Notice of Act of Dishonesty—Irregularity—Bankruptcy—Dismissal — Sureties — Relations of Collector—Sureties' Ignorance of Facts.*]—Action on a joint and several bond against sureties for the faithful and honest performance of the duties of a collector of poor rates and the due, punctual and correct accounting of all moneys from time to time collected or received by him in virtue of his said office. There was no evidence that the plaintiffs—guardians of the poor—had notice of any act of dishonesty on the part of the collector, who may prior to his dismissal have been guilty of acts of irregularity in delaying to pay over moneys. It was only after his dismissal that it was found that he was behind in his accounts. The collector was appointed in 1861, so that he was not liable to be dismissed save by the order of the Local Government Board. The guardians, as soon as they were informed of the state of things disclosed in the collector's public examination held before a bankruptcy registrar, called the attention of the Local Government Board to the matter, and did all in their power to prevail upon the Board to dismiss him. The collector's sureties, his father and father-in-law, did not, as they should have done, allege and prove that they were ignorant of the facts which appeared on the public examination.

Held—that the defendants had failed in their defence that they were released from their bond by reason of the plaintiffs' neglect to discharge the collector and to inform the defendants of his failure to account.

Phillips v. *Foxall* ((1872), L. R. 7 Q. B. 666; 41 L. J. Q. B. 293; 20 W. R. 900; 27 L. T. (N.S.) 231) distinguished.

Durham Corporation v. *Fowler* ((1889), 22 Q. B. D. 394; 58 L. J. Q. B. 246; 53 J. P. 374; 60 L. T. 456—Div. Ct.) and *Byrne* v. *Muzio* ((1881), 8 L. R. Ir. 396) followed.

Caxton and Arrington Union *v.* Dew, (1899) [68 L. J. Q. B. 381; 80 L. T. 325—Bruce, J.

22. *Joint and Several Guarantee—Joint and Several Judgment—Release of one of two Joint Debtors from all Claims—Accord and Satisfaction—Extinguishment of Debt.*]—The doctrine that the release of one of two joint debtors operates as a release of the other applies to a case where there has been a judgment against both.

A. and B. were liable "jointly and severally" for £6,000 owing to a bank from a company. The bank obtained judgment against A. and B. "jointly and severally" for the sum of £6,000. The judgment being unsatisfied, the bank presented a bankruptcy petition against B. alone for the judgment of £6,000. Terms were arranged upon which this petition was withdrawn embodied in a document in the form of a receipt, acknowledging the receipt of certain cash and bills "in full discharge of all claims" by the bank against B. in connection with the company, and all guarantees given by him to the bank in connection with the company. The bank then presented a bankruptcy petition against A. alone for the balance of the judgment debt for £6,000.

Held—(by Rigby and Collins, L.JJ., Romer, L.J., doubting) that the liability of A. under the judgment had been discharged by the document by which B. was relieved, by way of accord and satisfaction, from his liability.

Ex parte Good, In re Armitage ((1877) 5 Ch. D. 46; 46 L. J. Bank. 65; 25 W. R. 422; 36 L. T. 338—C. A.) distinguished.

In re E. W. A., [1901] 2 K. B. 642; 70 [L. J. K. B. 810; 49 W. R. 642; 85 L. T. 31; 8 Manson, 250—C. A.

23. *Principal Sum due on Three Months' Notice—Death of Principal Debtor before Notice given—No Personal Representative—Liability of Surety.*]—A debtor promised to repay to the plaintiff an advance within three months of the receipt by him of a written notice requiring payment, and the defendant agreed to guarantee the repayment of the advance as per the above agreement. The principal debtor died leaving no estate, and neither probate nor letters of administration were taken out. No written notice requiring payment was ever given. In an action against the defendant to recover the amount of the advance,

Held—that as no notice had been given requiring payment, the condition upon which the money became payable was not fulfilled, and the defendant as surety was not liable.

Rickaby *v.* Lewis, (1905) 22 T. L. R. 130— [Walton, J.

24. *Surety for Payment of Rent—Tenant a Limited Company—Dissolution of Company—Liability of Surety—Companies Act,* 1862 (25 & 26 Vict. *c.* 89), *s.* 143.]—The plaintiffs granted a lease of land for a certain term to a company incorporated under the Companies Acts, the defendants being sureties for the payment of the rent, which was payable monthly. The lease provided that "the lessees do and each of the sureties doth for himself covenant that the lessees and sureties, or some or one of them, will during the said term pay the said rent on the dates and in the manner hereinbefore mentioned." During the term the company was wound up and finally dissolved under sect. 143 of the Companies Act, 1862, and the rent was paid down to the date of the dissolution. The plaintiffs thereupon sued the defendants as sureties for the rent due for the following month.

Held—that the term came to an end when the company was dissolved, and that the sureties were no longer liable.

Hastings Corporation *v.* Letton & Sons, (1907) [97 L. T. 582; 20 T. L. R. 456—Div. Ct.

Discharge of Surety—*Continued.*

25. *Time Given to Principal Debtor—Liability of Surety—Promissory Note.*]—The ordinary doctrine that where time is given to the principal debtor the surety is thereby discharged, does not apply where the security given is a promissory note, because a promissory note is a "promise to pay on demand," and therefore, unlike a bill of exchange, is a continuing security until payment has been made and the surety released.

Bellingham & Co., Ld. *v.* Hurley, (1907) 52 [Sol. Jour. 131—Lawrance, J.

GUARDIAN AND WARD.

See Infants.

GUARDIANS OF POOR.

See Poor Law.

GUN LICENCES.

See Game; Revenue.

HABEAS CORPUS.

See Constitutional Law; Crown Practice.

HACKNEY CARRIAGES.

See Metropolis; Street Traffic; Tramways, 31, 35.

HARBOURS.

See Shipping and Navigation; Waters and Watercourses.

HAWKERS AND PEDLARS.

See Markets and Fairs.

HEALTH.

See Public Health.

HEARSAY EVIDENCE.

See Evidence.

HEIRLOOM.

See Real Property and Chattels Real; Settlements; Trusts.

HERIOT.

See Copyholds and Manors.

HIGH TREASON.

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HIGHWAYS, STREETS, AND BRIDGES.

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And see Ferries; Local Government; Metropolis; Practice and Procedure, 109.

I. ORIGIN OF HIGHWAYS.

(a) Adoption.

1. *Converting Private Road into Public Highway—Consent of Occupiers of Road—Person having the Right of Way—Highway Act*, 1862 (25 & 26 Vict. *c.* 61), *s.* 36.]—By sect. 36 of the Highway Act, 1862, the district surveyor may, at the request of the inhabitants of a parish and with the consent in writing of the owner and occupier of any driftway or any private carriage or occupation road within their parish, apply to justices to declare such driftway or road to be a public highway to be repaired at the expense of the parish, and the justices may make an order accordingly.

Held—that a person who had a mere right of way over the road was not an "occupier" thereof whose consent was necessary under sect. 36.

R. *v.* Somers and Others, [1906] 1 K. B. 326; [75 L. J. K. B. 144; 70 J. P. 37; 54 W. R. 402; 94 L. T. 194; 22 T. L. R. 137; 4 L. G. R. 161—Div. Ct.

(b) Dedication.

2. *Artificial Structure made under Statutory Powers—Claim for other Purposes than that of Highway—Bathing, Fishing and Recreation—Evidence.*]—There may be a dedication to the public of a right of way over an artificial structure, even though that artificial structure is made under statutory powers and by a public body. If such a dedication is claimed for other purposes than that of a highway, it is a claim difficult to prove, and would require very conclusive evidence. If the highway claimed is over something built out of public funds, it requires considerable evidence to prove that there has been dedication and still more evidence to prove that there has been a dedication if there is the remotest chance of the highway interfering at all with the primary use of the structure.

As between two possible views, the one of the structure and land dedicated for such purposes as bathing, fishing and recreation, and the other that the whole thing has been permissive, there is strong probability that the use is permissive rather than of right.

Tyne Improvement Commissioners *v.* Imrie [and Others, Attorney-General *v.* Tyne Improvement Commissioners, (1899) 81 L. T. 174—Phillimore, J.

3. *Access to Seashore—Absence of Injury—Discretion of Court—Injunction.*]—The Court will be slow to infer dedication of rough paths or tracks leading to the seashore merely because an owner has allowed the public to use them, such user doing him no injury.

Tracks which had been used by fishermen and others for many years for the purpose of reaching the foreshore passed through the property of a landowner. The latter having erected a wall and a wood fence, dug a trench, and filled up a gap across these tracks. Certain of the local inhabitants, claiming the tracks to be common and public highways, took steps to assert the rights which they claimed, broke down the wall and fence, filled up the trench, and opened the gap.

The plaintiff asked for an injunction to restrain the defendants from trespassing on his land and demolishing his obstructions, and damages.

Held—that although upon the foreshore of this country, and the rough cliff paths which exist in many places, the public have not a right of way recognised by law, and although rights of property are, as a general proposition, entitled to prohibition by, if necessary, an injunction, yet it does not follow, if an owner comes to the Court for an injunction against trespassers, that the Court is bound to make, or in the absence of good reason will make, such an order.

Declaration of plaintiff's rights made and nominal damages given, but injunction refused.

Llandudno Urban District Council v. *Woods* ([1899] 2 Ch. 705; 68 L. J. Ch. 623; 63 J. P. 775; 48 W. R. 43; 81 L. T. 170—Cozens-Hardy, J.) followed.

See Waters, No. 61.

Behrens *v.* Richards, [1905] 2 Ch. 614; 74 [L. J. Ch. 615; 69 J. P. 381; 21 T. L. R. 705; 54 W. R. 141; 3 L. G. R. 1228; 93 L. T. 623 —Buckley, J.

4. *Canal and Reservoirs Company—Statutory Body—Public Right of Way over Banks of Reservoirs—Destruction of Banks by public User—Maintenance of Banks*—Ultra Vires.]—The plaintiffs' predecessors in title—a statutory company—constructed a canal and certain reservoirs about 1820 for the purposes of the canal, and in order to carry out its object the reservoirs had to be placed on ground at a higher level than the canal to admit of the water finding its way to the canal. The defendants alleged that a public right of way had been established over the banks of the reservoirs. The plaintiffs sued the defendants for trespass to the banks, and the defence set up was a public right of way, not a mere stray.

Held—that the only rights the statutory company had were to carry out the purposes

Origin of Highways—*Continued.*

committed to them by Parliament; that they had no power to fetter themselves in any way in carrying out those purposes by dedicating rights of way to the public over the banks of the reservoirs, which would be destroyed by the public user, as the company had no funds applicable to the increased cost of maintenance which would thereby be thrown upon them: and judgment must be entered for the plaintiffs.

Mulliner v. *Midland Ry. Co.* ((1879) 11 Ch. D. 611; 48 L. J. Ch. 258; 27 W. R. 330; 40 L. T. 121—M. R.) followed.

GREAT WESTERN RY. CO. *v.* SOLIHULL RURAL [DISTRICT COUNCIL, (1902) 66 J. P. 772; 86 L. T. 852; 18 T. L. R. 707—C. A.

5. Cul de sac—*Evidence—No Bar or Posts.*]—A *cul de sac* may be a highway, at any rate in a town.

A square (a *cul de sac*) had never been cleaned, paved, or lighted by the local authority, and had not been used except by persons going on business to the back entrances of houses backing on to it.

HELD—that, on the facts, it had not been proved to have been dedicated as a highway, although there was no bar or post at the entrance to it.

Bourke v. *Davis* ([1890] 44 Ch. D. 111; 38 W. R. 167; 62 L. T. 34 (Kay, J.) and *Woodyer* v. *Hadden*, [1816] 5 Taunt. 125) discussed.

ATTORNEY-GENERAL AND LONDON PROPERTY [INVESTMENT TRUST, LD. *v.* RICHMOND CORPORATION AND GOSLINGS, (1904) 68 J. P. 73; 89 L. T. 700; 20 T. L. R. 131; 2 L. G. R. 628—Eady, J.

6. Cul de sac—*Acts of User—Parties—Attorney-General.*]—In the case of a *cul de sac* mere acts of user alone are not sufficient evidence of dedication.

Quære, whether a private individual suing without the Attorney-General can maintain a claim for a declaration that a road has been dedicated to the public as a highway.

Decision of Kekewich, J. ([1906] 1 Ch. 253; 75 L. J. Ch. 154; 54 W. R. 294; 22 T. L. R. 89) affirmed.

WHITEHOUSE *v.* HUGH, [1906] 2 Ch. 283; [75 L. J. Ch. 677; 95 L. T. 175; 22 T. L. R 679—C. A.

7. *Forecourts — Consent of Freeholder — Whether Termor can dedicate.*]—A leaseholder cannot dedicate land to the use of the public without the consent of the owner of the fee.

Semble—land cannot be dedicated to the use of the public for a term, *e.g.*, by a leaseholder, for the period of his lease; dedication must be in perpetuity.

HELD—that certain forecourts, used by shopkeepers for depositing goods, had not been dedicated, for there was no evidence from which the freeholder's consent could be inferred; and moreover the user for deposit of goods negatived dedication.

Attorney-General v. *Biphosphated Guano Co.* ([1879] 11 Ch. D. 327; 49 L. J. Ch. 68; 40 L. T. 201; 27 W. R. 621—C. A.) discussed.

Dawes v. *Hawkins* ([1860] 8 C. B. (N.S.) 848—dictum of Byles, J.) approved.

Decision of Neville, J. ([1907] 1 Ch. 704; 76 L. J. Ch. 313; 71 J. P. 219; 96 L. T. 614; 23 T. L. R. 366; 5 L. G. R. 577) affirmed.

CORSELLIS AND OTHERS *v.* LONDON COUNTY [COUNCIL, [1908] 1 Ch. 13; 6 L. G. R. 78; 77 L. J. Ch. 120; 71 J. P. 561; 24 T. L. R. 80—C. A.

8. *Public Footway—Award under an Inclosure Act—Right of User for Barrows and Carts—Post — Obstruction—Removal — Injunction.*]—By an award made under an Inclosure Act a strip of land, about six feet wide, was awarded as a footway. Some years after this award had been made certain persons used this lane for the passage of barrows and handcarts, some few of which were pulled by donkeys or ponies. This user continued for forty or fifty years, when the plaintiffs placed a post at the entrance to this lane to prevent its further user by barrows and carts. The defendant removed this post, claiming a right to use the lane for carts and barrows. The plaintiffs thereupon claimed an injunction to restrain him from interfering with the post.

HELD—that the user by wheeled traffic was in its inception, and had been all along, a public nuisance; that it was illegal, and that no length of time could legalise it; and that after the award no one could have had the power to dedicate the lane as a public highway for all purposes.

SHERRINGHAM URBAN DISTRICT COUNCIL *v.* [HOLSEY, (1904) 68 J. P. 394; 91 L. T. 225; 20 T. L. R. 402; 2 L. G. R. 744—Joyce, J.

9. *Railway Company—Land held by Railway Company for Purposes of its Undertaking.*]—A public right of way cannot be acquired by user over lands acquired by a railway company for the purposes of its undertaking, even when such lands have been acquired by agreement and not by compulsory powers.

EDINBURGH MAGISTRATES *v.* NORTH BRITISH [RY. CO., (1904) 5 F. 620—Ct. of Sess.

And see No. 21, *infra*.

10. *Railway Company—Dedication of Level Crossing as a Footway—How far Valid and Irrevocable.*]—A dedication by a railway company of a level crossing as a public footway is not necessarily *ultra vires* and invalid. It is valid so long as it is compatible with the statutory objects of the company.

If there has been such a dedication the company cannot obstruct the footway so dedicated so long as the user by the public does not interfere with or endanger the train service.

ATTORNEY-GENERAL AND BARNES URBAN [DISTRICT COUNCIL *v.* L. & S. W. RY., (1905) 69 J. P. 110; 21 T. L. R. 220; 3 L. G. R. 1327—Farwell, J.

Origin of Highways—*Continued.*

11. *Railway Company—Land acquired for Purposes of Undertaking—Bridge constructed for Convenience of Estate severed by Railway—Power to dedicate to the Public.*]—A railway company which has statutory powers to take land cannot alienate its rights in land thus acquired (other than superfluous land) if such alienation is inconsistent with the purposes for which the land is vested in them.

The plaintiff company having acquired land for the purposes of its undertaking, built and maintained a private accommodation bridge over its lines for the convenience of a landowner whose property had been severed by the railway.

In course of time the bridge came to be much used by the public, and the acts done by the company in connection with the roadway over the bridge were such that if they had been done by a private owner would have constituted a dedication of the roadway to the public.

Gas pipes were laid by the predecessors in title of the defendants in the roadway over the bridge, in purported exercise of the powers conferred by sect. 6 of the Gasworks Clauses Act, 1847, *i.e.*, on the assumption that the road over the bridge was a public road.

The plaintiff company having acquired additional land for the purpose of widening their track, wished to alter the bridge, and requested the defendants to remove the gas pipes, which they declined to do, claiming that the roadway was vested in them subject to an obligation on the part of the plaintiffs to repair and support it.

HELD—that the road over the bridge in question was not a public road so as to enable the defendants to exercise therein the powers conferred by sect. 6 of the Gasworks Clauses Act, 1847, as the plaintiff company had, under the circumstances of the case, no power to dedicate the roadway to the public.

HELD, also, that this decision, in the absence of the Attorney-General, did not bind him or the public.

A mandatory injunction compelling the defendants to remove the gas pipes was refused.

Grand Junction Ry. v. *Petty* ((1888) 21 Q. B. D. 273; 57 L. J. Q. B. 572; 52 J. P. 692; 36 W. R. 795; 59 L. T. 767—C. A.) and *G. W. Ry.* v. *Solihull Rural District Council* ((1902) 66 J. P. 772; 86 L. T. 852; 18 T. L. R. 707—C. A., No. 4, *supra*) followed.

TAFF VALE RY. CO. *v.* PONTYPRIDD URBAN [DISTRICT COUNCIL, (1905) 69 J. P. 351; 93 L. T. 126; 3 L. G. R. 1339—Buckley, J.

12. *Railway Company — Statutory undertaking—Railway Company owning Canal—Right of Way over Embankment of Reservoir—Power to dedicate.*]—The power of a statutory body to dedicate to the public a right of way over its property depends upon the question whether such dedication would be incompatible with the special purposes for which the statutory powers were conferred.

HELD—upon the facts, that a railway company, owners of a canal, had power to dedicate a right of way along the embankment of a reservoir, as such dedication would not result in the cost of the upkeep and maintenance of the undertaking being materially increased.

LANCASHIRE AND YORKSHIRE RY. CO. *v.* DAVEN- [PORT AND OTHERS, (1906) 70 J. P. 129; 4 L. G. R. 425—C. A.

13. *Substituted Way—Dedication by Limited Owner.*]—Between 1844 and 1850 the sub-lessee for a term of years of certain lands, over which there had been in existence prior to 1805 a public right of way, substituted therefor another way, with a bridge and path. In 1874 the sub-lessee surrendered his interest to his immediate landlord, who held under a fee-farm grant dating from 1857. The fee-farm grantee continued in occupation of the land for two years, when he re-let it to the defendant. During the two years of his own occupation the fee-farm grantee acquiesced in the public user of the substituted way, and at the trial the jury found that he had acquiesced in and adopted the dedication to the public of the right of way as so altered. There was no evidence of dedication of or acquiescence in the substituted way by the owner in fee. The plaintiff, a small farmer, had been using the way as a means of access from his farm to the public road leading to the market town, about four miles distant. The defendant obstructed the way by removing the bridge and erecting a fence. The plaintiff was thereby forced to take a longer and more circuitous route when going to the market town, which he required to do about once a week, and was obliged on some occasions to pay for a car.

HELD—that it was competent to the grantee in a fee-farm grant to dedicate a public right of way, and that, under the circumstances of the case, the acquiescence of the fee-farm grantee in the act of his former tenant amounted to a dedication to the public of the substituted way, binding upon his interest, and all claiming under him, including the defendant.

HELD, further (Kenny, J. dissenting)—that the evidence was sufficient to sustain the finding of the jury that the plaintiff had suffered particular damage beyond that which was common to the public at large, and that the verdict for damages found for the plaintiff by the jury at the trial could not be disturbed.

SMITH *v.* WILSON, [1903] 2 Ir. R. 45—K. B. D.

14. *User by Public—Intention—Interruption by Owner—Non-resident Owner—Nature of Land.*]—To constitute a valid dedication to the public of a highway by the owner of the soil there must be an intention to dedicate of which the user by the public is evidence and no more, and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment.

Semble, user by the public over land belonging to a non-resident owner is less cogent evidence of dedication than where the user is necessarily brought to his personal notice; and, further,

Origin of Highways—*Continued.*

that the weight to be attached to user must depend somewhat upon the nature of the land itself, whether it is cultivated land or rough and unproductive land.

CHINNOCK *v.* HARTLEY WINTNEY RURAL [DISTRICT COUNCIL, (1899) 63 J. P. 327—Cozens-Hardy, J.

15. *User by Public—Evidence.*]—Held upon the facts of the particular case that certain paths in the neighbourhood of Cheltenham had been dedicated to the public as highways.

Poole v. *Huskinson* ((1843) 11 M. & W. 830) and *Chinnock* v. *Hartley Wintney Rural District Council*, ([1899] 63 J. P. 328—Cozens-Hardy, J., *supra*) applied.

Decision of Eady, J. (68 J. P. 464; 20 T. L. R. 559) affirmed.

LECKHAMPTON QUARRIES CO., LD. *v.* BAL-[LINGER AND CHELTENHAM RURAL DISTRICT COUNCIL, (1904) 93 L. T. 93; 21 T. L. R. 362; 3 L. G. R. 940; 69 J. P. 377—C. A.

16. *User by Public—Embayments—Cleansing and Repairing by Highway Authority—Evidence of Intention to dedicate—Towns Improvement Clauses Act*, 1847 (10 & 11 Vict. *c.* 34), *s.* 69.]—The corporation of Liverpool were the owners of the freehold land upon which a building was in the year 1869 built by their lessee with recessed windows or embayments on the ground floor. The upper part of the building overhung the embayments, and the main wall of the building on either side of the embayments projected beyond the embayments to the building line. Within two embayments were windows which were used for the exhibition of shop goods. There was a third embayment in which was the doorway to the premises. These embayments were 10 inches or 11 inches deep. The public passing along the street were allowed to pass in and out of these embayments. The object of the embayments occupied by the windows was to invite passers-by to look at the goods exhibited in the windows, and the object of the embayment occupied by the door was to make a convenient entrance into the shop. Upon an information against the tenant for causing an obstruction to the safe and convenient passage along the street,

HELD—that the passing of the public over the embayments could not be regarded as forming evidence of dedication to the public; that the cleansing and repairing of the embayments by the corporation in its capacity of highway authority showed no intention on the part of the corporation to declare a right of passing over the embayments; that the paving of such an inappreciable breadth of 11 inches afforded no presumption of dedication by the owner; and that if the corporation had intended to dedicate a right of passage over the embayments to the public they would not have granted a lease of new premises erected in 1899 which were so built as to obstruct the passage of the public over the embayments.

PIGGOTT *v.* GOLDSTRAW, (1901) 65 J. P. 259; [84 L. T. 94; 19 Cox, C. C. 621—Div. Ct.

(c) Prescription.

17. "*Church Way or Path*"—*Inhabitants of a Parish—Immemorial Custom.*]—A local public, or class of persons, as the inhabitants of a parish, may by custom be entitled to have a way over certain land to a church (or market).

Such a way is not a highway; it is a private right of way limited to a particular class of persons, and only to be used even by them for its special purpose.

A regular usage for twenty years unexplained and uncontradicted is sufficient to warrant a jury in finding the existence of an immemorial custom; and, *semble*, in most cases they ought to find it from such evidence.

Primâ facie, the custom is a parochial one; *quære*, whether a manorial custom, even if proved, would be good.

BROCKLEBANK *v.* THOMPSON, [1903] 2 Ch. 344; [72 L. J. Ch. 626; 89 L. T. 209; 19 T. L. R. 285—Joyce, J.

18. *Forty Years' Enjoyment—Land in Strict Settlement for Lives—Reversion—Substituted Path—Dedication—Lost Grant—Prescription Act*, 1832 (2 & 3 Will. 4, c. 71), *ss.* 2, 7, 8.]—A lost grant cannot be presumed against a reversioner merely by user during life tenancies.

The plaintiffs sued the defendants in trespass for breaking and entering the lands of the plaintiffs known as Tyn-y-green Farm. The defendants were the owners and occupiers of the adjoining farm, Pen-y-gelli Farm, and claimed to be entitled to use a roadway across Tyn-y-green Farm. The latter had been held in strict settlement since 1810, and had been held from 1810 by successive tenants for life. The way in dispute ran from a highway called the Werndhu to another highway called the Kerry Road, and it seemed clear that there was a roadway between these public roads before 1840, and that about 1868 the way was diverted at a certain spot and a new roadway made from that spot to join the Kerry Road at a new point, the old portion between the point of diversion and the Kerry Road being no longer used. The owner and occupiers of Pen-y-gelli were not in any way consulted as to this alteration.

HELD—that the defendants had established no right of way. For the reason given above, no lost grant could be presumed; there was no evidence of a dedication as a highway; and no right had been acquired by prescription, for forty years had not elapsed since the diversion, and there had been no one in a position to acquiesce in a user so as to make it lawful.

Decision of Walton, J. (18 T. L. R. 777) affirmed.

ROBERTS AND LOVELL *v.* JAMES AND ANOTHER, [(1903) 89 L. T. 282; 19 T. L. R. 573—C. A.

19. *Maps and Plans—Evidence of Reputation.*]—On a question of highway or no highway ordnance plans and deposited plans of a pro-

Origin of Highways—*Continued.*

posed light railway are admissible as evidence of reputation.

ATTORNEY-GENERAL *v.* ANTROBUS, [1905] 2 [Ch. 188 ; 69 J. P. 141 ; 92 L. T. 790 ; 21 T. L. R. 471 ; 3 L. G. R. 1071—Farwell, J.

And see No. 21, *infra.*

20. *Scottish Law—User — Road originally Private.*]—By the law of Scotland (where the English Prescription Act of 1832 is not in force) forty years' user of a road by the public is sufficient to establish the right of user ; but evidence of user as of right for a period short of forty years is not sufficient, unless the circumstances are such that the user raises a presumption of prior user of the same character extending over the required period.

EDINBURGH MAGISTRATES *v.* NORTH BRITISH [RY. CO., (1904) 6 F. 620—Ct. of Sess.

And see No. 9, *supra.*

II. RIGHT OF PASSAGE.

21. Cul-de-sac—*Access to Ancient Monument*—Jus spatiendi et manendi—*Prescription.*]—The fact that a landowner who holds an estate by a clear fee simple title has for many years permitted the public to have access to an ancient monument of great interest on such estate does not authorise the presumption that the monument is subject to a trust for a free user by the public of a way thereto.

A *cul-de-sac* may be a public highway where there has been an express dedication or one that is implied from the expenditure of public money thereon with the consent of the landowner, but in unenclosed country there must be a public place forming a *terminus ad quem.* In such a locality a right of way cannot be acquired by user of a road for the purpose of visiting an ancient monument, not public property, such user being attributable to permission to go to and return from such monument, and being objectless except for that purpose.

So HELD in regard to Stonehenge.

Attorney-General v. *Simpson* ([1904] A. C. 476), *see* WATERS, No. 31 ; *dictum* of Lord Macnaghten followed : *Wimbledon and Putney Common Conservators* v. *Dixon* ((1875) 1 Ch. D. 362 ; 45 L. J. Ch. 353 ; 24 W. R. 466 ; 35 L. T. 679—C. A.).

Campbell v. *Lang* ((1853) 1 Macq. 451) and *Eyre* v. *New Forest Highway Board* ((1892) 56 J. P. 517—Wills, J.) followed and applied.

ATTORNEY-GENERAL *v.* ANTROBUS. [1905] 2 [Ch. 188 ; 74 L. J. Ch. 599 ; 69 J. P. 141 ; 92 L. T. 790 ; 21 T. L. R. 471 ; 3 L. G. R. 1071 —Farwell, J.

And see No. 19, *supra.*

22. *Improper User—Highway running through Game Preserves—Catching Moths at Night.*]—The owner of the soil of a highway running through woods claimed an injunction to restrain trespasses by some undergraduates, who had used lamps for catching moths at night on the highway and on adjoining land.

HELD—that an injunction should be refused, the trespasses being merely technical and the defendants never threatening or intending to infringe any rights of property, and abandoning their pursuit when asked to do so.

FIELDEN *v.* COX, (1906) 22 T. L. R. 411—[Buckley, J.

23. *Land crossed by Highway—Passing and repassing—User of Highway for Business Purposes.*]—The plaintiff was the owner and occupier of land crossed by a public highway, the soil of which was vested in him. The plaintiff had granted to a trainer of racehorses a licence for valuable consideration to exercise and train his horses upon the plaintiff's land. The defendant, who was the owner of a sporting newspaper, went upon the highway each morning for a considerable time and walked up and down it, between two points, about fifteen yards apart, not for the purposes of using it as a highway, but for the purpose of watching the performances and trial gallops of the racehorses on the adjoining land, and taking notes thereof. The information thus obtained he published in his newspaper. The plaintiff brought an action of trespass, alleging that the acts of the defendant caused annoyance and detriment to himself and to his licensee.

HELD—that, as the defendant was not using the highway for the purposes for which it was dedicated as a highway, but for the purpose of carrying on his business there, he was a trespasser.

Harrison v. *Duke of Rutland* ([1893] 1 Q. B. 142 ; 62 L. J. Q. B. 117 ; 57 J. P. 278 ; 41 W. R. 322 ; 68 L. T. 35—C. A.) followed.

HICKMAN *v.* MAISEY, [1900] 1 Q. B. 752 ; 69 [L. J. Q. B. 511 ; 48 W. R. 385 ; 82 L. T. 321 ; 16 T. L. R. 274—C. A.

III. ROADSIDE STRIPS AND DITCHES.

And see BOUNDARIES AND FENCES.

(a) Adjoining Owners.

24. *Ditch—Hedge—Presumption of Ownership.*]—Where a highway of a specified width has been laid out within living memory under an enclosure award there is no presumption that an adjoining ditch and hedge form part of the highway if the highway is of the specified width without the ditch or hedge.

SIMCOX *v.* YARDLEY RURAL DISTRICT COUNCIL, [(1905) 69 J. P. 66 ; 3 L. G. R. 1350—Eady, J.

25. *Ditch by side of Highway—Ownership—How far adjoining Owner may enclose.*]—A ditch by the side of a highway or roadside waste is not necessarily part of the highway or waste It may belong to and be the private property of the adjoining owner and he may lawfully enclose it.

CHIPPENDALE *v.* PONTEFRACT RURAL DISTRICT [COUNCIL, (1907) 71 J. P. 231 — County Court.

Roadside Strips and Ditches—*Continued.*

26. *Roadside Strip—Presumption of Ownership of Soil by adjoining Owners—Rebuttal of Presumption*—Bonâ fide *Claim—Highway Act*, 1864 (27 & 28 Vict. *c.* 101), *s.* 25.]—Justices had convicted the appellant of allowing a cow to stray on a road "not passing over any common, or waste or unenclosed land." The appellant was a commoner of the New Forest, and the *locus in quo* was within the forest, and was a road (without gates at the ends) connecting two of the forest wastes; and the appellant, as a commoner, claimed the right to graze cattle there.

HELD—that the conviction must be quashed, because the justices had evidently misdirected themselves as to the weight of evidence necessary to rebut the presumption that the adjoining owners owned the soil of the wayside strip, on which the cow was grazing; also they had apparently not considered the claim of right; and thirdly (per Channell, J.), the strip might nevertheless be waste, though the soil was vested in adjoining owners.

PLUMBLEY *v.* LOCK, (1903) 67 J. P. 237; 19 [T. L. R. 14; 1 L. G. R. 54—Div. Ct.

27. *Roadside Strip—Strip between Metalled Road or Quay and Cliff — Presumption of Ownership.*]—The defendant admittedly owned the land to the top of a cliff; between the cliff foot and the sea ran a quay or metalled road which was bounded on the sea side by a "sea wall"; on each side of the road was a watertable, and between the cliff foot and watertable on that side was an irregular strip of waste now in dispute. The strip was included in the conveyance to the defendant, "subject to all rights existing over it." The evidence as to user was conflicting.

HELD—that, although where a highway has been set out or fenced at each side, but in course of time part only of the space so defined has been metalled and used as a road, the public right of passage *primâ facie* extends to the whole space set out, yet where there is a defined and metalled road edged by an appropriate watertable, the mere fact that adjoining land, more or less waste and useless, is open and accessible from the highway will not, in the absence of other evidence, establish dedication of any land except that which has been actually used for the highway purposes, and even slight evidence of user for private purposes, having regard to the character of the place in question, will establish the private right of exclusive occupation.

ATTORNEY-GENERAL v. PERRY, [1904] 1 Ir. R. [247—C A.

(b) Presumption of Dedication.

28. *Fence — Waste — Presumption of Dedication of Strips.*]—A road across the edge of the waste of a manor was separated on one side by a fence from the adjoining land, and on the other side was open to the waste. Between the metalled road and the fence there was a narrow strip of grass land.

HELD—that there was a presumption that the lord of the manor had dedicated the land up to the fence as part of the highway.

EVELYN *v.* MIRRIELEES, (1901) 17 T. L. R. 152 [—C. A.

29. *Fence—Public Authorities Protection Act* 1893 (56 & 57 Vict. *c.* 61), *s.* 1—*R. S. C., Ord.* 25, *r.* 5.]—Although the existence of fences on either side of a highway does not prove conclusively that the whole intervening space is part of the highway, such fences are *primâ facie* the boundaries of a highway, and give rise to the usual presumption, unless some reason be found for supposing that they were put up for a different purpose.

The owner of an irregular piece of land abutting on, and not fenced off from, a highway, claimed it as his own, and erected a fence round it. This was pulled down by the local authority. An action was brought by the owner against the local authority more than six months after the fence had been pulled down.

HELD—that the Public Authorities Protection Act, 1893, clearly applied, and that the action was brought too late; and, further, that the plaintiff was not entitled to a merely declaratory judgment under the Rules of the Supreme Court, Order 25, rule 5, and that the action must be dismissed.

OFFIN *v.* ROCHFORD RURAL DISTRICT COUNCIL [1906] 1 Ch. 342; 75 L. J. Ch. 348; 70 J. P. 97; 54 W. R. 244; 94 L. T. 669; 4 L. G. R. 595—Warrington, J.

30. *Footpath passing through Lane of Varying Breadth—Presumption as to Public Right of Passage between Fences of Lane—Evidence of User.*]—The presumption applicable to an ordinary public highway bounded by fences that the public right of way extends to the whole space between the fences, is not applicable to a public footpath which passes through a lane of irregular shape and of a varying breadth between the fences, and in the case of such footpath there is no presumption that the public right extends over the whole space between the fences of the lane. The fact that persons passing along the footpath had frequently, and without objection on the part of the owners, walked along the whole space between the fences, does not establish the presumption.

FORD *v.* HARROW URBAN DISTRICT COUNCIL. [(1903) 67 J. P. 248; 88 L. T. 394; 1 L. G. R. 256—Ridley, J,

31. *Land lying along public Footpath devoted to private Traffic—User is but the Evidence to prove dedication.*]—Where there is a public right of way across land and a certain amount of land lying along the course of the public footpath devoted to traffic, even if it be private traffic, then *primâ facie* the owner of the soil must be taken to have dedicated to the public so much of the surface as he has in point of fact devoted to traffic, even if it be private traffic.

The owners of a rectangular piece of land ending at the river Mole, along which there ran

Roadside Strips and Ditches—*Continued.*

a public footway, entering at the south-east corner and leading out at the north-west corner to a footbridge over the river, had appropriated the land for a private carriage-way. They took no steps to prevent the public who were using the footway going over any part of the land they pleased, although they (the owners) subsequently exercised certain acts of ownership over it.

HELD—that it would be presumed that the whole of the land had been dedicated to the public for the purposes of the footway, and that the subsequent acts of ownership were not sufficient to rebut that presumption.

ATTORNEY-GENERAL *v.* ESHER LINOLEUM CO., [LD., [1901] 2 Ch. 647; 70 L. J. Ch. 808; 50 W. R. 22; 85 L. T. 414; 66 J. P. 71—Buckley, J.

32. *Nuisance by Flooding—Hedge and Ditch adjoining Highway—Presumption of Ownership—Owner's Common Law Liability to cleanse Ditch—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 50), *s.* 67—*Real Property Limitation Acts*, 1833 *and* 1874 (3 & 4 Will. 4, *c.* 27), *s.* 3, (37 & 38 Vict. *c.* 57), *s.* 1.]—It is the duty at common law of the owner of land next adjoining a highway to so scour and cleanse such ditches on his land as adjoin the highway as to prevent them from causing a nuisance to the highway by their foulness, and the highway authority can, notwithstanding the remedy afforded by sect. 67 of the Highway Act, 1835, bring an action against the owner for an injunction restraining the continuance of the nuisance.

ATTORNEY-GENERAL *v.* WARING, (1899) 63 J. P. [789—Verey, Official Referee.

33. *Rebutting Evidence—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 149.]—The presumption of dedication from public user of greens along the side of a highway between the fences may be rebutted by evidence of an entry in the court rolls of the manor that these greens were waste belonging to the manor, also that they were dealt with subsequent to the entry, as being private property.

FRIERN BARNET URBAN DISTRICT COUNCIL *v.* [RICHARDSON, (1898) 62 J. P. 547—C. A.

34. *Rebutting Evidence.*]—The presumption that greens alongside of a highway between hedges are dedicated to the use of the public must depend upon the circumstances of the case.

HELD—that the presumption was rebutted by evidence of acts of ownership, such as permission to enclose followed by enclosure, and licence to remove soil followed by removal openly and without interruption.

NEELD *v.* HENDON URBAN DISTRICT COUNCIL, [(1899) 63 J. P. 724; 81 L. T. 405; 16 T. L. R. 50—C. A.

35. *Rebutting Evidence—Surrounding Circumstances.*]—A road which was not laid out under any Inclosure Act was deemed to be an ancient highway, and had been kept in repair under a turnpike trust from the middle of last century until a few years ago, when the trust expired. It was now a main road under the control and management of the defendants. There was an unenclosed strip of land, on which willows and rough grass grew, on the west side of the road. This strip was about 300 yards long and about 50 feet wide at the broadest part, and tapered off to nothing at each end. The strip was not part of the waste of the manor. The land adjoining the strip on the west was the boundary fence of a farm of which the plaintiff was tenant in possession, the co-plaintiff being her tenant. The result of the evidence as a whole was that, as far as living memory went, the plaintiffs or their predecessors in title had used and enjoyed this strip in such a manner, and to such an extent, as the nature of the strip permitted, and had exercised acts of ownership inconsistent with public rights. No single act was done on the strip by the road authorities until the defendants had recently placed hard core, and done work on the strip for the purpose, as they alleged, of improving the highway. The plaintiffs claim a declaration and an injunction.

HELD—that the evidence was not sufficient for the purpose of proving dedication of the strip as a highway by user; that there was no presumption of dedication up to the old fence, or if there was, it was rebutted by the surrounding circumstances and the evidence; that the user of the margin had been too indefinite to form the foundation of a public right, or to establish a dedication as part of the highway; and that the declaration must be made and the injunction granted.

BELMORE (COUNTESS OF) *v.* KENT COUNTY [COUNCIL, [1901] 1 Ch. 873; 70 L. J. Ch. 501; 65 J. P. 456; 49 W. R. 459; 84 L. T. 523; [17 T. L. R. 360—Cozens-Hardy, J.

36. *Roadside strip between metalled Track and Fence—General Presumption of Law — Whether Presumption rebutted or inapplicable—"Once a Highway always a Highway"—Rural District Council abating an Encroachment on main Road vested in County Council—Local Government Acts*, 1888 (51 & 52 Vict. *c.* 41), *s.* 2 (4), and 1894 (56 & 57 Vict. *c.* 73), *s.* 26.]—In the case of an ordinary highway running between fences, although the space between them may be of varying width, the whole of such space must be presumed to have been dedicated as highway, unless such presumption is rebutted by evidence, or is rendered inapplicable by the nature of the *locus in quo* or other circumstances.

Mere disuse of a highway for any length of time cannot deprive the public of their right over it; and the assent of a highway authority to an encroachment upon a highway cannot legalise such encroachment.

Neeld v. *Hendon Urban District Council* ((1899) 63 J. P. 724; 81 L. T. 406—C. A., No. 34, *supra*) and *R.* v. *Train* ((1862) 31 L. J. M. C. 169; 2 B & S. 640; 9 Cox, C. C. 180—C. C. R.) considered.

HARVEY *v.* TRURO RURAL DISTRICT COUNCIL, [(1904) 68 J. P. 51; 52 W. R. 262—Joyce, J.

Roadside Strips and Ditches—*Continued.*

37. *Special Act — Construction.*] — Where a highway though of varying and unequal width runs between fences, the public right of way *primâ facie* extends over the whole space between the fences. The effect of descriptions in special Acts of Parliament affecting interests in land considered.

LOCKE-KING *v.* WOKING URBAN DISTRICT [COUNCIL, (1898) 62 J. P. 167 ; 77 L. T. 790 ; 14 T. L. R. 32.—Kekewich, J.

IV. OWNERSHIP OF SOIL.

38. *Body incorporated for building Bridge and Approaches—Presumption of Ownership.*] — The plaintiffs were incorporated by an Act of 36 Geo. 3, *c.* xciv., for the purpose of building a bridge over the River Itchen, at Northam, and for making roads communicating therewith. The Act empowered the plaintiffs to set out the lands through which the roads were to pass, and to purchase the lands so set out, and the Act vested the bridge and the roads in them. The bridge and roads were completed in 1800, and the plaintiffs had ever since been in possession of the site and subsoil of the roads. The defendants, as the local authority, made a sewer under one of the roads, and upon an arbitration to assess the compensation payable to the plaintiffs therefor, the latter were unable to produce any conveyance to them relating to the soil of that part of the road in which the sewer was laid. The lord of the manor in which the road was situated had joined in the conveyance to the plaintiffs of other portions of the road, but it was admitted that the lord of the manor was not entitled to the subsoil in question. The defendants contended that, as no conveyance of the subsoil in question was produced, and as under the Act it was not necessary for the plaintiffs to purchase the subsoil of the road, in the absence of any deed of conveyance it ought to be presumed that no such deed had been made, and that, therefore, the subsoil had never been acquired by the plaintiffs.

HELD—that the whole scheme of the Act was that the plaintiffs should purchase the fee simple of the lands set out for the roads, and that, having been in possession ever since the road was made, it must be taken that they had acquired the fee simple in the subsoil and were the owners thereof.

Decision of Joyce, J. (23 T. L. R. 96) affirmed.

THE COMPANY OF PROPRIETORS OF THE [NORTHAM BRIDGE AND ROADS *v.* THE SOUTH STONEHAM RURAL DISTRICT COUNCIL, (1906) 23 T. L. R. 476 ; 71 J. P. 345.—C. A.

39. *Lane in a City—Acts of Ownership—Evidence of Acts of Ownership in similar Lanes—Repairs—Maintenance of hinged Post in centre of Lane.*]—The soil of Logic Lane in the city of Oxford is vested in University College, the owners of the adjoining property on each side.

The college had done repairs to the lane, and also to a hinged post which they had maintained in the centre of it since 1848 (at any rate). The post had at intervals been locked in an erect position, and the college kept the key.

The defendants had done some repairs to the lane, but only (as the judge held) under statutory powers ; and at one time they apparently had a key to the post, not, however, as owners of the land, but for use in case of emergency.

The defendants relied on a charter of King John granting the *rill* of Oxford to its burgesses ; and (on the authority of *Jones* v. *Williams* ((1837) 2 M. & W. 331) and *Doe* d. *Barrett* v. *Kemp* ((1829) 7 Bing. 336) they gave evidence of acts of ownership, referable to the charter, as to similar highways within the *rill*.

HELD—that the presumption as to ownership *ad medium filum* was not rebutted.

UNIVERSITY COLLEGE, OXFORD *v.* OXFORD [CORPORATION, (1904) 68 J. P. 471 ; 20 T. L. R. 637—Eady, J.

40. *Local Authority erecting Standard for Electric Cable—Standard sunk in the Subsoil of Pavement—Whether a Trespass upon the Subsoil—Special statutory Power to erect such Standards "on, in, over or under any Street or Road"—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 4, 149 — *Newport Corporation Act*, 1900 (63 & 64 Vict. *c.* xlii.), *s.* 51.]—Where an authority, having statutory powers to erect and maintain electric cable standards "on, in, over or under any street or road," erect such a standard in the pavement, their act, although the standard is sunk in the soil to a considerable depth, does not amount to a "taking of land" ; and therefore the owner of the subsoil of the pavement has no right of action against them for trespass. His right, if any, is to claim compensation for injurious affection.

ESCOTT *v.* NEWPORT CORPORATION, [1904] 2 [K. B. 369 ; 73 L. J. K. B. 693 ; 68 J. P. 135 ; 52 W. R. 543 ; 90 L. T. 348 ; 20 T. L. R. 158 ; 2 L. G. R. 779—Div. Ct.

41. *Pasturage on awarded Roads—Rights of Soil—Private Road—Lord of the Manor—Adjoining Owners—Surveyors of Highways—Presumption of release of Restrictions as to Depasturing.*] —By an Inclosure Act commissioners were appointed to set out certain roads, and it was enacted that the herbage of the public and private roads should belong to and be the property of the person or persons to whom the commissioners should allot and award the same. One-twentieth part of the land was to be allotted to the lord of the manor in respect of his right of soil and in lieu full bar and compensation for all rights of soil in the land directed to be divided and inclosed.

The award made in 1822 set out (*inter alia*) a private road, and provided that all the grass and herbage which should from time to time grow and arise upon it should belong to and be the property of the surveyor, and be by him let annually for depasturing sheep, but no other cattle or stock whatever, at rents to be annually paid and applied towards the repairs of the road.

HELD—that the soil of the road became vested in the owners of the adjoining allotments, subject

Ownership of Soil—*Continued.*

to a right of way and to the right of the surveyor of the highways to the herbage thereon : that as there had been an open and regular and unchallenged dealing with the herbage of the road for more than fifty years in a manner and to an extent not authorised by the award, viz., the depasturing of horses and cattle, as well as sheep, the Court would presume a lawful origin from such usage, and presume a lost grant by the owners of the soil of the road, by virtue of which the surveyor was released from the restrictions imposed by the award as to the mode of grazing.

Haigh v. *West* ([1893] 2 Q. B. 19 ; 62 L. J. Q. B. 532 ; 57 J. P. 358 ; 69 L. T. 165—C. A.) applied.

Decision of Cozens-Hardy, J., [1901] 1 Ch. 22 ; 70 L. J. Ch. 35 ; 65 J. P. 56 ; 49 W. R. 154 ; 83 L. T. 496 ; 17 T. L. R. 35.

NEAVERSON *v.* PETERBOROUGH RURAL DISTRICT COUNCIL, [1902] 1 Ch. 557 ; 18 T. L. R. 360 ; 71 L. J. Ch. 378 ; 86 L. T. 738 ; 66 J. P. 404 ; 50 W. R. 549—C. A.

42. *Pasturage on awarded Roads—User—Title in Parish and Parish Council—No Title in District Council—Competence of Attorney-General — Costs of Issues though Action not maintainable.*]—By an award made under an Inclosure Act of 1799, it was ordered that the herbage on the awarded public and private roads should be let by auction yearly at Easter by the surveyor of highways for the parish or such other person and under such restrictions and regulations or at such other times as the occupiers of lands and tenements in vestry should appoint, and that the proceeds should be expended in and towards the repair of the roads in the parish. G. Drove (a private road) was one of the roads mentioned in the award. The herbage on the drove was always let annually by auction. Before 1894 it was let by the vestry and the proceeds applied in repairing the roads of the parish. After the Local Government Act of 1894 the herbage was let by the parish council and the proceeds handed to the district council, who applied them in reduction of the amount due for road repair from the parish. This action was brought by the Attorney-General, on the relation of the district council, and by the district council, for damages for injury to the letting value of the herbage, alleged to be due to the defendants' wrongful depasturing of the drove, and for an injunction. The tenant or hirer of the herbage was not a party.

HELD—that the property or title to the herbage was originally in the parishioners, or, under 59 Geo. 3, c. 12, s. 17, in the churchwardens and overseers as trustees for them, and now, under the Local Government Act, 1894, ss. 6 (1) and 67, in the parish council, and that the district council had no right of action.

HELD, further—that, as the question did not concern the interests of the whole community or public at large, but only the exclusive right of property of a very limited portion of the community, the Attorney-General had no *locus standi* and could not maintain the action.

HELD, consequently—that the action was not maintainable.

But HELD—that though the plaintiffs had no cause of action, yet they could be awarded, and the defendants deprived of, the costs of issues of fact decided adversely to the defendants.

ATTORNEY-GENERAL AND SPALDING RURAL [DISTRICT COUNCIL *v.* GARNER, [1907] 2 K. B. 480 ; 76 L. J. K. B. 965 ; 71 J. P. 357 ; 97 L. T. 486 ; 23 T. L. R. 563 ; 5 L. G. R. 944 —Channell, J.

43. *Presumption of ownership* ad medium filum viæ—*Street in town—Rentcharge issuing out of—Liability—Charitable Trusts Recovery Act*, 1891 (54 & 55 Vict. *c.* 17), *s.* 3.]—Certain rentcharges were admittedly charged by the will of T. W., dated in 1619, upon certain premises, which were subsequently acquired by the Corporation of London, subject to these charges, and thrown by them into a roadway.

The corporation subsequently sold property abutting on the roadway (which now formed the premises in question) by auction to T., subject to any rentcharges upon the property ; and the question arose whether he was liable in respect of the rentcharge as owner of the soil of the street to the centre, which must be presumed to have passed to him on the conveyance of the property abutting thereon.

HELD—(following the general rule stated by Cotton, L.J. in *Micklethwaite* v. *The Newlay Bridge Co., Ld.* (33 Ch. Div. 133) as to the presumption of the highway passing *ad medium filum*), that T. was liable to pay the rentcharge ; that the rule applied to streets in towns as much as to the country ; and that the presumption was not rebutted by the fact that the corporation had owned the soil beyond the *medium filum*.

RE WHITE'S CHARITIES, CHARITY COMMISSIONERS [*v.* LONDON CORPORATION, [1898] 1 Ch. 659 ; 67 L. J. Ch. 430 ; 78 L. T. 550 ; 46 W. R. 479—Romer, J.

V. DIVERSION.

44. *Certificate of Justices—Appeal to Sessions —Findings of Jury—Proposed new Highway more commodious for Public, but Parties appealing injured or aggrieved—Effect of Findings—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 20), *s.* 85.] —Where, on an appeal against a certificate for the diversion of a highway, the jury find in answer to questions left to them, that the proposed new highway would be more commodious to the public, but that the parties appealing would be injured or aggrieved by the diversion :—

HELD—that upon the true construction of sect. 89 of the Highway Act, 1835, the appeal must be allowed notwithstanding the first finding of the jury.

Decision of quarter sessions (69 J. P. 304) reversed.

WALKER AND OTHERS *v.* YORK CORPORATION, [1906] 1 K. B. 724 ; 75 L. J. K. B. 413 ; 70 J. P. 270 ; 54 W. R. 493 ; 94 L. T. 744 ; 22 T. L. R. 456 ; 4 L. G. R. 524—Div. Ct.

Diversion—*Continued.*

45. *Footpath—Proposal to use another existing Path—Whether such Path a Highway.*]—To a proposal to stop up a footpath, and substitute another existing path (without the consent of the owner thereof), it was objected that such path was not a highway "repairable by the inhabitants at large."

HELD—sufficient that it was a highway "in the ordinary sense" of the word.

BREFFIT *v.* CASTLEFORD URBAN DISTRICT [COUNCIL, (1904) 67 J. P. 460—Qr. Sess.

46. *Formalities under Highway Act, 1835—Presumption of Grant of Certificate—Evidence of Compliance—Highway Act, 1835* (5 & 6 Will. 4, *c.* 50), *ss.* 23, 84—92.]—In 1842 a resolution was passed at a vestry meeting that a road known as Rectory Grove should be substituted for an older highway repairable by the inhabitants at large, known as Chess Lane. There was no evidence that any certificate of justices had been enrolled or steps taken under the Highway Act, 1835, ss. 23 and 84. Chess Lane was closed, and ever since 1842 Rectory Grove had been open to and used by the public, and upon one occasion it had been repaired by the surveyor of the district of Leigh, but there was no evidence as to whether it was in his capacity as surveyor or not.

HELD—that the justices were justified in finding that Rectory Grove was a highway repairable by the inhabitants at large, and in presuming that the certificate of the justices was duly granted and the formal proceedings duly taken to comply with the provisions of the Highway Act, 1835.

LEIGH URBAN DISTRICT COUNCIL *v.* KING, [1901] 1 K. B. 747; 70 L. J. K. B. 313; 65 J. P. 243; 83 L. T. 777; 17 T. L. R. 205—Div. Ct.

47. *Notices affixed at the Ends of Diversion—Time to be so affixed—"Four successive Weeks"—Certificate of Justices—Consent of Owner not appearing in—Refusal of Justices to certify—Subsequent Application to and Grant by other Justices—Highway Act, 1835* (5 & 6 Will. 4, *c.* 50), *ss.* 84, 85.]—In proceedings to divert a highway under the Highway Act, 1835, ss. 84 and 85, it is not a condition precedent to the justices granting a certificate for diversion that the notice required by sect. 85 should have been affixed at each end of the highway for four successive weeks.

In a case where the district council passed a resolution for the diversion of a highway and application had been made to two justices, who, after a view, refused to grant a certificate, a fresh application, without a fresh resolution, can be made by the district council to two other justices, and they have power to grant a certificate.

The written consent of the owner of the land through which the new highway is proposed to be made need not appear on the face of the certificate.

Decision of Div. Ct. ([1904] 2 K. B. 349; 73 L. J. K. B. 858; 68 J. P. 417; 91 L. T. 193; 20 T. L. R. 520) reversed on the first point.

REX *v.* KENT JJ., [1905] 1 K. B. 378; 74 L. J. [K. B. 373; 69 J. P. 69; 53 W. R. 183; 92 L. T. 132; 21 T. L. R. 95; 3 L. G. R. 261—C. A.

48. *Plan—"Metes, Bounds, and Admeasurements"—Certificate of Justices—Highway Act, 1835* (5 & 6 Will. 4, *c.* 50), *s.* 85.]—By sect. 85 of the Highway Act, 1835, where a public highway is proposed to be diverted a plan is to be delivered to the two justices who view the highway, describing the old and the proposed new highway "by metes, bounds, and admeasurements." An ordnance map was delivered to the justices which showed the proposed new highway and its width, but did not state what was its length.

HELD—insufficient, although there was a scale on the map by reference to which the length might be calculated.

REX *v.* SURREY JJ., EX PARTE LOCKE-KING, [(1907) 24 T. L. R. 185—Div. Ct.

VI. MANAGEMENT AND CONTROL OF HIGHWAYS.

49. *Bicycle—Riding Bicycle on Highway at Night without lighted Lamp—Power of Police Officer to arrest Offender—Assault—Highway Act, 1835* (5 & 6 Will. 4, *c.* 50), *ss.* 78, 79—*Local Government Act, 1888* (51 & 52 Vict. *c.* 41), *s.* 85.] —A police constable has no power to apprehend a person who is riding a bicycle on the highway at night without having a lighted lamp, as required by the regulations contained in sect. 85 of the Local Government Act, 1888, as the provision in that section declaring bicycles to be carriages within the meaning of the Highway Acts does not include or incorporate the power to arrest without a warrant given by sects. 78 and 79 of the Highway Act, 1835; and, consequently, if a constable, for the purpose of obtaining the name and address of the offender, who refuses to stop when called upon, stop the bicycle and thereby throw the rider to the ground, he is guilty of assault.

HATTON *v.* TREEBY, [1897] 2 Q. B. 452; 18 [Cox, C.C. 633; 61 J. P. 586; 66 L. J. Q. B. 729; 77 L. T. 309; 13 T. L. R. 556; 46 W. R. 6—Div. Ct.

50. *Locomotive — "User" on Highway — Locomotive passing over Highway from one Locality to another—Licence—Bye-laws—Highways and Locomotives (Amendment) Act, 1878* (41 & 42 Vict. *c.* 77), *s.* 32.]—The passage of a steam-roller or other locomotive along a highway upon its journey from one locality to another is a "user" on the highway within the meaning of a bye-law made by a county authority, which provided that "no locomotive shall be used on any highway within the county until an annual licence for the use of the same shall have been obtained by the owner thereof"; and the owner of the locomotive so passing along the highway is liable to the penalty imposed by

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sect. 32 of the Highways and Locomotives Act, 1878, unless he has obtained a licence from the county authority as provided by the bye-law.

London County Council *v.* Wood, [1897] 2 [Q. B. 482 ; 18 Cox, C. C. 637 ; 61 J. P. 567 ; 66 L. J. Q. B. 712 ; 77 L. T. 312 ; 13 T. L. R. 558 ; 46 W. R. 143—Div. Ct.

51. *Nuisance—Sanction of County Council—Injunction.*]—A county council is given the management of roads in the same way that the highway authorities used to have it, and under the Local Government Act, 1888, s. 11, the soil of the roads is vested in them *quâ* roads, and simply to the extent necessary for the purpose of preserving and maintaining and using them as roads. A county council cannot allow the destruction of the roads *in toto* or to some less degree which the Court finds in fact to be a nuisance. A county council has no authority to grant a licence to commit a nuisance.

Attorney-General *v.* Barker, (1900) 83 [L. T. 245 ; 16 T. L. R. 502—Farwell, J.

52. *Promenade—Motor Car Races—Promotion by Corporation of Motor Car Races on Promenade made under Local Acts*—Ultra Vires.]—By a local Act, passed in 1865, the corporation of Blackpool were authorised to make and maintain a carriage-drive and a promenade (called "the parade") by the sea. It was provided by sect. 13 of the Act that the carriage-drive should be a public highway, by sect. 17 that the parade should not be a public highway, and by sect. 18 that the parade should be "kept and used exclusively for the purposes of recreation by persons on foot, and with or without carriages, in respect of which toll is authorised to be taken." Sect. 19 authorised a toll of twopence for every bath-chair, &c., or like carriage driven by human power.

By a later Act, passed in 1899, additional works were authorised, including a new carriage-way, absorbing the original parade, a new road with a tramway thereon alongside the said carriage-way, and a new parade alongside the tramroad. By sect. 7 it was provided that the corporation might appropriate the whole or such part of the new parade as they might think fit for the exclusive use of foot passengers, and by sect. 8 it was provided that the new road should be for the exclusive purpose of the tramways laid thereon.

The parade was, in fact, used exclusively for foot passengers and bath-chairs, &c.

The corporation, in 1906, gave their approval to motor car races being held on the parade, and gave permission for part of the tramway road to be used for the purpose of cars returning to the starting point. They also undertook to keep the portion of the parade over which the races were to be run clear of traffic, and to erect a barrier and provide the necessary police control.

This action was brought by the Attorney-General, at the relation of a ratepayer, for an injunction to restrain the corporation from organising or promoting motor races on the sea front.

Held—that the corporation were in the position of trustees of the parade for limited public purposes, namely, for the purpose of use by foot passengers, perambulators, invalid carriages, and similar vehicles, and that it was an abuse of the parade to allow it to be used for either horses or motor cars, and *à fortiori* motor races.

Attorney-General *v.* Blackpool Corpora- [tion, (1907) 71 J. P. 478—Palatine Ct., Leigh-Clare, V.-C.

53. *Toll—Turnpike Road—Army—Carriage—Exemption—"Employed in Her Majesty's Military Service"—Private Carriage—Army Act*, 1881 (44 & 45 Vict. *c.* 58), *s.* 143.]—The appellant, a major in the Royal Artillery, used his private carriage in order to carry out his official duties, which lay at places some distance apart. He was not in receipt of or entitled to any Government allowance for such carriage, nor entitled to hire such carriage at the cost of the Government.

Held—that such carriage was not "employed in Her Majesty's military service" within the meaning of the Army Act, 1881, s. 143, and was not, therefore, exempt from the payment of a statutory toll payable on a turnpike road.

Craig *v.* Nicholas, [1900] 2 Q. B. 444 ; 69 [L. J. Q. B. 608 ; 64 J. P. 569 ; 49 W. R. 48 ; 82 L. T. 765 ; 16 T. L. R. 382—Div. Ct.

VII. REPAIR AND MAINTENANCE OF HIGHWAYS.

See also Burial and Cremation, 16, 17 ; Revenue, 55, 56.

(a) Awarded Road.

54. *Inclosure Act*—Contemporanea Expositio—*Condition Precedent.*]—The point in question between the plaintiffs and the defendants was, who was liable to pay for the repairs of a piece of road which was in the district of the plaintiffs, but which was said to be repairable by the defendants by virtue of an award under an Inclosure Act passed in 1767. Commissioners were directed and required by the Act to set out and appoint public highways and private roads over the commons and waste grounds in question as they in their discretion should think requisite, so as all such public highways should be 60 feet at least in width, and all such public highways should be made and at all times thereafter repaired and kept in repair "in such manner as other public highways are by law directed to be repaired by such of the said townships respectively."

Held—that after the words above set out in inverted commas there should be read in the words "within whose district such public highways are situated"; that the comparatively modern evidence of *contemporanea expositio* adduced was really not in favour of the plaintiffs

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as the facts went; that public highways of at least 60 feet in width was not a condition precedent, or essential to the setting out of the roads, but it was only directory: and that the plaintiffs had failed to show that there was such a liability cast on the defendants as they contended for.

ATTORNEY-GENERAL AND RURAL DISTRICT [COUNCIL OF SETTLE *v.* RURAL DISTRICT COUNCIL OF LUMSDALE, (1902) 86 L. T. 822 —Farwell, J.

55. *Whether an Allotment—Ditch in Highway—Failure to clean out—Cutting of Grips from Roadway to Ditch—Misfeasance or Non-feasance—Drain or Sewer.*]—By the Inglewood Forest Award of 1819, made under an Inclosure Act, the commissioners set out certain public carriage roads or highways and also certain allotments. There was a provision in the award that each allotment holder should discharge the water from his allotment on to the adjoining allotment. The plaintiff brought an action against the defendants, the rural district council, for failing to cleanse and keep in repair a ditch on one of the roads set out under the award, whereby his fields were damaged. It appeared that the defendants had not cleaned out the ditch, and that they had cut grips from the road into the ditch and cleaned out the grips from time to time. The drainage from two cottages on the other side of the road passed under the road through a culvert into the ditch.

HELD—that the road was not an "allotment" under the award, and that, therefore, the defendants were not bound to carry off the water from the ditch under the provisions of the award.

HELD, also, that the defendants were not guilty of misfeasance, but only of non-feasance.

HELD, also, on the authority of *Williamson* v. *Durham Rural District Council* ([1906] 2 K. B. 65; 75 L. J. K. B. 498; 70 J. P. 352; 95 L. T. 471; 54 W. R. 509; 4 L. G. R. 1163—Div. Ct., *see* SEWERS AND DRAINS, No. 21)—that, even if the cottages had been proved not to be within the same curtilage, the ditch was not a sewer.

IRVING *v.* CARLISLE RURAL DISTRICT COUNCIL, [(1907) 71 J. P. 212; 5 L. G. R. 776—Div. Ct.

(b) Drainage.

56. *Highway—"Drain"—Catch-pit—Pouring Rain and Storm Water on to adjoining Land—Presumption of Legal Origin of Right of Local Authority to use Drain—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 50), *s.* 67.]—A complaint was made by the Attorney-General, at the instance of the local authority of Bromley, that the defendant had stopped up a drain which carried away the water that came on to the highway. This means of carrying off the water had existed as far back as living memory would go. The road that passed the spot rose on either side, and the land on the side away from the defendant's land sloped to the road. Under these circumstances water ran down to this spot and was impounded on the surface of the road unless it was carried away by some means or other. There were catch-pits on either side of the road with a connection between them by which the water from the other side flowed into the catch-pit on the east side, and the whole escaped by a pipe six feet long, which carried it through the hedge and discharged it on the defendant's land. It was compatible with certain evidence that was given in the case that there had at one time been a ditch on the defendant's land which carried away the water from the point at which it entered the land.

HELD—that this convenience for carrying away the water was a "drain" within the meaning of sect. 67 of the Highway Act, 1835; and, moreover, that a legal origin was possible and ought to be presumed for the right which was claimed by the local authority to use this drain to carry away the water from the road.

Judgment of Lord Alverstone, C.J. ([1901] 2 K. B. 101; 70 L. J. K. B. 512; 65 J. P. 581; 49 W. R. 489; 84 L. T. 562; 17 T. L. R. 422) reversed.

ATTORNEY-GENERAL *v.* COPELAND, [1902] 1 [K. B. 690; 71 L. J. K. B. 472; 66 J. P. 420; 50 W. R. 490; 86 L. T. 486; 18 T. L. R. 394 —C. A.

(c) Indictment for Non-Repair.

57. *Indictment of Inhabitants—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 50), *ss.* 94, 95—*Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 10.]—On an information that a certain highway was out of repair, justices ordered an indictment to be preferred under the Highway Act, 1835, s. 95, against the inhabitants. A rule for a *certiorari* was obtained on the ground that the procedure relied on had been impliedly repealed by the Highways and Locomotives Act, 1878, s. 10, and that the rural district council were the real parties liable.

HELD—that the justices' order was right.

R. *v.* MORSE, [1904] W. N. 114—Div. Ct.

58. *Order for Repairs—Indictment by County Council—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 10.]—The defendants were indicted under sect. 10 of the Highways and Locomotives (Amendment) Act, 1878, for the non-repair of a certain highway. The order made by the county council upon the defendants directed the repairs to be done to the satisfaction of the county surveyor. It was objected that an order in these terms was not warranted by the section, and therefore vitiated the indictment.

HELD—that anything in the order inconsistent with sect. 10 of the Act of 1878 should be ignored, and the objection was accordingly overruled.

REG. *v.* SOUTHPORT CORPORATION, (1901) 65 [J. P. 184—Bucknill, J., Liverpool Assizes.

59. *Width not specified in Indictment—Repairable by Inhabitants at large—Substitution of*

Repair and Maintenance of Highways—*Continued.*

New and Broader Highway—Disrepair—Order under sect. 10 of Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. *c.* 77), *s.* 10.]—In 1891 a highway was closed by order of quarter sessions, and a new highway was substituted for it. The certificate of the justices stated that the new highway was 12 yards wide, whereas in fact it was 14 or 15 yards wide. The new highway fell into disrepair. An order was then made under sect. 10 of the Highways and Locomotives (Amendment) Act, 1878, and an indictment was preferred against the highway authority—the defendants. Notices were served on the frontagers by the highway authority under sect. 150 of the Public Health Act, 1875, after the date of the order. The width of the road was not specified in the indictment. The jury found that the old road was a highway repairable by the inhabitants at large before 1835.

HELD—that on such finding judgment could be entered for the Crown.

REX *v.* CROMPTON URBAN DISTRICT COUNCIL, [(1902) 66 J. P. 566; 86 L. J. 762; 20 Cox, C. C. 243—Div. Ct.

(d) Mandamus.

60. *Complaint to Council that Highway is out of Repair—Admitted Highway—Admitted Need of Repair—Duty of County Council to make Order—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 10.]—Complaint having been made to a county council that a district council had failed to repair and maintain a certain highway within their district, the county council instructed their surveyor to inspect it. Upon his report that the way in question was a highway and was out of repair, they appointed commissioners to hold a local inquiry, with the result that the commissioners reported to the same effect, and further recommended the county council to issue an order under sect. 10 of the Highways and Locomotives (Amendment) Act, 1878. The council, however, decided not to make any such order.

The Court granted a rule *nisi* calling upon the county council to show cause why a *mandamus* should not issue commanding them to issue an order.

REX *v.* DORSET COUNTY COUNCIL, (1903) 67 [J. P. 19—Div. Ct.

61. *Irish Roads—Irish County and District Councils—Local Government (Ireland) Act*, 1898 (61 & 62 Vict. *c.* 37), *ss.* 81, 82.]—If an Irish county or district council or such council's contractor neglect to keep roads in a proper state of repair, a *mandamus* will issue to the council, who have failed to discharge the duty imposed on them by sect. 82 of the Irish Local Government Act, 1898.

Quære, whether an indictment would lie against the council in such a case.

REX *v.* CLARE COUNTY COUNCIL, [1904] 2 Ir. R. [569—C. A.

(e) Materials for Repair.

62. *Highway Surveyor—Supplying Team Work—Member of District Council—Surveyor or not—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 50), *s.* 46—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 144—*Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *ss.* 25, 46.]—By the Highway Act, 1835, s. 46, the surveyor of the parish may contract for the purchasing, getting, and carrying of materials required for the repairing of the highways, but he may not share or have any interest in any such contract without the licence in writing of two justices of the peace previously obtained by him, under certain penalties.

By the Public Health Act, 1875, s. 144, urban authorities have the powers of surveyors of highways and of parish vestries under the Highways Acts.

By the Local Government Act, 1894, s. 25, the district council of every rural district " . . . shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under sects. 144 to 148 of the Public Health Act, 1875, and those sections shall apply in the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority." And by sect. 46 of that Act a person is not to be disqualified from being a member of the council " by reason of being interested . . . in the transport of materials for the repair of roads or bridges in his own immediate neighbourhood."

The respondent H. was a member of the Saddleworth District Council, and in March, 1897, he on his own account let to hire a team to be used in repairing a highway within the district of the council of which he was a member, and he received from the council payment in respect thereof. He did not before letting for hire as aforesaid obtain any licence in writing from two justices of the peace. He was thereupon summoned before the magistrates for the penalties contained in the Highways Act, 1835, s. 46, who, however, dismissed the summons.

HELD (dismissing the appeal)—that the magistrates were right.

BUCKLEY *v.* HANSON, (1898) 18 Cox, C. C. [688; 62 J. P. 119: 77 L. T. 664—Div. Ct.

63. *Land allotted for Road-making Materials—Land sold to Railway Company—Proceeds of Sale in Court—Absolute Title to Land—Payment out of Court to District Council—Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. *c.* 18), *s.* 69—*Sale of Exhausted Parish Lands Act*, 1876 (39 & 40 Vict. *c.* 62), *s.* 1.]—Land allotted by an inclosure award of 1834 to a highway surveyor for road materials was bought by a railway company under their compulsory powers. The purchase-money was paid into Court, the dividends thereon being paid to the surveyor for the time being. Upon application by an urban district council, as the present highway authority, for payment out to them of the capital :—

HELD—that, subject to the consent of the Local Government Board, the money might be

Repair and Maintenance of Highways—*Continued.*

paid out to the council under sect. 69 of the Lands Clauses Consolidation Act, 1845, as they had become absolutely entitled to it under sect. 1 of the Sale of Exhausted Parish Lands Act, 1876.

RE BRUMBY AND FRODINGHAM URBAN DISTRICT COUNCIL, (1905) 69 J. P. 96; 3 L. G. R. 258—Kekewich, J.

64. "*Waste Ground or Common Land*"—*Sheep Walks on Welsh Mountain—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 50), *s.* 51.]—A plaintiff proved that she owned certain farms adjoining a mountain and had always let to the tenant of each the right of grazing sheep on a particular part of the mountain. She showed no paper title to such sheep walks, but there was no evidence of title in any other person.

HELD—that the sheep walks were not "waste land or common ground" within sect. 51 of the Highway Act, 1835, and that the plaintiff had sufficiently proved her ownership to maintain an action against the highway authority who had taken stone therefrom without her consent or an order of justices.

SCOTT *v.* TOWYN RURAL DISTRICT COUNCIL, [(1907) 5 L. G. R. 1050—Lord Alverstone, C.J.

(f) Miscellaneous.

65. *Main Roads—Differences—Arbitration—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *ss.* 11 (4) *and* 12 (2).]—The words "arbitration under this Act" in sect. 12 (2) of the Local Government Act, 1888, mean arbitration in accordance with the provisions of sect. 62, and do not refer back to sect. 11 (4) of the Act.

In re Kent County Council and Sandgate Local Board ([1895] 2 Q. B. 43; 64 L. J. Q. B. 502; 59 J. P. 456; 43 W. R. 601; 72 L. T. 725; 15 R. 452—Div. Ct.) followed.

IN RE ISLE OF WIGHT RURAL DISTRICT [COUNCIL AND ISLE OF WIGHT COUNTY COUNCIL, (1901) 65 J. P. 87—Div. Ct.

66. *Repair until taken over by Local Authority — Standard of Repair — Reconstruction — Liability for.*]—A covenant to contribute a proportionate part of the expenses of repairing and maintaining a road until undertaken by the local authority does not extend to contributing a proportion of the expense of an entire reconstruction of the road.

In construing such a covenant regard must be had to the standard of the condition of the road at the time when the covenant was entered into, and the obligation is to contribute a proportionate part of the expense of putting it into a state of repair corresponding to the standard contemplated or existing at that time.

Where the road is reconstructed for the purpose of its being taken over by the local authority, the covenantor is liable to contribute a proportionate part of such expenses as would have been incurred in putting it into the state of repair above mentioned, but is not liable to contribute to the expenses of such work as amounts to reconstruction.

Decision of Joyce, J. (68 J. P. 181) affirmed.

SCOTT *v.* BROWN, (1905) 69 J. P. 89—C. A.

67. *Subsidence by Working of Coal Mines—Measure of Damages—Raising Road to Original Level—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 149—*Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *ss.* 10, 27.]—A highway vested in the plaintiffs under sect. 149 of the Public Health Act, 1875, subsided in consequence of the lawful working of the defendants' coal mines. The plaintiffs, acting upon proper advice, raised the highway to its former level, and sought to recover the expenses of so doing from the defendants, who contended that they were only liable to pay the cost of making the highway as commodious to the public as it was before, without raising it to its former level.

HELD—that the plaintiffs, acting *bonâ fide* in the interests of the public, were entitled to raise the highway to its former level, and to recover the cost of so doing from the defendants.

Decision of Jelf, J. ([1905] 2 K. B. 823; 69 J. P. 323; 93 L. T. 307; 21 T. L. R. 569; 3 L. G. R. 817) reversed.

WEDNESBURY CORPORATION *v.* LODGE HOLE [COLLIERY CO., LD., [1907] 1 K. B. 78; 76 L. J. K. B. 68; 71 J. P. 73; 95 L. T. 815; 23 T. L. R. 80; 5 L. G. R. 43—C. A.

68. *Trust for Repair of Road—Road taken over by Local Authority—Continuance of Trust.*]—A testator in 1709 devised real estate to trustees after the death of his aunt and certain annuitants, and bequeathed the sum of £3,000 upon trust to build galleries in Great St. Mary's Church in Cambridge, and construct a causeway, and to set aside £40 a year for the repair of the galleries and causeway, and after directing the foundation of two travelling fellowships gave the overplus to the University Library. By an order of the Court made on the petition of the trustees in 1742 a further sum of £40 a year was ordered to be expended on the causeway. Under the Local Government Act, 1888, the causeway was declared a main road, and was now controlled by the Cambridgeshire County Council and Chesterton District Council. The University now applied that so much of the £40 a year bequeathed by the testator as was not required for repair, and the whole of the £40 a year payable under the order of 1742, might be applied for the purposes of the library.

HELD—that the trusts for the repair of the road were still subsisting.

ATTORNEY-GENERAL *v.* DAY, [1900] 1 Ch. 31; [69 L. J. Ch. 8; 64 J. P. 88; 81 L. T. 806—North, J.

(g) Misfeasance.

69. *Negligence — Personal Injuries — Road excavated for Sewer — Trench insufficiently filled in—Heap of Soil on other Side of Road—Accident to Cab.*]—In an action against a corporation, who were the highway and sanitary

Repair and Maintenance of Highways—*Continued.*

authority, it appeared that the plaintiff was in a hansom cab, which was overturned under the following circumstances: The cabman seeing that the near side of the road was dangerous owing to the soil on the top of a new sewer having "settled," turned to the offside of the road, and there ran into an unlighted heap of soil.

Darling, J. held that the defendants were guilty only of non-feasance and withdrew the case from the jury; the Court of Appeal considered that the circumstances required further investigation, and ordered a new trial (18 T. L. R. 171). At the second trial Phillimore, J. left to the jury certain questions with the following result: (1) Was the left half of the road dangerous to traffic?—Yes, sufficiently so to justify the driver in crossing over to the offside. (2) If so, was the filled-up trench dangerous, or the other part of the road?—Both, chiefly the trench. (3) Was the road left in a proper condition by the defendants after the sewer was completed?—Yes, properly finished at the time, but the rain spoilt it. (4) Did the cabman go to the offside on account of the work not being properly finished?—Yes. (5) Was the heap put on the road by the direction or permission of the defendants?—No.

Held (Romer, L.J. doubting)—that upon these findings the plaintiff was entitled to judgment.

Per M.R.—The defendants, having once made the road founderous, were in the position of continuing misfeasors until they had put it back into a fit condition for traffic; and, as they knew of the existence of the heap, on to which their misfeasance compelled the cabman to drive, and must be taken to have contemplated it as a possible danger, they were liable for the damage caused by it overturning the cab, although they were not responsible for it being there.

Decision of C. A., *sub nom. Bull* v. *Shoreditch Corporation*, (1903) 19 T. L. R. 64, affirmed.

Shoreditch Corporation *v.* Bull, [1904] 2 [K. B. 756; 20 T. L. R. 254; 90 L. T. 210; 68 J. P. 415—H. L.

70. *Negligence—Steam Roller—Damage to Gaspipes—Personal Injury from Gas Explosion.*]—The defendants, the highway authority for the district, used a heavy steam roller for the repair of the streets, which crushed by its weight the gas mains, and so caused an escape of gas into the sewer, which resulted in an explosion whereby the plaintiff was injured. The gas mains were laid at such a depth as to be unhurt by ordinary traffic.

Held—that the defendants had been guilty of negligence in using such a steam roller.

Driscoll *v.* Poplar Board of Works, (1898) [62 J. P. 40; 14 T. L. R. 99—Div. Ct.

71. *Negligence of Contractor—Liability of Local Authority.*]—Where a local authority employs a contractor to repair a road, and he leaves a heap of materials lying on it without fence or lights, the authority are liable to persons who suffer injury therefrom.

In such a case the negligence of the contractor is not "casual or collateral negligence," but negligence in doing the thing contracted for, and the authority cannot shelter themselves behind the contractor.

Clements *v.* Tyrone County Council, [1905] [2 Ir. R. 542—C. A.

72. *Non-repair—Accident causing Damage—Misfeasance—Non-feasance—Liability of Public Authority—Liverpool Improvement Act*, 1846 (9 & 10 Vict. *c.* cxxvii.), *ss.* 36, 37, 38 *and* 58.]—By the Liverpool Improvement Act, 1846, s. 36, the corporation of Liverpool were declared to be the surveyors of highways for the borough. By sect. 37 the control of the streets was vested in the corporation. By sect. 38 the corporation were empowered to form or pave streets with such materials as they should think fit. By sect. 58 it was enacted that the corporation should be liable to be indicted at common law for the want of sufficient repair of any highway in the borough in the same manner as any person or persons liable to the repair of such highways was or were before the passing of the Act.

The plaintiff's horse and trap were being driven along a public highway in Liverpool, when the horse was injured owing to a hole having been formed in the roadway. There was no evidence of misfeasance on the part of the defendants. The want of repair was admitted.

Held—that the liability which was imposed by the Act of 1846 on the defendants was a liability of the same nature as that placed on the inhabitants of a parish by the common law, which could only be enforced by the Crown by means of an indictment, and that the defendants were not liable to be sued by an individual for damages for non-feasance.

Hartnell v. *Ryde Commissioners* ((1863) 4 B. & S. 361) was decided upon a special statute, and, since *Cowley* v. *Newmarket Local Board* ([1892] A. C. 345; 62 L. J. Q. B. 65; 56 J. P. 805; 67 L. T. 486—H. L.), it is no longer law, so far as it lays down any general principle which is not consistent with the decision in that case.

Maguire *v.* Liverpool Corporation, [1905] [1 K. B. 767; 74 L. J. K. B. 369; 69 J. P. 153; 53 W. R. 449; 3 L. G. R. 485; 21 T. L. R. 278; 92 L. T. 374—C. A.

73. *Non-repair—Road paved with Setts on Asphalte Bed a long Time ago—Pitch oozing through Setts, causing Damage—Misfeasance or Non-feasance.*]—An action was brought against the defendants, a highway authority, to recover damages for injury sustained by the plaintiff in consequence of the defendants negligently placing certain pitch or tar on a road, and negligently allowing the same to remain for an unreasonable time, whereby the road became uneven and dangerous; alternatively for damages

Repair and Maintenance of Highways—*Continued.*

for a nuisance. The evidence showed that the injuries were caused by the plaintiff's mare slipping on a pool of pitch or tar, which had in consequence of the hot weather oozed up between the setts of wood or stone from the asphalte beneath. The road had been constructed a long time before the accident. A county court judge held that there was no evidence to go to the jury of misfeasance on the part of the defendants, and, as they were not liable in damages for mere omission to repair, he non-suited the plaintiff.

HELD—that as no evidence was given before the county court judge that the road had been improperly constructed, he was right in concluding that the accident did not arise from the misfeasance of the defendants.

HOLLOWAY *v.* BIRMINGHAM CORPORATION, [(1905) 69 J. P. 358 ; 3 L. G. R. 878—Div. Ct.

74. *Removal of Protection from Danger to Public—Flooding of Road—Liability of Highway Authority.*]—The only liability on a highway authority is for acts of misfeasance, and there is no liability for acts of non-feasance.

In 1877 there was a stream, afterwards a backwater, by the side of a road, and in flood time the stream overflowed the road. This was represented to the district authority as a danger to the public, and a post and rail fence was put up by the highway authority to protect persons going along the road in time of flood. The defendants' predecessors put up the fence, and it existed for twenty-two years ; and then the defendants, on the report of their surveyor, took it down on January 26th, 1900, and did nothing else up to February 16th, at which time there was a flood which covered the road, and the deceased, driving along the road, drove into the ditch and was drowned.

HELD—that the death of the man was caused by the defendants doing that which was a misfeasance—that is, by their act in pulling down the old fence.

WHYLER *v.* BINGHAM RURAL DISTRICT [COUNCIL, [1901] 1 K. B. 45 ; 70 L. J. K. B. 207 ; 64 J. P. 77 ; 83 L. T. 652 ; 17 T. L. R. 23—C. A.

(h) Mode of Repair.

75. *Mandatory Order — Retaining Walls — Main Road—Duty to repair Walls—Mandatory Injunction — Declaration — Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 11.—The liability of a highway authority is general, *i.e.*, merely to maintain and repair the highway ; they must select and adopt proper methods of performing their duty ; the Court will not prescribe methods, but merely consider the result.

Quære, whether any body of persons other than the inhabitants of a parish are under any legal liability for not repairing highways.

The owner of land, through which a main road ran, brought an action against the county council claiming a declaration that the council were liable to repair the retaining walls on either side of such road ; he also asked for a mandatory injunction ordering the council to do any necessary repairs to such walls.

HELD—that the Court could not consider whether the repair of these walls (or any other particular work) was necessary for the proper maintenance of the road, and that it would be contrary to practice to grant a mandatory injunction to do repairs, even if the council were liable to repair the walls.

ATTORNEY-GENERAL *v.* STAFFORDSHIRE [COUNTY COUNCIL, [1905] 1 Ch. 336 ; 74 L. J. Ch. 153 ; 69 J. P. 97 ; 53 W. R. 312 ; 92 L. T. 288 ; 21 T. L. R. 139 ; 3 L. G. R. 379—Joyce, J.

76. *Paring with Tarmac—Motor Car Trials—Improvement of Road—Whether Expenditure Lawful*—Bonâ fide *Exercise of Statutory Powers—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 149, 246—*Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *s.* 141.]—The Brighton Corporation paved with "tarmac" two roads upon which the Automobile Club held motor races. The Divisional Court granted a writ of *certiorari* to bring up and quash resolutions of the corporation for the payment of the expenses of such paving.

On appeal : HELD—that the decision should be reversed, the corporation having *bonâ fide* arrived at the conclusion that the work would improve the highway for use by the inhabitants of, and visitors to, the borough, although the occasion of the work was to enable the Automobile Club to hold their meeting for motor car speed trials at Brighton.

Decision of Div. Ct. (70 J. P. 377 ; 54 W. R. 539 ; 95 L. T. 391 ; 22 T. L. R. 497 ; 4 L. G. R. 1104) reversed.

R. *v.* BRIGHTON CORPORATION, (1907) 71 J. P. [265 ; 96 L. T. 762 ; 23 T. L. R. 440 ; 5 L. G. R. 584—C. A.

77. *Sea Wall—Esplanade—Works necessary for Protection of Road—Annual Payment—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 11, *sub-s.* 2.]—A local authority under an obligation to keep up a road is chargeable with the cost of works necessary for the preservation of the road, even though they may not actually form part of it, such as a sea wall and groynes necessary to prevent a road running along the sea shore from being periodically injured by inroads of the sea.

The fact that a footpath along the top of such sea wall is, besides being part of the highway, used as a promenade or esplanade for the purposes of pleasure does not affect the liability to repair.

The words "annual payment towards the costs of maintenance and repair" in sect. 11, sub-sect. 2, of the Local Government Act, 1888, mean a payment to be made annually in respect of the expenditure of the particular year, not a fixed sum to be arrived at by taking the average expenditure over a series of years.

Judgment of the Court of Appeal, *sub nom.*

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Kent County Council v. *Sandgate Urban District Council* ((1897) 61 J. P. 517; 13 T. L. R. 476) reversed.

SANDGATE URBAN DISTRICT COUNCIL *v.* KENT [COUNTY COUNCIL, (1899) 79 L. T. 425; 15 T. L. R. 59—H. L. (E.).

78. *Use of Steam Roller—Statutable Rights—Injury to Gas Pipes in the Exercise of such Rights.*]—The plaintiffs, a gas company, laid down pipes under the surface of certain roads, as they were entitled by statute to do, in order to supply gas for public and private purposes. The defendants were charged by statute with the duty of maintaining the roads in the county, and were for that purpose authorised to purchase or hire a steam roller. The defendants used steam rollers for the repair of the roads, but the rollers were so heavy as to frequently injure the plaintiffs' pipes, though they were laid at a depth sufficient to be safe from injury by the ordinary traffic and ordinary mode of repair, if such rollers had not been used.

HELD—that the plaintiffs were entitled to an injunction to restrain the defendants from using steam rollers in such a way as to injure the pipes of the plaintiffs then properly laid under the roads, regard being had to what, at the time of the laying of the pipes, was the ordinary traffic, and the reasonable means of repairing the roads.

Gas Light and Coke Co. v. *St. Mary Abbotts Vestry* ((1885) 15 Q. B. D. 1; 54 L. J. Q. B. 414; 49 J. P. 469; 33 W. R. 892; 53 L. T. 457—C. A.) followed.

ALLIANCE AND DUBLIN CONSUMERS GAS CO. [*v.* DUBLIN COUNTY COUNCIL, [1901] 1 Ir. R. 492—C. A.

(i) Ratione Tenuræ.

79. *Exemption from Rates—Bargain relieving from Repair—Nominal Sum paid in Discharge of Liability—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 50), *s.* 33—*Highway Act*, 1862 (25 & 26 Vict. *c.* 61), *s.* 35.]—By sect. 35 of the Highway Act, 1862, a person liable to repair a highway *ratione tenuræ* was enabled by a process described in the section to apply for an order relieving him from the responsibility of repairing in future; and the justices were authorised in this form of procedure to make an order by which they fixed a certain sum to be paid by the person so applying in full discharge of all claims thereafter in respect of the repair and maintenance of such highway. Justices fixed a merely nominal sum, and for a considerable time the order thus made was pursued.

HELD—that there was no reason, in the absence of fraud, why the bargain thus made under statutory authority was to be set aside simply because the magistrates did not fix, as they should have done, a capital sum such as in their judgment would have been adequate payment in respect of the liability of which they were relieving the proprietor of the land.

Decision of the Court of Appeal ([1899] 1 Q. B. 1026; 68 L. J. Q. B. 640; 63 J. P. 373; 47 W. R. 581; 80 L. T. 587; 15 T. L. R. 346) affirmed.

DALTON OVERSEERS *v.* NORTH EASTERN [RY. CO., [1900] A. C. 345; 69 L. J. Q. B. 650; 64 J. P. 612; 82 L. T. 693; 16 T. L. R. 419—H. L. (E.).

80. *"Legal Exemption" from Highway Rate—No Evidence of actual Exemption—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 50), *s.* 33.]—If an owner of land did not pay highway rates in respect thereof before 1835, the fact that he, as owner of such land, is under an obligation to repair some highway *ratione tenuræ* may be sufficient ground for treating such exemption as a legal one within the meaning of sect. 33 of the Highway Act, 1835. But an obligation to repair some road in the district *ratione tenuræ* is in itself no evidence of a "legal exemption," unless the owner proves also that he was, in respect of the land in question, actually exempt from statute duty, or rates in lieu thereof, before 1835.

The burden of proof is on him, at any rate if the rating authority are *bonâ fide* unable to give any evidence on the point.

On an appeal to sessions against a highway rate, F. proved that he was liable to repair two miles of road *ratione tenuræ*; the oldest rate books in existence showed that since 1862 he had also paid highway rates in respect of the property liable for such repairs; and he gave no evidence of exemption in fact before that date. Sessions, nevertheless, held (67 J. P. 36) that he was "legally exempt."

HELD—that Sessions had decided wrongly.

Heath v. *Weaverham Overseers* ([1894] 2 Q. B. 184; 63 L. J. M. C. 187; 58 J. P. 557; 42 W. R. 478; 70 L. T. 729—Div. Ct.) discussed.

BINGLEY URBAN DISTRICT COUNCIL *v.* FERRAND, [1903] 2 K. B. 445; 72 L. J. K. B. 734; 67 J. P. 370; 52 W. R. 79; 89 L. T. 333; 19 T. L. R. 592; 1 L. G. R. 845—Div. Ct.

81. *Owner or occupier liable—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 25, *sub-s.* 2.]—Sect. 25, sub-sect. 2, of the Local Government Act, 1894, provides that, "where a highway repairable *ratione tenuræ* appears . . . not to be in proper repair, and the person liable to repair the same fails . . . to place it in proper repair, the district council may place the highway in proper repair, and recover from the person liable to repair the highway the necessary expenses of so doing."

HELD, that the owner of the lands is not "the person liable to repair" within the meaning of this sub-section, and that, therefore, when the district council place in repair a highway repairable *ratione tenuræ*, they cannot, under this sub-section, recover the expenses of so doing from the owner, as the liability for such repairs is—as it was before the passing of the Act—upon the occupier and not upon the owner.

CUCKFIELD RURAL DISTRICT COUNCIL *v.* [GORING, [1898] 1 Q. B. 865; 62 J. P. 358; 67 L. J. Q. B. 539; 78 L. T. 530; 14 T. L. R. 362; 46 W. R. 541—Div. Ct.

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82. *Owner or Occupier Liable—Recovery of Expenses incurred by District Council in effecting Repairs—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 25, *sub-s.* 2.]—At the time the Local Government Act, 1894, was passed, it was well-settled law that an owner of lands who is not the occupier of them could not be charged *ratione tenuræ* with the repair of a highway. The occupier alone was the person liable. The Local Government Act, 1894, s. 25, sub-s. 2, enacts that: "Where a highway repairable *ratione tenuræ* appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair the same fails when requested so to do by the district council to place it in proper repair, the district council may place the highway in proper repair, and recover from the person liable to repair the highway the necessary expenses of so doing."

HELD—that the Local Government Act, 1894, in no way altered the incidence of liability, and that the owner of lands which are in the possession of his tenants is not the person liable for the expenses of repairing the highway within the meaning of the sub-section.

Cuckfield Rural District Council v. *Goring* ([1898] 1 Q. B. 865; 67 L. J. Q. B. 539; 62 J. P. 358; 46 W. R. 541; 78 L. T. 530; 14 T. L. R. 362—Div. Ct., *supra*) approved.

DAVENTRY RURAL DISTRICT COUNCIL *v.* [PARKER, [1900] 1 Q. B. 1: 69 L. J. Q. B. 105; 48 W. R. 68; 81 L. T. 403; 16 T. L. R. 5—C. A.

83. *Stile and Public Footpath—Evidence.*]—The defendant was the yearly tenant of a farm through which there was a public pathway. At one point in its course there was a stone stile with stone steps, some of which had been worn away by time and use. In crossing this stile the plaintiff slipped on one of the steps and broke his leg.

It was proved on behalf of the plaintiff that the defendant's predecessor in possession, who was also owner, had done repairs to the path and stile, and there was also evidence that previous occupiers had done some repairs, and the defendant also had done something, but none of the repairs were considerable. There was no evidence that the parish had ever repaired or required any occupier to repair.

HELD—that a few trifling repairs for his own benefit did not impose upon the defendant the duty of continuing such repair for the benefit of others, and that there was not sufficient evidence to warrant the conclusion that the defendant was liable to repair *ratione tenuræ*.

Quære, if an action will lie at the instance of a private person against one liable to repair *ratione tenuræ* in respect of non-repair.

RUNDLE *v.* HEARLE, [1898] 2 Q. B. 83; 67 [L. J. Q. B. 741; 78 L. T. 561; 14 T. L. R. 440; 46 W. R. 619—Div. Ct.

84. *Writ* ad quod damnum—*Inquisition—Loss of and presumption of King's Licence—Stopping up old Highway—Substitution of new Road—Change in Character of Road—Obligations imposed on Grantee—Repair of new Road—Liability to repair charged on Alienees—Several Owners and Occupiers—Each liable to whole Charge—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 25, *sub-s.* 2.]—The plaintiffs claimed under sect. 25, sub-sect. 2, of the Local Government Act, 1894, the amount of expenses incurred by them in the repair of a road within their district called Ember Lane, which was the new road set out pursuant to an inquisition of 1773 taken by G. O. under a writ of *ad quod damnum*. Although the writ and inquisition and return were proved by the production of records of the quarter sessions of Surrey, no trace could be found of any licence by the king, which in the ordinary course should have been granted in the terms of the findings of the jury upon the inquisition. If any such licence was granted it appeared to have been lost. There was no doubt that the inquisition was acted upon; the old road was stopped up, and the new road was made, and had ever since been used as a highway except that it had become a *cul de sac* for carts and carriages. There was also evidence that the new road was never repaired by the inhabitants or by any public authority. There was evidence that such repair as had from time to time been done was done by owners of lands forming part of the lands referred to in the inquisition as the lands of G. O.

HELD—that it must be presumed that a licence was granted by the king, and that the old road was stopped up and Ember Lane set out and substituted for it under such licence, and that the licence was granted in the terms and subject to the conditions of the inquisition, as it was impossible to suppose that the Crown would override the rights of the public by granting a licence which did not give to the public the protection required by the inquisition, and that G. O. was allowed to stop up the road on condition that he and his heirs should keep the substituted road, Ember Lane, in repair: and that the fact that the road had become a *cul de sac* for carts and carriages had not taken away the rights of the public to use it so far as it might be found convenient to do so for carts, carriages, and horses.

HELD also—that as G. O., his heirs and assigns, accepted and acted on the grant by stopping up the old highway, this was sufficient to establish an obligation *ratione tenuræ* to repair the new road made in place of the old road so stopped up; and that it was immaterial whether such grant was made and accepted before or after the reign of King Richard I.

The defendant admitted that he was the owner and occupier of Ember Court from September 29th, 1899, to October 24th, 1900, and that Ember Court formed part of the lands formerly belonging to G. O., and that the expenses in question were incurred about August, 1900. But it was true that some part of the lands of G. O. referred to in the inquisition never belonged to the defendant.

HELD—that the liability to repair was charged upon the heirs and assigns of the lands constituting the Ember Court estate of G. O., and

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that the defendant, being one of several alienees, was liable to the whole charge.

The principle of *Reg.* v. *Bucklugh* (*Duchess*) ((1705) 1 Salk. 357) followed.

Esher and Dittons Urban District [Council *v.* Marks, (1902) 71 L. J. K. B. 309; 66 J. P. 243; 50 W. R. 330; 86 L. T. 222; 18 T. L. R. 333—Walton, J.

VIII. EXTRAORDINARY TRAFFIC.

(a) Contributory Negligence of Authority.

85. *Locomotives—Public Nuisance—Damage to Road—Alleged Neglect of Authority to Repair—Locomotive Act*, 1861 (24 & 25 Vict. *c.* 70), *s.* 13.]—An action was brought by the Attorney-General on the relation of a highway authority for an injunction to restrain the defendant from using any locomotive on a certain highway in such a way as by damage to, or obstruction of, the said highway to cause a public nuisance. Upon an application for an interim injunction, until the trial of the action, affidavits were filed stating that the defendant had by the use of traction engines and trucks rendered the highway in question dangerous and impassable for ordinary traffic, and the judge in chambers granted an interim injunction in the above terms.

Held—that the injunction was rightly granted and that it was no answer on the part of the defendant to say that the highway authority had failed to keep the highway in a proper state of repair, and that, but for such neglect, the traffic would not have caused a nuisance.

Attorney-General (on the relation of [the Monmouthshire County Council) and the Monmouthshire County Council *v.* Scott, [1904] 1 K. B. 404; 2 L. G. R. 461; 73 L. J. K. B. 196; 68 J. P. 137; 89 L. T. 726—C. A.

At the trial of the action the Court found as facts that the haulage by traction-engine was more economical than by horses and carts, that the prohibition of such haulage would be a trade loss to the defendant, and that the highway had become at the date of the writ so incommodious for traffic as to render necessary great care by the public. The Court further found that this condition of the highway was not primarily caused by the defendant's traction traffic, but partly by that traffic, partly by the ordinary traffic, partly by the weather, and chiefly by the failure of the highway authority to maintain the highway in a fit state to bear the traffic (including the traction traffic), which was not more unusual or onerous than they should have expected to come upon it. Since the date of the writ the reconstruction of the road had been nearly completed, and the Court found that as soon as this should be completed there would be no risk of the defendant's traction-engine rendering the highway so incommodious as to constitute a public nuisance. Upon these findings the Court refused to grant a perpetual injunction.

The Court of Appeal declined to interfere with the decision.

Decision of Jelf, J. (68 J. P. 502; 20 T. L. R. 630) affirmed.

Attorney-General and Monmouthshire [County Council *v.* Scott, [1905] 2 K. B. 160; 74 L. J. K. B. 803; 69 J. P. 109; 93 L. T. 249; 21 T. L. R. 211; 3 L. G. R. 272—C. A.

86. *State of Highway—Pressure on Road of Vehicles per Square Inch—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 Vict. *c.* 29), *s.* 12.]—The principle of contributory negligence has no application in an action under sect. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by sect. 12 of the Locomotives Act, 1898, to recover extraordinary expenses of repairing a highway from a person by or in consequence of whose orders extraordinary traffic of excessive weight has been conducted thereon; but in considering the amount of the damage caused by extraordinary traffic or excessive weight the state of the highway as maintained by the highway authority is material.

The fact that the pressure per square inch of the wheels of the vehicles alleged to be of excessive weight is less than that of the pressure per square inch of the ordinary traffic or weight on the road in question, although it is material, does not prove that the vehicles are not of excessive weight.

Accordingly, in an action under the said sections, where it appeared that the county court judge had been influenced by the principle of contributory negligence, and by the said argument as to relative pressures, the action was sent down to the county court for a new trial.

Semble (per Wills, J.), in estimating ordinary traffic or weight for the purpose of ascertaining what is extraordinary traffic or excessive weight on a highway, more than one year's traffic should be taken into consideration, as that year's traffic may be extraordinary.

Decision of county court judge (68 J. P. 16) reversed.

Hemsworth Rural District Council *v.* [Micklethwaite, (1904) 68 J. P. 345; 2 L. G. R. 1084—Div. Ct.

(b) Liability for Damage.

87. *Additional Expenses — Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23.]—The plaintiff council brought an action to recover expenses incurred in repairing damage to certain highways caused by the excessive weight and extraordinary traffic of the defendant. The highways had originally been used for agricultural traffic, butchers' and bakers' carts, and other light vehicles. The defendant carried bricks over the highways from his brickworks by means of traction-engines, and had been using a traction-engine for this purpose for some years past. During the years 1900, 1901, and 1902, the defendant had made payments in respect of the extra expense incurred in repairing

Extraordinary Traffic—*Continued.*

the highways in consequence of his extraordinary traffic during those years. Latterly the state of the highways required a large amount of flints and material for their repair. The plaintiff council claimed in this action for extraordinary expenses incurred during the years 1903, 1904.

HELD—the defendant was liable.

HIGH WYCOMBE RURAL DISTRICT COUNCIL [*v.* PALMER, (1905) 69 J. P. 167 — County Court.

88. *Breaking Water Mains—Excessive Weight — Liability of Owner of Locomotive.*] — The plaintiffs were the owners of the waterworks at Chichester, and as such owned the water mains under the roads. The mains were laid many years ago in soil without cement, and at a depth which left about twenty inches between the crown of the main and the crown of the road. A traction engine, weighing ten tons and upwards, in passing along a road under which the mains were laid, broke them. The engine was, by reason of its weight, likely to damage pipes constructed and laid as the pipes in question were laid. There was no negligence or want of reasonable skill or care on the part of the owner of the engine or his servants as regards either the construction or the user of the engine, the mains being broken solely by the great weight of the engine. The mains were at the date when they were broken sufficiently strong and well laid to withstand the pressure of the ordinary traffic of the district, and there was no neglect by the plaintiffs in their duty as the road authority.

HELD—that upon these facts the plaintiffs were entitled to recover from the owner of the engine in respect of the damage to the mains, since the injury was caused by the unnecessary or excessive weight of the engine.

CHICHESTER CORPORATION *v.* FOSTER, [1906] [1 K. B. 167; 75 L. J. K. B. 33; 70 J. P. 73; 54 W. R. 199; 93 L. T. 750; 22 T. L. R. 18; 4 L. G. R. 205—Div. Ct.

89. *Building Materials hauled by Traction Engines on Agricultural Roads — Materials brought by Contractor under Contract with Water Company to build Reservoir in four Months — Method and Route of Haulage not specified in Contract—Whether brought "in consequence of the Order of" the Water Company.*]—The defendants entered into a contract with A. that he should construct a reservoir for them in four months. The contract did not specify the method or route of haulage to be employed in bringing the requisite materials to the site. A. for the space of eight months employed traction engines and trucks over second and third class district roads to bring the materials from the railway station to the reservoir, a distance of about a mile and a quarter. In an action for the extraordinary expenses of repairing the roads alleged to have been damaged by extraordinary traffic or excessive weight—the traction engines and trucks—conducted thereon by or in consequence of the order of the defendants, the defendants' engineer, called by the plaintiffs, said: "I thought the contractor would lay a light railway across the fields from the goods station without going on the roads at all. That would be feasible, as also cart haulage." At the close of the plaintiffs' case the county court judge gave judgment for the defendants, holding that there was no evidence that the traffic had been conducted on these roads in consequence of the order of the defendants.

HELD—that there was such evidence.

REIGATE RURAL DISTRICT COUNCIL *v.* SUTTON [DISTRICT WATER CO., (1907) 71 J. P. 405; 5 L. G. R. 917—Div. Ct.

90. *Carriage of Timber grown in the Neighbourhood—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23.]—The principal industry in W. and the neighbourhood is the manufacture of chairs, and the defendant was proved to have hauled by means of a traction engine and trucks a quantity of timber grown in the neighbourhood for this industry. He hauled about sixteen truck loads, each load weighing about three tons. Traction engines were in common use in the district for farm purposes, and for purposes of trade, especially on main roads; but it was not proved that any traction engine other than that of the defendant had been on the highways in question, which were not main roads. Damage was done to the highways by the traction engine and trucks, in repairing which the local authority incurred extra expense.

HELD, by the county court judge—that the defendant was liable on the ground both of "excessive weight" and "extraordinary traffic."

WYCOMBE RURAL DISTRICT COUNCIL *v.* SMITH, [(1903) 67 J. P. 75—Sir A. Marten, K.C.—County Court.

91. *Contractor and Sub-contractor—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23.]—P., a contractor, undertook to build a lunatic asylum for the visiting committee of the county council of Dorset, and entered into a sub-contract with T. to haul the materials necessary for the work from two railway stations. T. was to supply the horses, carts, and men to load and unload the materials, and T. also was only to use such roads as were pointed out by P. T. was not to use any traction engines or carts which P.'s foreman did not certify to be suitable for the work. In the contract between P. and the visiting committee, there was a clause by which P. undertook to indemnify the visiting committee against all claims for damage done by extraordinary traffic. T. also indemnified P. by a similar clause. Extraordinary expenses having been incurred by the highway authority by reason of damage caused by extraordinary traffic in the haulage of the materials:—

HELD—that P. was not liable to pay the damage for "extraordinary traffic" as being the "person by whose order such weight or traffic had been conducted."

PETHICK BROTHERS *v.* DORSET COUNTY [COUNCIL, (1898) 62 J. P. 579; 14 T. L. R. 548—C. A.

Extraordinary Traffic —*Continued.*

92. *Heavy fall of Timber—Traction Engine—Limitation—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 Vict. *c.* 29), *s.* 12 (1) (b).]—Large quantities of timber had been felled on the B. estate, and between the early part of 1900 and March 31st, 1902, the timber felled had been sold to the defendants by separate and successive contracts. The defendants had carried the timber so purchased to a railway station over two roads, which the plaintiff council were liable to repair, and which were ordinary country roads intended to bear ordinary country traffic; the haulage of the timber was for the most part done by means of a traction engine. The plaintiffs, on August 4th, 1902, brought this action under sect. 23 of the Highways and Locomotives (Amendment) Act, 1878, and sect. 12 of the Locomotives Act, 1898, to recover the extraordinary expenses incurred by them on the two roads by reason of the damage caused by the above traffic.

HELD—that the traffic was extraordinary traffic within the meaning of sect. 23 of the Highways and Locomotives (Amendment) Act, 1878.

HELD further—that the felling of timber on the B. estate and its haulage thence by the defendants did not constitute a "particular work" within the meaning of sect. 12 (1) (*b*) of the Locomotives Act, 1898; and that the plaintiffs were debarred by that sub-section from recovering expenses incurred by reason of any damage done to the roads by the defendants' traffic before August 4th, 1901.

NORFOLK COUNTY COUNCIL *v.* GREEN AND [ANOTHER, (1904) 68 J. P. 223; 90 L. T. 451; 2 L. G. R. 652—Walton, J.

93. *Injury to Pipes by Steam Traction Engine—Liability of Owner—Locomotives Acts*, 1861, 1865 (24 & 25 Vict. *c.* 70; 28 & 29 Vict. *c.* 83).]—The defendant was the owner of a steam traction engine. Whilst being driven by the defendant's servants along the streets of K., it injured the water and sewer pipes of the plaintiffs (the urban sanitary authority) laid beneath the street. It was admitted that there was no negligence in the management of the machine, and that the engine was constructed in conformity with the Locomotives Acts, 1861 and 1865. It was, however, found as a fact that the plaintiffs' pipes were laid at a depth below the surface of the streets sufficient to protect them from injury by ordinary traffic, but not sufficient to protect them from injury by the defendant's traction engine. The plaintiffs sued the defendant for damages in the county court; and on case stated by the judge of assize:—

HELD—that the defendant was liable upon the ground that a traction engine being exceptionally calculated to inflict such damage, and injury having resulted from its use that would not have resulted from ordinary traffic, the defendant was liable in damages for such injury, and that the Locomotive Acts did not restrict his liability.

ARMAGH UNION GUARDIANS *v.* BELL, [1900] [2 Ir. R. 371—Q. B. Div.

94. *Person "by or in consequence of whose order" such weight has been conducted—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 Vict. *c.* 29), *s.* 12.]—The defendant was about to build a house in the plaintiffs' district. He gave an order to a brick company for 250,000 bricks to be delivered on the land where the house was to stand. The company, without the knowledge of the defendant, made an arrangement with a contractor for the delivery of the bricks by means of a traction-engine and trucks, and it was admitted that the roads had been damaged by the use of the excessively heavy traction engine and trucks, and would not have been damaged if the bricks had been delivered in carts in the ordinary way. The defendant gave no instructions as to the manner in which the bricks were to be delivered, and during the time of their delivery he was away. The plaintiffs claimed the amount of the extraordinary expenses incurred by them in repairing the roads.

HELD—that the county court judge was not wrong in holding that the damage to the roads by the excessive weight was not in consequence of any order given by the defendant, but was in consequence of the vendors of the bricks having thought fit to choose this particular method of fulfilling their contract with the defendant; and that the defendant was not, within sect. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by sect. 12 of the Locomotives Act, 1898, the person "by or in consequence of whose order" such weight had been conducted over the roads.

EGHAM RURAL DISTRICT COUNCIL *v.* GORDON, [1902] 2 K. B. 120; 71 L. J. K. B. 523; 66 J. P. 759; 50 W. R. 703; 87 L. T. 31; 18 T. L. R. 515—Div. Ct.

(c) Limitation of Action.

95. *Action against Public Authority—Damage done by independent Contractor—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 Vict. *c.* 29), *s.* 12—*Public Authorities Protection Act*, 1893 (56 & 57 Vict. *c.* 61), *s.* 1.]—By the Locomotives Act, 1898, s. 12 (1) (*b*), proceedings for the recovery of any expenses of extraordinary traffic under the Highways and Locomotives Act, 1878, shall be commenced within twelve months of the time when the damage was done, or, if damage is in consequence of particular building contract or work extending over long period, within six months of completion of contract or work.

Damage to a road, which was vested in the plaintiffs, was caused by extraordinary traffic brought upon it by a contractor who was employed by the defendants, a local authority (under a contract which expired March 31st, 1903), to haul stone to be used for the purpose of widening a highway, the widening being carried out by the defendants, the works in connection therewith extending over a period exceeding eighteen months, and being still in progress at date of action. The plaintiffs brought an action to recover the expenses incurred in repairing the

Extraordinary Traffic—*Continued.*

road, the alleged damage being done between January 19th and March 24th, 1903. The writ was issued on February 11th, 1904.

HELD—(1) that the Public Authorities Protection Act, 1893, is not, so far as actions against public authorities are concerned, repealed by the Locomotives Act, 1898; but that, the damage done having been done by an independent contractor and not by a servant or agent of the defendants, the Act of 1893 had no application.

(2) that, under the circumstances of the case, the "work" of which the damage was the consequence was not the scheme of improvement, but was the work done in pursuance of the contract for the haulage of the stone.

(3) that the second part of sect. 12 (*b*) of the Act of 1898 was intended to give an extended time within which an action may be brought, and not to curtail the limitation specified in the earlier part of the sub-section. And

(4) that therefore the action was maintainable in respect of the damage caused to the road within twelve months before action brought.

Decision of Darling, J. (68 J. P. 590; 91 L. T. 563) reversed.

KENT COUNTY COUNCIL *v.* FOLKESTONE [CORPORATION, [1905] 1 K. B. 620; 74 L. J. K. B. 353; 69 J. P. 125; 53 W. R. 371; 92 L. T. 309; 3 L. G. R. 438; 21 T. L. R. 269—C. A.

96. "*Completion of Contract*"—*Highways and Locomotives* (*Amendment*) *Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 Vict. *c.* 29), *s.* 12 (1).]—By the Locomotives Act, 1898, s. 12 (1) (*a*), extraordinary expenses incurred by a road authority in repairing a highway by reason of damage caused by extraordinary traffic thereon, are recoverable by an action in the High Court or county court, and by sub-sect. (1) (*b*) proceedings for the recovery of such expenses "shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work."

It being conceded that, where the damage was caused by work done under a building contract or work extending over a long period, an action might be commenced either within twelve months of the doing of the damage or within six months after the completion of the contract or work (see *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620; 74 L. J. K. B. 353; 69 J. P. 125; 53 W. R. 371; 92 L. T. 309; 21 T. L. R. 269; 3 L. G. R. 438—C. A., *supra*):—

HELD—that "the completion of the contract" meant completion so far as it related to the work causing the damage which gave rise to the action.

Therefore where the damage was caused by the haulage of pipes in connection with the construction of an aqueduct under a contract which provided that the entire work should be at the risk of the contractor for twelve months after completion, and the action was commenced during the currency of the period of maintenance, but more than six months after the completion of the work:

HELD, also, even assuming that this contract was a building contract, that the six months began to run from the completion of the work, and that the action was out of time, except so far as the damage was done within twelve months of the issue of the writ.

LANCASTER RURAL DISTRICT COUNCIL *v.* [FISHER AND LE FANU, [1907] 2 K. B. 517; 76 L. J. K. B. 1070; 97 L. T. 560; 71 J. P. 401; 23 T. L. R. 614; 5 L. G. R. 1223—C. A.

97. *Contractor and Employer—Person "by or in consequence of whose Order" Traffic is Conducted—Surveyor's Certificate—Highways and Locomotives* (*Amendment*) *Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 Vict. *c.* 29), *s.* 12.]—The defendants owned land in the plaintiffs' district, on which they intended to erect a lunatic asylum, and entered into contracts with certain firms for the alteration and extension of a house standing thereon. The materials for the work were carted over certain highways in the plaintiffs' district, but did not become the property of the defendants until worked into the structure. The defendants never gave any orders as to the particular route the carting was to follow. The traffic amounted to extraordinary traffic, and damage was done to the plaintiffs' highways. The bulk of this traffic took place under two large contracts, both of which were entered into before the date of the commencement of the Locomotives Act, 1898, but neither was completed till after that date. One contract was completed more than six months before the writ in this action was issued.

HELD — that (1) the defendants were the persons by or in consequence of whose order the traffic was conducted, and that therefore they were liable to make good the damage to the highways caused thereby under sect. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by sect. 12 of the Locomotives Act, 1898. (2) Inasmuch as it is not the giving of the order which creates the liability, but the doing of the damage, the defendants were liable if and to the extent that damage was done after the commencement of the Act although the contract which caused it was entered into before that date. (3) Where there are several contracts under which traffic is being conducted, proceedings to recover extraordinary traffic expenses must be commenced within six months of the date of the completion of the particular contract under which the damage sued for was done. (4) A surveyor's certificate is sufficient if it makes it clear that extraordinary expenses have been incurred, although it does not show on its face that in making it regard has been had to "the average expense of repairing highways in the neighbourhood."

EPSOM URBAN DISTRICT COUNCIL *v.* LONDON [COUNTY COUNCIL, [1900] 2 Q. B. 751; 69 L. J. Q. B. 933; 64 J. P. 727; 83 L. T. 284; 16 T. L. R. 571; 49 W. R. 302—Bigham, J.

Extraordinary Traffic—*Continued.*

98. *Steam Haulage of Road-mending Materials conducted under Contract for One Year*—"*Particular Building Contract*"—"*Work Extending over a long Period*"—*Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 Vict. *c.* 29), *s.* 12 (1) (*b*).]—By sect. 12, sub-sect. 1 (*b*), of the Locomotives Act, 1898, proceedings for the recovery of extraordinary expenses "shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work." Contractors agreed with the defendant corporation to deliver stones for the making up of a road for a period of twelve months. The stones were hauled by traction engines, and caused damage to the roads in the district of the plaintiff local authority. In an action to recover the extraordinary expenses caused thereby :—

Held—that "work" meant some particular work to be done, and did not include a contract to deliver materials ; and that therefore the plaintiffs could only recover for the damage done during the twelve months before action.

Held, also—that the words "by or in consequence of whose order" in sect. 12, sub-sect. 1 (*c*), of the Act meant by or in consequence of whose order the traffic had been in fact conducted, whether it was or was not the necessary consequence of the order.

Decision of Walton, J. ([1907] 2 K. B. 39 ; 76 L. J. K. B. 599 ; 71 J. P. 166 ; 97 L. T. 173 ; 5 L. G. R. 453) varied.

Bromley Rural District Council v. Croydon Corporation, (1907) 24 T. L. R. 132—C. A.

(d) Practice.

99. *Action in High Court—Amount sued for over, but recovered under, £250—Costs, whether on High Court or County Court Scale—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 Vict. *c.* 29), *s.* 12 (1) (a).]—Section 12 (1) (*a*) of the Locomotives Act, 1898, provides that expenses incurred in repairing a highway by reason of damage caused by extraordinary traffic may be recovered if not exceeding £250 in the county court and if exceeding that sum in the High Court.

The plaintiffs brought an action in the High Court against the defendant to recover a sum exceeding £250 for expenses incurred in repairing a highway under the above section. The action was tried with a jury, who assessed the damages at £60. The learned judge entered judgment for that amount with costs, and certified that the action was properly brought in the High Court.

Held—that the High Court had jurisdiction to entertain the action and that the plaintiffs were entitled to costs upon the High Court scale.

Quære, whether such an action is one of tort within the meaning of sect. 116 of the County Courts Act.

Chesterfield Rural District Council *v.* [Newton and Others, [1904] 1 K. B. 62 ; 73 L. J. K. B. 24 ; 68 J. P. 33 ; 52 W. R. 129 ; 89 L. T. 466 ; 20 T. L. R. 6 ; 2 L. G. R. 45—C. A.

100. *Inspection of Books of Highway Authority—Books relating to other Highways in the Neighbourhood—Inspection by Engineer—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23.]—In an action by a highway authority to recover expenses incurred in consequence of extraordinary traffic on a highway, the average expense of repairing other highways in the neighbourhood is not a question in issue, and therefore the defendant is not entitled to inspection of the books of the highway authority relating to such other highways.

The defendant is entitled to inspection by his solicitor of books relating to the highway in respect of which the action is brought, but the Court will not make an order for inspection by an engineer.

Bromley Rural District Council *v.* [Chittenden and Others, (1906) 70 J. P. 409 ; 4 L. G. R. 967—C. A.

101. *Recovery of Expenses "Incurred"—No Repairs in fact Executed or Money Paid at time of Action brought—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. *c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 Vict. *c.* 29), *s.* 12.]—An action by a highway authority under sect. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by sect. 12 of the Locomotives Act, 1898, to recover extraordinary expenses incurred in repairing a highway by reason of damage caused by excessive weight or extraordinary traffic will not lie until extraordinary expenses for such repairs have been in fact expended.

Little Hulton Urban District Council *v.* [Jackson, (1904) 68 J. P. 451 ; 2 L. G. R. 986—Div. Ct.

IX. OBSTRUCTION OF HIGHWAYS.

And see Tramways, 34.

102. *Dedication of Footway to Public subject to right—Jurisdiction ousted by claim of right—Towns Police Clauses Act*, 1847 (10 & 11 Vict. *c.* 89), *s.* 28.]—To a complaint before justices at petty sessions under sect. 28 of the Towns Police Clauses Act, 1847, for obstructing a public footway, it is a good defence that such footway was dedicated to the public subject to the right of the defendant to commit the acts of obstruction complained of, and such defence if raised *bonâ fide* ousts the jurisdiction of the justices. The evidence, however, to establish such defence should be of a cogent character.

Rex *v.* Londonderry Justices, [1902] 2 Ir. R. [266—K. B. Div.

Obstruction of Highways—*Continued.*

103. *Indictment—Verdict of Acquittal—Obstruction to Highway—Misdirection—Staying Proceedings on Indictment — Obtaining use of Attorney-General's Name.*]—Upon an indictment for obstruction to a highway the proceedings on the indictment will not be stayed upon the ground of misdirection on the part of the judge in the way he left the question to the jury. The fact that the judge misdirected the jury is not sufficient to justify the Court in staying the proceedings upon a previous indictment, nor in removing the so-called difficulty in the way of future proceedings. Moreover, the parties can, by informing the Attorney-General, obtain the use of his name, and then proceedings can be taken in respect of the alleged obstruction, which can be carried to the House of Lords if necessary, so that the ruling of the judge upon the question can be finally determined.

Rex v. *Wandsworth Inhabitants* ((1817) 1 B. & Ald. 63) distinguished.

REX *v.* NORTH-EASTERN RY. CO., (1901) 70 [L. J. K. B. 548 ; 49 W. R. 524 ; 84 L. T. 502 ; 19 Cox, C. C. 682—Div. Ct.

104. *Laying Rubble on Highway—"Injury, interruption or personal danger" of Person using Highway — Duplicity — Conviction — Amending Conviction—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 50), *s.* 72.]—The appellant, a surveyor to an urban district council, was summoned for laying a quantity of rubble on a highway to the interruption or personal danger of any person travelling thereon, contrary to the Highway Act, 1835, s. 72. The police at night found a heap of rubble round an excavation on the high road, which was unlighted and unprotected. They had seen it lying there in the daytime, and knew it was there ; and there was no other person on the road at the time. The justices convicted the appellant of unlawfully laying a quantity of rubble upon a highway, to "the interruption *or* personal danger" of any person travelling thereon.

On appeal sessions amended the conviction by substituting "and" for "or."

HELD—(1) that it was not necessary to prove any person was endangered or interrupted ; (2) that the conviction was not bad for duplicity for the laying of the rubble in the highway followed by more than one of the specified consequences constituted only one offence ; and (3) that sessions were justified in amending the conviction.

SMITH *v.* PERRY, [1906] 1 K. B. 262 ; 75 [L. J. K. B. 124 ; 70 J. P. 93 ; 94 L. T. 140 ; 22 T. L. R. 158 ; 4 L. G. R. 224 ; 21 Cox, C. C. 98—Div. Ct.

105. *"Leaving" Carriage so as to Obstruct—Carriage not Unattended—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 50), *s.* 78.]—In considering whether the driver of a carriage has "left" it on a highway "so as to obstruct the passage thereof," the fact that there is someone attending to it is a material circumstance to be taken into account, but it does not necessarily preclude the justices from convicting.

HIND *v.* EVANS, (1906) 70 J. P. 458 ; 4 L. G. R. [1152—Div. Ct.

106. *Obstruction placed by County Council—Rule as to inappreciability—Action by Attorney-General on behalf of Public—Injunction.*]—A county council cannot legally sanction the erection of a permanent structure not authorised by the necessities of the public service, along or upon a county road. The Attorney-General, as representing the public, is the proper person to prevent this by injunction.

When the soil has been taken for county purposes everything between the road fences is *primâ facie* part of the public highway.

An obstruction placed upon a county road can only be looked on as inappreciable when the obstruction is temporary in character, or where it is so small in extent that it could not, under any circumstances, impede traffic.

ATTORNEY-GENERAL *v.* MAYO COUNTY COUN- [CIL, [1902] 1 Ir. R. 13—M. R.

107. *Promenade — Custom — Dedication — Erecting Barriers—Right to pass over in Carriages—Right of Way on Foot.*]—In an action brought by an owner in fee for a declaration of title to a strip of land on the bank of the river Blackwater, adjoining the town of Fermoy, called "The Barnane Walk," subject to a right of way on foot possessed by the public over the premises, the evidence adduced regarding the character and user of the premises showed that so long as memory went back it had been devoted to the recreation of the inhabitants of the town, by whom it was used as a promenade.

HELD—that the town commissioners of the town had no right to erect a barrier across the entrance to the walk, and that the owner in fee of the land subject to the said right of the inhabitants of Fermoy could not encroach on the walk (*a*) by granting to his tenants of other lands abutting thereon a right to pass over the walk in carriages, unless such grant were subject to the condition that the use of the inhabitants should not be thereby interfered with, or (*b*) by converting the walk into a public road to be traversed by all kinds of vehicles.

Distinction between the right to use a place as a promenade possessed by the inhabitants of a district, and a right of way over the place on foot possessed by the public.

ABERCROMBY *v.* FERMOY TOWN COMMIS- [SIONERS, [1900] 1 Ir. R. 302—C. A.

108. *Street—Public Rights—Reasonable User—Loading and Unloading of Vans—Nuisance—Injunction.*]—The primary object of a street is for the free passage of the public, and anything which impedes that free passage, without necessity, is a nuisance. If the nature of a person's business be such as to require the loading and unloading of so many more of his waggons than can conveniently be contained within his own premises, he must either enlarge his premises, or remove his business to some more convenient

Obstruction of Highways—*Continued.*

spot. The private reasonable right of a householder to carry on his business must yield to the public right of user of the street. If the public right of user is in fact so obstructed that it cannot be used to the extent which the law requires, then the private right must give way, and it is no answer to say that persons can go on using a street in a way which is reasonable, looking at their interests alone. Each case is a question of degree.

Decision of Kekewich, J. affirmed.

ATTORNEY-GENERAL *v.* BRIGHTON AND HOVE [CO-OPERATIVE SUPPLY ASSOCIATION, [1900] 1 Ch. 276; 69 L. J. Ch. 204; 48 W. R. 314; 81 L. T. 762; 16 T. L. R. 144—C. A.

109. "*Timber*" *laid thereon so as to be a Nuisance—Surveyor of Highways—Power of, to Obtain Order to Clear Highway—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 50), *s.* 73.]—A surveyor of highways can obtain an order from a justice under sect. 73 of the Highway Act, 1835, to clear a highway by removing timber laid thereon so as to be a nuisance, although the word "timber," which is in the introductory words of that section, is omitted from the operative words thereof.

DIXON *v.* CHESTER, (1906) 70 J. P. 380; 22 [T. L. R. 501; 4 L. G. R. 1127—Div. Ct.

110. *Timber Trees—Yew—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 50), *ss.* 65, 66.]—By the Highway Act, 1835, s. 65, if any obstruction is caused to any way by a tree the owner may be summoned by the surveyor to show cause why such tree is not lopped, or why the obstruction should not be removed, and the owner shall comply with the order of the magistrates within ten days of the order being left on him.

By sect. 66: "Provided always . . . that no person shall be obliged to fell any timber trees growing in hedges at any time whatsoever, except where the highways shall be ordered to be widened or enlarged as herein mentioned, or then to cut down . . . any oak . . . except in the months of April, May, or June, or any ash, elm, or other trees in any other months than December, January, February, or March.

The appellant Bullen was summoned under sect. 65 for that a yew tree growing on his lands obstructed a carriage-way, and the magistrates made an order for its removal. It was contended on his behalf that, as no order had been made for widening the road, under sect. 66 he could not be ordered to remove it even if it was an obstruction. But, even if they could order its removal, they could not do so in July, when they made the order.

HELD (affirming the magistrate)—that the order was right, and that sect. 66 did not apply to such a case as this at all.

BULLEN *v.* WAKELEY, (1898) 18 Cox. C. C. 692; [62 J. P. 166; 77 L. T. 689—Div. Ct.

111. *Work in Excess of Statutory Powers—Particular Damage—Evidence.*]—The plaintiff claimed damages against the defendants for having obstructed the highway where he carried on the business of a greengrocer. The defendants pleaded statutory powers of doing that which was alleged against them. In answer to this the plaintiffs said that the defendants had unnecessarily and negligently blocked and obstructed the road.

HELD—that *primâ facie* no action lay merely for blocking and obstructing a highway. To maintain an action of that nature the plaintiff must prove that he has suffered some particular damage, or some damage peculiar to himself; and held—that there was no evidence that the plaintiff was damaged by any work in excess of the statutory powers, and the defendants were entitled to judgment.

Decision of Kennedy, J. (79 L. T. 170; 14 T. L. R. 575, affirmed.

MARTIN *v.* LONDON COUNTY COUNCIL, (1899) [80 L. T. 866; 15 T. L. R. 431—C. A.

X. BRIDGES.

(a) Erection and Repair.

112. *Liability Incurred by Surveyor for Debt—Liability of Rural District Council as his Successors—Highways and Bridges Act*, 1891 (54 & 55 Vict. *c.* 63). *s.* 3.]—A surveyor of highways, purporting to act under sect. 3 of the Highways and Bridges Act, 1891, agreed with the plaintiffs for himself and his successors to pay a sum of money by two annual instalments towards the cost of building a bridge in the district. Before the second instalment became due the surveyor had ceased to be such, the rural district council having become, by sect. 25 of the Local Government Act, 1894, the highway authority for the district.

HELD—that the arrangement was a very reasonable and proper one to make as to the payment for the work, and was clearly within the power given to highway authorities by sect. 3 of the Highways and Bridges Act, 1891.

Decision of Lawrance, J. ((1901) 17 T. L. R. 521) affirmed.

HERTFORDSHIRE COUNTY COUNCIL *v.* BARNET [RURAL DISTRICT COUNCIL, [1902] 2 K. B. 48; 71 L. J. K. B 610; 66 J. P. 531; 50 W. R. 582; 86 L. T. 880; 18 T. L. R. 609—C. A.

113. *Public Footbridge — Nonfeasance — Abatement of Nuisance—Right to Repair—Right to erect New Bridge—Trespass—Statute of Bridges*, 1530–1 (22 Hen. 8, *c.* 5).]—There is a broad difference between removing an obstruction, which has been wrongfully placed in the highway, and making good by a permanent structure the result of mere nonfeasance on the part of those charged with the duty of repairing, and it is doubtful whether such an operation can properly fall under the term "abatement" of a nuisance.

The right of the public upon a highway is that of going and coming only, and the right of "abatement" in an individual is only ancillary thereto. The dedicating owner

Bridges—*Continued.*

therefore, is not bound to accept a greater burden, and may complain if it is imposed upon him.

Where there is no obligation to repair, there can be (in the absence of any special power given) no right to repair.

The default of a local authority cannot extend the burden placed upon a person's land, and give to other persons a right to go on that land which could not have existed if the local authority had not been guilty of default.

There was evidence that a footbridge with a public right of way over it had once existed over the plaintiff's land, consisting of one moiety of the bed of a river, and it was proved that for many years before 1898 that bridge had decayed and ceased to exist. In that year the defendants erected a footbridge in the place in question, and the plaintiff caused that part of it which passed over his land to be removed. The defendants subsequently entered on the plaintiff's land, and re-erected it across the plaintiff's land. The plaintiff brought an action of trespass. The defendants pleaded "not possessed," and other pleas. There was no proof of any right in, or obligation on, the defendants to repair the bridge, neither was there any proof of any such obligation on the plaintiff.

HELD—that the defendants' act was wrongful as against the plaintiff, and entitled him to remove the bridge so far as it was erected on his land.

CAMPBELL DAVYS *v.* LLOYD, [1901] 2 Ch. 518; [70 L. J. Ch. 714; 49 W. R. 710; 85 L. T. 59; 17 T. L. R. 678—C. A.

114. *Quarter Sessions Borough over* 10,000 *Population—New County Bridges—Liability to Contribute—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *ss.* 6, 35.]—By sect. 6 of the Local Government Act, 1888, the county council shall have power to purchase or take over, on terms to be agreed on, existing bridges not being at present county bridges, and to erect new bridges and to maintain, repair, and improve any bridges so purchased, taken over, or erected.

And by sect. 35, in the case of a quarter sessions borough . . . containing . . . a population of 10,000 or upwards the following provisions shall . . . apply. (2) Where such borough is at the passing of this Act exempt in whole or in part from contributing towards costs incurred for any purpose for which the quarter sessions of the county in which the borough is situate are authorised to incur costs the parishes in the borough shall not, save as in this Act expressly mentioned, be assessed by the county council to county contributions in respect of costs incurred for any such purpose.

A writ was issued by the plaintiffs against the defendants indorsed as follows: "The plaintiffs' claim is for a declaration that the plaintiffs are not liable to contribute rateably to the cost of erecting, maintaining, or repairing new county bridges, and for £137 13*s*., money received by the defendants for the plaintiffs' use."

Bury St. Edmunds is a quarter sessions borough, containing according to the census of 1881 a population of over 10,000.

The defendants have since 1892 paid £1,570 4*s*. 4*d*., in respect of these bridges which they have charged to their county accounts as general expenses, and the plaintiffs have been assessed to their county rate and have contributed thereto the sum of £137 13*s*., their rateable proportion of the whole sum.

HELD—that the borough was exempt from contributing, and were entitled to the declaration they asked for on their writ, but as to the sum of money, they could only recover what had been paid within six months on the authority of *The Mayor of Thetford* v. *The Norfolk County Council*, [1898] 1 Q. B. 41, *see* LOCAL GOVERNMENT, 55.

BURY ST. EDMUNDS CORPORATION *v.* WEST [SUFFOLK COUNTY COUNCIL, [1898] 2 Q. B. 246; 62 J. P. 486; 67 L. J. Q. B. 750; 78 L. T. 624; 14 T. L. R. 436; 47 W. R. 16—Div. Ct.

115. *Repair—Liability—County Bridges Act*, 1803 (43 Geo. 3, *c.* 59).]—Where a bridge carrying a public highway over a watercourse was built prior to the County Bridges Act, 1803, a county council can only avoid their common law liability to repair the bridge by proving that the liability to repair it is cast on some other person than themselves.

HELD (in the particular case)—that they had not cast it upon the parish merely by proof that the parish had once repaired it, nor on the adjacent owners by suggesting that, as they had made the watercourse under an enclosure award, they had probably made the bridge also, and were liable on that ground.

ATTORNEY-GENERAL ON THE RELATION OF [THE DONCASTER RURAL DISTRICT COUNCIL, AND THE DONCASTER RURAL DISTRICT COUNCIL *v.* WEST RIDING OF YORKS COUNTY COUNCIL, (1903) 67 J. P. 173; 19 T. L. R. 192; 1 L. G. R. 223—Kekewich, J.

116. *Repair—County Bridge—Right to Take Stones from Bed of River—River Flowing between Inclosed Fields—Whether a River is "Inclosed Land"—Highway Act*, 1835 (5 & 6 Will. 4, *c.* 50), *ss.* 51-55—*The* 4 & 5 Vict. *c.* 51.]—A river flowing between fields that are inclosed, belonging to the same owner, is "inclosed land or ground" within the meaning of sects. 51, 53, of the Highway Act, 1835, and therefore a surveyor to obtain stones from such a river for repairing a county bridge on a highway under those sections must first obtain the consent of the owner of the river bed, or a licence from two justices pursuant to those sections.

ALLINSON *v.* CUMBERLAND COUNTY COUNCIL, [(1907) 71 J. P. 398; 97 L. T 187; 23 T. L. R. 606; 5 L. G. R. 871—Div. Ct.

(b) Tolls.

117. *Bicycles—"Carriages"*—7 Geo. 3, *c.* lxiii.]—A statute imposed certain tolls in favour of the owner of a certain bridge for passage over the bridge in respect of "every coach, . . . cart, car, or other carriage whatsoever, with four wheels,

Bridges—*Continued.*

the sum of 4*d.*, and with less than four wheels, the sum of 2*d.*"

HELD—that bicycles and tricycles are "carriages" within the meaning of the above statute, and are liable under the terms of the statute to the toll of 2*d.* each on passing over the bridge.

CANNAN *v.* EARL OF ABINGDON, [1900] 2 Q. B. [66 ; 69 L. J. Q. B. 517 ; 64 J. P. 504 ; 48 W. R. 470 ; 82 L. T. 382 ; 16 T. L. R. 318—Div. Ct.

118. *Bicycle*—"*Carriage Hung on Springs*"—5 Geo. 4, *c.* cxiv., *s.* 78.]—By 5 Geo. 4., c. cxiv., the defendants were empowered to build a bridge across the river Teign, and by sect. 78 to charge the following tolls : "For every person on foot and if with a wheelbarrow or such like other carriage the sum of 1*d.* . . . For every coach, chariot, horse chaise, Berlin landau, and phaeton, gig, whiskey-car, chair, or Coburg, and for every other carriage hung on springs the sum of 6*d.* for each wheel, and for each horse or other beast of draught drawing the same the sum of 2*d.*"

HELD—that a bicycle ridden over the bridge was not within the section : it might (*sed quære*) in some cases be treated as a "carriage hung on springs," but the present section only applies to vehicles intended for animal draught.

Principles on which old taxing Acts should be applied to modern names or articles considered.

Cannan v. *Earl of Abingdon* ([1900] 2 Q. B. 66 ; 69 L. J. Q. B. 517 ; 64 J. P. 504 ; 48 W. R. 470 ; 82 L. T. 382—Div. Ct., *supra*) considered.

Decision of Wright, J. ([1903] 1 K. B. 405 ; 85 L. T. 726 ; 18 T. L. R. 104, 234) affirmed.

SIMPSON *v.* TEIGNMOUTH AND SHALDON BRIDGE [Co., [1903] 1 K. B. 405 ; 72 L. J. K. B. 204 ; 67 J. P. 65 ; 51 W. R. 545 ; 88 L. T. 117 ; 19 T. L. R. 222 ; 1 L. G. R. 235—C. A.

119. *Bicycle*—"*Sledge, Drag, or such like Carriage*"—*Local Act* (39 Geo. 3, *c.* xxviii.).]—By a local Act trustees were authorised to charge "for every sledge, drag, or such like carriage, the sum of sixpence."

HELD—that a bicycle does not fall within the words quoted. The principle of construction must be, "What would in an ordinary sense be considered to be a carriage in the contemplation of the Legislature at the time the Act was passed ?"

Decision of Wright, J. (18 T. L. R. 568) affirmed.

SMITH *v.* KYNNERSLEY AND OTHERS, [1903] 1 [K. B. 788 ; 72 L. J. K. B. 357 ; 67 J. P. 125 ; 51 W. R. 548 ; 88 L. T. 449 ; 19 T. L. R. 335 ; 1 L. G. R. 393—C. A.

120. *Prescription—Effect of Statute conferring Tolls upon Prescriptive Right—Extinguishment of Old Franchise by Statute.*]—Where an Act of Parliament has, according to its true construction, embraced and confirmed a right which had previously existed by custom or prescription, that right becomes henceforward a statutory right, and the lower title by custom or prescription is merged in and extinguished by the higher title derived from the Act of Parliament.

From a time long before living memory down to 1734, the corporation of New Windsor had taken certain tolls for passage over the wooden bridge which crossed the Thames at Windsor. They had that right by prescription, and the right of a tenant under the lord of the franchise to do certain things which could not be contested ; but the lord of the franchise had also certain rights.

In 1734 the local Act 9 Geo. 2, c. xv., was passed, the intention of which was to substitute for the franchise a statutory right which was equivalent to the franchise, and to leave no other right standing : to regulate the rights of the holders of the franchise or the rights and obligations of those who used the bridge. This Act was temporary.

The Act of Geo. 2 was in 1819 repealed by a temporary Act, viz., 59 Geo. 3, c. cxxvi., and substituted different tolls from the former ones.

HELD—that the effect of the substitution of a new statutory authority for an authority derived from the franchise was to determine the franchise, to put an end to it, and that the subsequent Act could not have the effect of calling again into existence and revivifying a right that was dead and gone.

The decision of C. A. ([1898] 1 Q. B. 186 ; 67 L. J. Q. B. 96 ; 62 J. P. 5 ; 77 L. T. 585 ; 14 T. L. R. 23) affirmed.

NEW WINDSOR CORPORATION *v.* TAYLOR, [1899] A. C. 41 ; 68 L. J. Q. B. 87 ; 63 J. P. 164 ; 79 L. T. 450 ; 15 T. L. R. 67—H. L. (E.)

121. *Tramcar*—"*Coach*"—(7 Geo. 3, *c.* lxxiii.)]—An Act of Parliament, passed in 1766, empowered the owners of a ferry across a creek to build a bridge over the creek and to demand certain tolls for the passage of the bridge including amongst others the following : "for every coach, chariot, berlin, chaise, chair, or calash drawn by more than two horses, the sum of sixpence," and, "for every waggon, wain, dray, car, cart, or sledge, or other carriage drawn by three or four horses or oxen, the sum of fourpence."

HELD—that the toll payable in respect of a tramcar drawn by three horses was that payable in respect of a "coach."

Judgment of Day, J., reversed.

PLYMOUTH, STONEHOUSE, AND DEVONPORT [TRAMWAY CO. *v.* GENERAL TOLLS CO., LTD., (1898), 14 T. L. R. 531—C. A.

XI. STATUTORY INTERFERENCE WITH HIGHWAYS.

And see titles GAS ; RAILWAYS ; TRAMWAYS ; WATERWORKS, ETC.

(a) Railway Companies.

122. *Bridge over Railway—Width of Bridge and Approaches—Duty to Widen—Special Act*

Statutory Interference with Highways—*Continued.*

—Incorporation of Prior Special Act—Provisions Inconsistent with General Act—Taff Vale Railway Acts, 1836 (6 & 7 Will. 4, *c.* lxxxii.), *s.* 69; *and* 1846 (9 & 10 Vict. *c.* cccxciii.), *ss.* 1, 3 *—Railways Clauses Act*, 1845 (8 & 9 Vict *c.* 20), *ss.* 50, 51.]—By sect. 69 of the Taff Vale Railway Act, 1836, where a bridge was erected to carry a public highway over the railway, the road over the bridge was to be of a width between the fences of not less than fifteen feet. By sect. 1 of the Taff Vale Railway Act, 1846, "all the provisions contained in" the Act of 1836 "relating to the Taff Vale Railway . . . except such of them as are inconsistent with the provisions of . . . the Railways Clauses Consolidation Act, 1845, and except also such as by this Act are altered or otherwise provided, shall extend to this Act and to the several purposes thereof as fully and effectually as though such provisions were re-enacted in this Act as applicable to such purposes." By sect. 3, "all the provisions of the . . . Railways Clauses Consolidation Act, 1845, so far as the same are applicable, and save in so far as the same may be inconsistent with the provisions hereinafter mentioned, shall extend to this Act and to the several purposes thereof, and the same together with this Act shall be read together as one Act." By sect. 1 of the Railways Clauses Act, 1845, the Act "shall apply to every railway which shall, by an Act which shall hereafter be passed, be authorised to be constructed, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorised thereby, so far as the same shall be applicable to such undertaking, and shall . . . form part of such Act and be construed together therewith as forming one Act." Sections 50 and 51 of the Act provided that every bridge carrying a public carriage road over a railway should (except as otherwise provided by the special Act) have a specified width, which was greater than the width prescribed in the Taff Vale Railway Act, 1836.

HELD—that the provision in the Taff Vale Railway Act, 1836, as to the width of the bridge was incorporated in the Act of 1846, it not being inconsistent with the provisions of ss. 50 and 51 of the Railways Clauses Act, 1845, inasmuch as sect. 50 contained the words, "except as otherwise provided by the special Act."

Semble—the word "bridge" in sect. 51 of the Railways Clauses Act, 1845, does not include the approaches to the bridge.

Decision of Phillimore, J. ([1907] 1 K. B. 739; 76 L. J. K. B. 486: 71 J. P. 189; 96 L. T. 633; 5 L. G. R. 395) varied.

RHONDDA URBAN DISTRICT COUNCIL *v.* TAFF [VALE RY. Co., [1908] 1 K. B. 239; 6 L. G. R. 201; 72 J. P. 25; 24 T. L. R. 165—C. A.

123. *Bridges and Approaches — Unnecessary and Unauthorised Diversion of Highway—Maintenance and Repair — Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. *c.* 20), *ss.* 16, 46, 65.]—The liability of a railway company under sect. 46 of the Railways Clauses Consolidation Act, 1845, to maintain and keep in repair bridges and approaches made by them in consequence of their line crossing highways is limited to cases where the company, under the authority of their statutory powers, cross existing highways, including such deviations as are necessary for the construction of the works, and come within sect. 16 of the Act. If a railway company, being authorised to cross a certain highway on the level, make a diversion of the highway which is not necessary for purposes of construction or authorised by statute, and make a bridge and approaches thereto over their line at a place where there was no highway, and divert the traffic of the highway along such bridge, they are not liable under sect. 46 to maintain or keep in repair the road over such bridge, or the approaches.

LONDON AND NORTH WESTERN RY. *v.* OGWEN [DISTRICT COUNCIL, (1899) 63 J. P. 295; 80 L. T. 401; 15 T. L. R. 291—C. A.

124. *Crossing Turnpike Road—Road carried over Railway by Bridge—Diversion of Road—Effect of—Extinguishment of Easement—Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. *c.* 20), ss. 16, 46, 56, 57.]- A railway was made in 1848, and by the Act of Parliament there was to be a level crossing at a certain road or lane which was a highway. But when opposition was threatened the Turnpike trustees, who had the ownership of the land, entered into a separate agreement with the railway company, by which a bridge was erected and the opposition withdrawn. The highway thereby had to be diverted, and it was part of the old highway, which was no longer used when the new one was made, that was the cause of an action brought by the plaintiffs, and of which they claimed possession. The defendant owned a small house near the land in question, and used the land to put a shed upon and also to stack his hay and feed a cow. It was admitted by the plaintiffs that the alleged road was a *cul de sac*. The plaintiffs claimed that by virtue of the Highway Acts and the Local Government Acts the road was vested in them.

HELD—that the railway company had been compelled to make the diversion, *i.e.*, instead of making a level crossing, owing to the exigencies of the inhabitants they had made a bridge, with the result that the land in question, which undoubtedly was originally a highway, was freed of that easement by sects. 16, 46, 56 and 57 of the Railways Clauses Act, 1845.

Salisbury (*Marquis*) v. *Great Northern Ry. Co.* ((1858) 5 C. B. (N.S.) 174; 5 Jur. (N.S.) 70; 28 L. J. C. P. 40) followed.

MELKSHAM URBAN DISTRICT COUNCIL *v.* GAY, [(1902) 18 T. L. R. 358—Darling, J.—Bristol Assizes.

125. *Footpath — Bridge* — Mandamus—*Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. *c.* 20), *s.* 46.]—Sect. 46 of the Railways Clauses Consolidation Act, 1845, does not impose upon a railway company whose line crosses a

Statutory Interference with Highways—*Continued.*

public footpath any obligation to carry the railway over the footpath or the footpath over the railway by means of a bridge.

DARTFORD RURAL DISTRICT COUNCIL *v.* [BEXLEY HEATH RY. CO., [1898] A. C. 210; 62 J. P. 227; 67 L. J. Q. B. 231; 77 L. T. 601; 14 T. L. R. 91; 46 W. R. 235—H. L. (E.)

126. *Level Crossing—Turnpike Road—Adjoining Station—Excessive Speed of Trains—Interference with Public Rights—Evidence of Injury—Injunction—Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. *c.* 20), *s.* 48.]—Where the Legislature has imposed certain conditions for the protection of the public, it is the duty of the Court, on the application of the Attorney-General, on the relation of the local authority charged with the protection of the public rights in question, to enforce the provisions of the law.

When a public company do acts which are illegal, and tend in their nature to interfere with public rights, the Attorney-General is justified in interfering, though there is no evidence of actual injury to the public.

The provisions inserted in the Railways Clauses Consolidation Act, 1845, respecting the speed—four miles an hour—at which trains should pass over a turnpike road on a level adjoining to a station, are intended for the protection of the public. A railway company commit an illegal act in disregarding the provision. The Court will restrain a railway company from allowing their trains to cross such a level at a speed greater than four miles an hour, even though there is no evidence of injury to the public.

Attorney-General v. *Shrewsbury Kingsland Bridge Co.* ((1882) 21 Ch. D. 752; 51 L. J. Ch. 746; 30 W. R. 916; 46 L. T. 687) followed.

Judgment of Bruce, J. ([1899] 1 Q. B. 72; 68 L. J. Q. B. 4; 79 L. T. 412; 15 T. L. R. 39) affirmed.

ATTORNEY-GENERAL EX REL. (WARWICKSHIRE [COUNTY COUNCIL) *v.* LONDON AND NORTH WESTERN RY. CO., [1900] 1 Q. B. 78; 69 L. J. Q. B. 26; 63 J. P. 772; 81 L. T. 649; 16 T. L. R. 30—C. A.

127. *Repair—Railway Crossing Road—Altering Gradient of Road in Order to Cross on the Level—Liability to Keep Incline in Repair—Railways Clauses Act*, 1845 (8 & 9 Vict. *c.* 20), *s.* 16.]—A railway were authorised to cross a highway by means of a level crossing; and, the line being at a higher level than the roadway, they constructed permanent slopes in order to bring the road gradually to the level of the line, and so cross it.

HELD—that they were under no obligation to keep in repair the surface of these graded approaches.

WEST LANCASHIRE RURAL DISTRICT COUNCIL [*v.* LANCASHIRE AND YORKSHIRE RY. CO., (1903) 72 L. J. K. B. 675; 67 J. P. 410; 51 W. R. 694; 89 L. T. 139; 19 T. L. R. 625; 1 L. G. R. 788—Wright, J.

128. *Sufficient Road not Substituted—Penalties—"Owner" of Road—Railways Clauses Act*, 1845 (8 & 9 Vict. *c.* 20), *ss.* 53, 54.]—The Railways Clauses Act, 1845, by sect. 53, provides that a railway company shall not interfere with any road so as to render it impassable without first providing a sufficient road instead thereof; and sect. 54 imposes on the company a penalty of £20 for every day during which the road is so interfered with, and provides that "in the case of a private road the same shall be paid to the owner thereof."

HELD—that sect. 54 imposes but one penalty for every day during which the road is improperly interfered with, and that the owner of any part of that portion of the road which is so interfered with, who first sues, can recover the whole penalty for his own benefit.

Decision of Wright, J. ([1897] 2 Q. B. 239; 66 L. J. Q. B. 670; 76 L. T. 778; 13 T. L. R. 491) affirmed.

LLEWELLYN *v.* VALE OF GLAMORGAN RY. CO., [1898] 1 Q. B. 473; 67 L. J. Q. B. 305; 78 L. T. 70; 14 T. L. R. 205; 46 W. R. 290—C. A.

(b) Tramways.

129. *Bridge—Reconstruction—Electric Power—Arbitration—Tramways Act*, 1870 (33 & 34 Vict. *c.* 78), *s.* 33—*London County Tramways (Electrical Power) Act*, 1900 (63 & 64 Vict. *c.* ccxxxviii), *s.* 6.]—Sect. 6 of the London County Tramways (Electrical Power) Act, 1900, gives the county council power to reconstruct a bridge, when this is necessary, to enable them to adapt a tramway for use by electric power.

In such a case all questions between the owners of the bridge and the county council must be determined by arbitration under the Tramways Act, 1870.

REGENT'S CANAL AND DOCK CO. *v.* LONDON [COUNTY COUNCIL, (1907) 71 J. P. 201; 5 L. G. R. 956—Eady, J.

130. *Electrification — Nuisance — Statutory Powers — Temporary Line — "Necessary for adapting"—Contractor—Public Authorities Protection Act*, 1893 (56 & 57 Vict. *c.* 61).]—The London County Council, having statutory powers to reconstruct certain tramways, and to do such work as might be necessary for adapting them to be worked by electricity, contracted with the defendants to carry out the work and to make temporary diversions or "turn-outs" upon the surface of the highways, in order to carry the tramway traffic during the reconstruction of the permanent line.

The plaintiffs, omnibus proprietors, sued for damages caused to their vehicles by the temporary lines being above the surface of the highways. It was proved that the diversions were carried out in the best possible manner; and that great public inconvenience would have been caused if the tramway traffic had been interrupted.

HELD—first, that the council had no power to make such temporary diversions, these not being works necessary for adapting the tramways to be

Statutory Interference with Highways—*Continued.*

worked by electricity; secondly, that the Public Authorities Protection Act, 1893, did not protect the defendants, who were independent contractors undertaking work for their own profit.

TILLING & Co. *v.* DICK, KERR & Co., LD., [1905] 1 K. B. 562; 74 L. J. K. B. 359; 69 J. P. 172; 53 W. R. 380; 92 L. T. 731; 21 T. L. R. 281; 3 L. G. R. 369—Warrington, J.

131. *Property in Street—Public Improvement—Compensation.*]—By an Act of Parliament "all public ways in the city of S. now or hereafter formed shall be vested in the council."

A portion of a street in the city was required to form a tramway under a local Act.

HELD—that the council had no such property in the street as to entitle them to compensation under the Act for the part so taken.

SYDNEY MUNICIPAL COUNCIL *v.* YOUNG, [1898] [A. C. 457; 67 L. J. P. C. 40; 71 L. T. 365; 46 W. R. 561—P. C.

(c) Water and Canal Companies.

132. *Bridges over Canals—Fences by Side of Approaches to Bridges—Liability of Canal Company to Repair—Oxford Canal Navigation Act*, 1829 (10 Geo. 4, *c.* xlviii.), *s.* 26.]—A private Act enacted that the defendants were not to be liable "to repair or amend any part of the roads approaching to any bridge or bridges made, or to be made, over the said canal . . . beyond or further than the extremity of the wing-wall" of the bridges, but that nothing therein contained should exonerate the defendants from repairing the bridges and the "wing-walls, ramparts, and side banks thereof."

HELD—that the liability of the defendants to repair was limited to the bridges, and included nothing else; and that the defendants were, therefore, not liable to repair fences by the side of approaches to bridges over their canal.

Decision of Kekewich, J. (71 L. J. Ch. 660; 66 J. P. 698; 87 L. T. 93; 18 T. L. R. 642) affirmed.

ATTORNEY-GENERAL *v.* OXFORD CANAL NAVIGATION, (1903) 72 L. J. Ch. 285; 51 W. R. 386; 67 J. P. 130; 88 L. T. 250; 19 T. L. R. 277; 1 L. G. R. 282.—C. A.

133. *Bridge—Repair—Approaches—Statutory Duty to Repair—Extent of Statute of Bridges* (22 Hen. 8, *c.* 5).]—A statute passed after the date of the Statute of Bridges empowered a company to make a cut across a highway, and in return imposed upon them the obligation of making and maintaining at their own costs a bridge to carry the highway across the cut.

HELD—that the company was only liable to maintain the bridge and its actual approaches with the roadway thereon, the extent of the approaches being a question of fact; and that their liability did not necessarily extend to a distance of 300 feet from each end of the bridge.

The rule as to 300 feet laid down by the Statute of Bridges applies to bridges repairable by the county or by prescription, but not to cases where the liability is directly imposed by a later Act.

HERTFORDSHIRE COUNTY COUNCIL *v.* NEW [RIVER CO., [1904] 2 Ch. 512; 53 W. R. 60; 20 T. L. R. 686; 74 L. J. Ch. 49; 68 J. P. 552; 91 L. T. 796; 3 L. G. R. 64—Eady, J.

XII. PRIVATE STREET WORKS.

See also METROPOLIS.

(a) Charge on Premises.

See also LANDLORD AND TENANT, 78—83, 116.

134. *Action for Declaration of Charge and Order for Sale—Whether Maintainable—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *s.* 13.]—An action was brought by the plaintiffs in the county court against the defendant, as the owner of certain premises, for (1) a declaration that they were entitled to a charge on the premises under sect. 13 of the Private Street Works Act, 1892, for apportioned expenses incurred under sect. 6 of that Act in private street works. (2) An inquiry as to incumbrances (if any) on the premises. (3) An order for sale of the premises. (4) A receiver. (5) Further or other relief.

The county court judge dismissed the action with costs, on the ground that the proceedings were unnecessary by reason of the provisions of sect. 13 of the Private Street Works Act, 1892.

HELD—that the order asked for, though not necessary, was convenient, and that the plaintiffs were entitled to it.

WEST HAM CORPORATION *v.* SHARP, [1907] [1 K. B. 445; 76 L. J. K. B. 307; 71 J. P. 100; 96 L. T. 230; 5 L. G. R. 694—Div. Ct.

135. *Date of "Completion of Works"—"Final Apportionment"—Vendor and Purchaser—"Outgoings"—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 1, 12, 13.]—The apportioned expenses of private street works executed under the Private Street Works Act, 1892, become a charge on the premises affected thereby as from the date of the completion of the works, and not merely as from the date of the final apportionment.

If, therefore, the premises are sold free from incumbrances after the completion of the works, but before the date of the final apportionment, the sum finally apportioned thereon is payable by the vendor.

Decision of Kekewich, J. ([1899] 2 Ch. 496; 68 L. J. Ch. 612; 63 J. P. 647; 48 W. R. 6; 81 L. T. 80) affirmed.

STOCK *v.* MEAKIN, [1900] 1 Ch. 683; 69 L. J. [Ch. 401; 48 W. R. 420; 82 L. T. 248; 16 T. L. R. 284—C. A.

136. *Enforcement of Charge—Owners Unknown—Action against "Owner of Plot X"—Substituted Service on Owner of Premises—*

Private Street Works—*Continued.*

Orders based thereon for Sale and Conveyance —Objection to Title—County Courts Act, 1888 (51 & 52 Vict. *c.* 43), *s.* 73—*County Court Rules*, 1903, *Order* 7, *r.* 40—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 150, 257, 267, *Sched.* 4, *Form B.*]—A plot of land was subject to a charge in favour of the plaintiffs under sect. 257 of the Public Health Act, 1875, for apportioned expenses of paving, incurred by the plaintiffs for the owner in default, under sect. 150 of that Act, together with interest thereon. The expenses and interest remaining unpaid, and the plaintiffs, being unable to find the owner in default, purported to commence an action in the county court to enforce their charge. The action was entered and entitled "The W. Urban District Council, of Council Offices, Peel Road, W., plaintiffs, and the owner of Plot No. 188, Canning Road, W., defendant." An order was then obtained by the plaintiffs for substituted service on the defendant by advertisement. This order was obtained on an affidavit by the plaintiffs' surveyor that he had made repeated efforts, but had failed, to ascertain the present owner of the plot, and that notices of apportionment and of a demand for payment had been posted on the said land. Subsequently an order was made that the expenses and interest were a charge upon the land, and that the plaintiffs were to be at liberty to sell the premises subject to a reserve price, and a further order was made declaring that upon such sale the owner of the plot should be a trustee for the purchaser within the meaning of the Trustee Act, 1893, and that the plaintiffs be appointed to convey the said plot for the estate of the said owner. The land was sold, but the purchaser objecting to the title refused to complete. The plaintiffs obtained an order in the county court for specific performance, and the purchaser's counterclaim for rescission of the agreement of sale and return of deposit was dismissed.

HELD, on appeal, that the order for substituted service and the orders based thereon were bad, and further, that on the facts of the case the defendant had not waived his objection to title.

WEALDSTONE URBAN DISTRICT COUNCIL *v.* [EVERSHED, (1905) 69 J. P. 258 ; 3 L. G. R. 722—Div. Ct.

137. *Tenant for Life paying Expenses—Charge of Tenant for Life on Fee Simple—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 13, 17.]—Where a tenant for life has paid to a local authority the expenses of paving a private street incurred by them under the Private Street Works Act, 1892, he has, by subrogation to their rights, a charge under the provisions of sect. 13 of that Act on the fee simple of the premises in respect of which the expenses were incurred, notwithstanding the provisions of sect. 17, which provide that a limited owner can raise moneys on such premises by mortgage for the payment of such expenses so that the principal due on the mortgage may be repaid within twenty years. The latter provision applies where a tenant for life is not willing to find the money himself.

IN RE PIZZI, SCRIVENER *v.* ALDRIDGE, [1907] [1 Ch. 67 ; 76 L. J. Ch. 87 ; 71 J. P. 58 ; 95 L. T. 722 ; 5 L. G. R. 86—Neville, J.

138. *When Charge takes Effect — Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 150, 257.]—The vendors of certain leasehold houses had undertaken to pay the outgoings in respect thereof up to September 29th, 1903. In February, 1903, the district council had given notice to them, under the Public Health Act, 1875, to do certain paving works, and default having been made, the council had themselves commenced the work, but the whole of it had not been completed before September 29th, and the amount of expenses attributable to these leaseholds had not been apportioned. Upon a summons by the purchasers asking for a declaration that the vendors were liable to pay this amount when apportioned, and for an order accordingly :—

HELD—that upon the true construction of sect. 257 of the Public Health Act, 1875, the expenses of the local authority did not become a charge on the premises until the completion of the works, and that the vendors were not liable to pay for them.

Stock v. *Meakin* ([1900] 1 Ch. 683 ; 69 L. J. Ch. 401 ; 48 W. R. 420 ; 82 L. T. 248—C. A., No. 135, *supra*) followed.

Decision of Byrne, J. ([1904] 1 Ch. 493 ; 73 L. J. Ch. 382 ; 68 J. P. 253 ; 52 W. R. 392 ; 90 L. T. 637) affirmed.

IN RE ALLEN AND DRISCOLL'S CONTRACT, [1904] 2 Ch. 226 ; 73 L. J. Ch. 614 ; 68 J. P. 469 ; 52 W. R. 680 ; 20 T. L. R. 605 ; 91 L. T. 676—C. A.

(b) Exemptions from Liability as Owner.

139. *Crown Property—Lands held for Military Purposes—Crown Property exempt from the Imposition of Pecuniary Burdens unless Crown expressly named in the Statute—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 150—*Volunteer Act*, 1863 (26 & 27 Vict. *c.* 65)—*Military Lands Act*, 1892 (55 & 56 Vict. *c.* 43).]—The respondent, a colonel in His Majesty's army and the commanding officer of the 1st Batt. Middlesex Rifle Volunteers, by virtue of the Volunteer Act, 1863, purchased the fee simple of certain land at Hornsey for the purpose of its being transferred to and used by the volunteer battalion pursuant to the provisions of the Military Lands Act, 1892. The premises so acquired were, pursuant to the last-named Act, mortgaged to the Public Works Loan Commissioners for a sum of money to be applied to repay the amount paid by the respondent in purchasing the premises and in fitting them up for the use of the volunteer battalion. The premises abutted upon Nightingale Lane. The appellants sought to recover from the respondent the apportioned amount of expenses incurred by them in sewering, levelling, and paving Nightingale Lane under the provisions of sect. 150 of the Public Health Act, 1875.

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HELD—that the land being in fact purchased, owned, and occupied solely for the purpose of the volunteer corps, it must be taken to be owned and occupied for Crown purposes, and that therefore the amount of the apportionment could not be recovered, as sect. 150 was not by express words made binding upon the Crown; and that the principle that Acts of Parliament do not impose pecuniary burdens upon Crown property unless the Crown was expressly named, or unless by necessary implication the Crown had agreed to be bound, was applicable to such a case.

HORNSEY URBAN DISTRICT COUNCIL *v.* HEN-[NELL, [1902] 2 K. B. 73; 71 L. J. K. B. 479; 66 J. P. 613; 50 W. R. 521; 86 L. T. 423; 18 T. L. R. 512—Div. Ct.

140. *Indemnity given on earlier Occasion—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *s.* 7—*Objection to Provisional Apportionment—Premises ought to be excluded.*]—In 1878 a local authority did some work on the causeway or pavement of a street within their district, which street was not a highway repairable by the inhabitants at large. A portion of the expenses incurred by the local authority was paid by two frontagers, J. and S. In the following year the local authority passed the following resolution: "Resolved, that an indemnity be given to J. and S. against liability on account of further expenses that may be occasioned in connection with" the street in question, and delivered a copy of such resolution to J. and S. In 1902 the local authority resolved to put in force the Private Street Works Act, 1892, in the said street, and objection was taken to the provisional apportionment under sect. 7 that the premises of J. and S. ought to be excluded from the provisional apportionment, relying on the above resolution. The justices ordered the premises to be excluded on this ground. On appeal:—

HELD—that the above resolution afforded no valid reason for excluding the premises from the provisional apportionment.

DODWORTH URBAN DISTRICT COUNCIL *v.* [IBBOTSON AND ANOTHER, (1903) 67 J. P. 132—Div. Ct.

141. *Railway Company—Land used solely as Part of their Railway or Works—Land let as Garden Ground—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *s.* 22.]—A railway company objected to the inclusion of a certain piece of land belonging to them in a provisional apportionment of the expenses of certain private street works in a street on which the land abutted, but with which it had no direct communication, the ground of their objection being that the land in question was at the time of the laying out of the street used by the company solely as a part of their line of railway or works within the meaning of sect. 22 of the Private Street Works Act, 1892. The land in question had been acquired by the railway company solely for the purpose of their railway and works, but the company allowed their servants, for the time being, to use it as garden ground on payment of a nominal rent. The justices found as a fact that it was not used in any way as part of the company's railway, sidings, station or works, and that, therefore, the company's objection failed, and they refused to state a case on the ground that the question was one of fact.

HELD—that, as there was no evidence contrary to the justices' finding and no point of law involved, the Court would not order the justices to state a special case.

R. *v.* JONES AND OTHERS, (1907) 71 J. P. 326; [96 L. T. 723; 5 L. G. R. 722—Div. Ct.

142. *Railway Company—Land used solely as Part of Line of Railway or Sidings—Land used for Deposit of Ashes—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 150—*Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *s.* 22.]—By the Carlisle Corporation Act, 1887, s. 192 (similar in terms to sect. 22 of the Private Street Works Act, 1892), it was provided that "No railway company shall be deemed to be an owner or occupier in respect of any land of such company upon which any street shall wholly or partially front or abut and which shall be used by such company solely as part of their line of railway or sidings and shall have no direct communication with such street, and the expenses incurred by the corporation under the powers of the Public Health Acts . . . shall be paid by the other owners having frontages abutting on such street . . ."

HELD—that land used by a railway company for the purpose of depositing ashes thereon did not fall within the exemption contained in that section.

IN RE CARLISLE CORPORATION AND SAUL'S [EXECUTORS, (1907) 71 J. P. 502; 97 L. T. 514; 5 L. G. R. 1128—Phillimore, J.

(c) Local Act.

143. *Liability of Frontagers—Effect of subsequent General Legislation—Ashton-under-Lyne Improvement Act*, 1849 (12 & 13 Vict. *c.* xxxv.)—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 149 and 340.

A local Act passed in 1849 gave power to the municipal corporation of a borough to recover from the frontagers of streets within the borough the expenses incurred by the corporation in paving and otherwise completing such streets.

The Public Health Act, 1875, provides that the urban authority shall level, pave, metal, flag, channel, alter, and repair, as occasion may require, streets which are highways repairable by the inhabitants at large.

HELD—that this provision of the Public Health Act did not repeal the provisions of the local Act, and, therefore, the municipal corporation was entitled to recover from a frontager a share of the expenses incurred by them in paving a street within the borough.

ASHTON-UNDER-LYNE CORPORATION *v.* PUGH, [1898] 1 Q. B. 45; 61 J. P. 788; 67 L. J. Q. B. 32; 77 L. T. 583; 46 W. R. 100—C. A.

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144. *Liability of Frontagers to Repair Footways—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 149—*Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 11.

A local Act passed in 1871 gave a corporation power at any time and from time to time to order that, if in any street (whether or not a highway repairable by the inhabitants at large) there was not a properly paved, asphalted, or flagged footway on each side, the owners or occupiers of buildings or lands in the street should make a footway or pathways at their own expense along their respective frontages, and provided that, if they made default in so doing, the corporation might at any time and from time to time execute the works and recover the expenses thereof from such frontagers.

HELD—upon the principle laid down in *The Corporation of Ashton-under-Lyne* v. *Pugh* ([1898] 1 Q. B. 45), that this provision in the local Act as to the liability of frontagers to make up the footways is not repealed by sect. 149 of the Public Health Act, 1875, or by sect. 11 of the Local Government Act, 1888.

HELD, also, that although under this provision of the local Act the frontagers can be required to make a footway where none exists, there is no continuing obligation upon them as to such footways when once made, and they cannot be called upon to contribute towards the expenses of repairing or modernising existing footways.

Decision of Div. Ct. ([1898] 1 Q. B. 847; 62 J. P. 387; 67 L. J. Q. B. 568; 78 L. T. 422) affirmed.

LODGE *v.* HUDDERSFIELD CORPORATION (No. 1), [1898] 1 Q. B. 859; 67 L. J. Q. B. 571; 62 J. P. 515—C. A.

(d) Miscellaneous.

145. *Alteration of Level—Liability of Local Authority—Damage done to Property adjoining Highway by flow of Water—Flow caused by wrongful act of Third Party.*]—The defendants, the highway board and local authority for the district, built a retaining wall across a street for the purpose of altering the level of a roadway. This wall did not interfere with the ordinary flow of surface water across the street and alongside the plaintiffs' premises, but owing to the wrongful act of third parties on land over which the defendants had no control, an unusual flow of water ran down this street and did damage to the plaintiffs' premises.

HELD—that the defendants were not liable, as the damage was occasioned by the unexpected flow of water for which they were not responsible, and that they were not negligent in not building this retaining wall so as to have prevented the unusual flow of water across the street and alongside the plaintiffs' premises.

ELY BREWERY CO. *v.* PONTYPRIDD URBAN [DISTRICT COUNCIL, (1901) 68 J. P. 3; 2 L. G. R. 40—C. A.

146. *Alteration of Widths of Footway and Carriageway dedicated to the Public—Paving Expenses—Powers of Urban Authority—Injunction—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 150.]—The plaintiff in the years 1891 and 1892 dedicated to the public a road laid out in accordance with plans submitted to and approved by the urban district council. In 1897 the boundaries of the city of Bristol were extended and the road came under the jurisdiction of the defendants, who served notices under sect. 150 of the Public Health Act, 1875, on the owners of houses fronting the road, annexing to such notices plans which showed an intention to turn part of the footways into carriageway. The defendants then proceeded to alter the road. The plaintiff brought an action for an injunction to restrain them from altering the widths of the footways and carriageway.

HELD—that a local authority must deal with the street as they find it. Sect. 150 of the Public Health Act, 1875, gives no power to alter the respective proportions of footway and carriageway, but only to make good the street as dedicated.

ROBERTSON *v.* BRISTOL CORPORATION, [1900] [2 Q. B. 198; 69 L. J. Q. B. 590; 64 J. P. 389; 48 W. R. 498; 82 L. T. 516; 16 T. L. R. 358—C. A.

147. *Alteration of Works—Expenses of Sewering—Recovery of Expenses—Apportionment of Expenses—Jurisdiction of Urban Authority—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 150.]—An urban authority under sect. 150 of the Public Health Act, 1875, served notices on the frontagers of a street requiring them to sewer the street as therein specified. On default the local authority carried out more extensive sewage works, but including the work necessary for drainage of the street itself, and apportioned on the frontagers part of the cost of the more extensive works, being the amount which it would have cost to sewer the street in accordance with the notices.

HELD—that the amount so apportioned was recoverable by the local authority.

ACTON URBAN DISTRICT COUNCIL *v.* WATTS, [(1903) 67 J. P. 400; 1 L. G. R. 594—Kekewich, J.

148. *Contract between two Frontagers—Construction of Contract—Road originally made by Frontagers jointly — One "to be under no Liability for Repair"—Covenant by Others to maintain "until taken to" by Local Authority—Liability for subsequent Works under Public Health Act*, 1875 (38 & 39 Vict. c. 55), *s.* 150.]—A road was in 1888 widened and made up by two frontagers under an agreement, whereby M. was not "to be under any liability to contribute to the maintenance or repair of the said roadway and sewers and main drain, or any works connected therewith; but the same were to be wholly and solely maintained by T., unless and until the same should be taken to by the parish, or some other local or public authority."

In 1901 the local authority made up the road,

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or street, and apportioned on M. as a frontager the sum of £108.

HELD—the agreement did not apply to the works executed by the authority, and that M. could not recover the £108 from T.

Decision of Bigham, J. (67 J. P. 238; 19 T. L. R. 57) reversed.

MOORE *v.* TODD, (1903) 19 T. L. R. 642; 68 J. P. [43—C. A.

149. *Liability of Frontagers outside the District of the Authority—Districts of two Local Authorities—Line of the Kerb of the Street forming the Boundary between the Districts—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 150.]—The appellants, a local authority, sought to recover from the respondents apportioned expenses incurred by the appellants in the execution of certain works in a road not repairable by the inhabitants at large, known as B. road. The boundary between the appellants' borough and the urban district of F. B. ran along the line of the kerb of the footpath on the north side of the said road, so that the carriageway and the footpath on the south side were within the appellants' borough, and the footpath on the north side was in the urban district of F. B. The respondents were the owners of premises abutting on the footpath on the north side, and wholly within the urban district of F. B. The appellants having made up the roadway and the footpath on the south side under sect. 150 of the Public Health Act, 1875, their surveyor apportioned the cost of the footpath on the south side among the frontagers on the south side, and sought to make the respondents equally liable with the frontagers on the south side for the expenses of making up the roadway.

HELD—that under sect. 150 the appellants had no power to apportion any part of the cost on frontagers not within the area of their borough.

HORNSEY BOROUGH COUNCIL *v.* BIRKBECK [FREEHOLD LAND SOCIETY, [1906] 1 K. B. 521; 75 L. J. K. B. 348; 70 J. P. 140; 54 W. R. 528; 94 L. T. 700; 22 T. L. R. 346; 4 L. G. R. 581—Div. Ct.

150. *Satisfactory Sewer—Pipe laid in* 1859 *in Private Road—Surface Water and Drainage of several Houses carried away thereby—Road sewered and Expenses apportioned on Frontagers—Acceptance of Pipe by Local Authority as satisfactory Sewer—Knowledge of Local Authority—Lapse of Time—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 150.]—A road having been made by the owners of a building estate, about 1859, a 12-inch pipe was laid by them along it from end to end. Houses were built from time to time in the neighbourhood of the road, and some of their owners connected their drains with the 12-inch pipe; but certain of the houses which were first built had a separate system of drainage into cesspools in a wood at the back of their premises. Drainage into the 12-inch pipe commenced at least as early as 1876. The 12-inch pipe discharged into a culvert, and thence into a river. The plaintiffs' predecessors, the local board of health, were constituted in 1878, and could in that year have put into operation the provisions of sect. 150 of the Public Health Act, 1875. There was evidence that in 1882 their surveyor knew of at least one connection of drains with this pipe, and that complaint having been made in 1892 or 1893 as to the outfall of the pipe's contents into the river, the local authority subsequently proposed a scheme of drainage by which the drainage was to be diverted from the 12-inch pipe and carried into septic tanks.

HELD—that the pipe was a "sewer" within the meaning of the Public Health Act, 1875, and had vested in the plaintiffs.

HELD, also, on the evidence, as a finding of fact, that the local authority must be taken to have been satisfied with the sewer and could not now re-sewer the road and proceed against frontagers under sect. 150 of the Public Health Act, 1875.

Semble, when a sewer has thus existed for a long period of years it must be inferred that the sewer has been accepted by the local authority as a sewer laid to their satisfaction.

Bonella v. *Twickenham Local Board* ((1887) 20 Q. B. D. 63; 57 L. J. M. C. 1; 52 J. P. 536; 36 W. R. 50; 58 L. T. 299—C. A.) applied.

WILMSLOW URBAN DISTRICT COUNCIL *v.* SIDE- [BOTTOM, (1906) 70 J. P. 537; 5 L. G. R. 80—Neville, J.

151. *Scotland—Register of Streets—Fixing Width for Purpose of regulating Height of Buildings—Width as at Present, or as intended to be after Widening—Glasgow Building Regulation Act*, 1900 (63 & 64 Vict. *c.* cl.), *s.* 20.]—The master of works in fixing the width of a public registered street in Glasgow must determine the width as it actually exists, and not as it will be if the street be widened.

But if the master of the works inserts in the register a width calculated on a prospective widening, an action will be premature before the register is finally approved by the sheriff.

Decisions of Ct. of Sess. ((1905) 7 F. 1020, 1034) affirmed.

NISBET *v.* HAMILTON AND OTHERS: CALE- [DONIAN RY. *v.* GLASGOW CORPORATION, [1907] A. C. 158, 160—H. L. (Sc.).

(e) New Streets.

See also MARKETS AND FAIRS, 2.

152. *Ancient Highway — Decisions — Towns Improvement Clauses Act*, 1847 (10 & 11 Vict. *c.* 34), *s.* 63—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 157.]—The decisions under sect. 157 of the Public Health Act, 1875, as to what is a new street apply in considering what constitutes a "new street" in sect. 63 of the Towns Improvement Clauses Act, 1847.

The defendants proposed to erect buildings on the east of an ancient highway, on the west side of which buildings extended for 485 feet. There

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were no buildings on the east side except two cottages, on the site of which the defendants proposed to build a building 233 feet long. The district council required the defendants to set back their buildings so as to leave a road 30 feet wide, which they refused to do.

HELD—that the new buildings would make the old highway a new street within the meaning of the Act.

Robinson v. *Local Board of Barton-Eccles* ((1883) 8 App. Cas. 798; 53 L. J. Ch. 226; 48 J. P. 276; 32 W. R. 249; 50 L. T. 57—H. L. (E.)) applied.

ATTORNEY-GENERAL *v.* RUFFORD & CO., LD., [1899] 1 Ch. 537; 68 L. J. Ch. 179; 63 J. P. 232; 47 W. R. 405; 80 L. T. 17—North, J.

153. *Drainage Bye-law — Channelling — Invalidity—Uncertainty—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 157 — *Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 6, 7.]—In pursuance of the powers conferred by sect. 157 of the Public Health Act, 1875, the appellants made with respect to new streets and buildings a bye-law providing that in the case of certain classes of streets there should be constructed on each side of the street a proper channel of a given size "either of granite cubes laid on a bed of cement concrete at least six inches in thickness or otherwise in a suitable manner and with suitable materials."

HELD—that the bye-law was not bad either for being inconsistent with sect. 150 of the Public Health Act, 1875, and sects. 6, 7 of the Private Street Works Act, 1892, or for uncertainty.

LEYTON URBAN DISTRICT COUNCIL *v.* CHEW, [1907] 2 K. B. 283; 76 L. J. K. B. 781; 71 J. P. 355; 96 L. T. 727; 5 L. G. R. 837 —Div. Ct.

154. *Drainage Bye-law—Breach of Surveyor's Specification — Original Offence — Continuing Offence—Inclusion in one Conviction—Notice of continuing Offence—Information not mentioning —Surface Water Sewer—Validity of Bye-law—Local Act—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 156, 158, 183.]—Bye-laws as to new streets made in 1876 under sect. 156 of the Public Health Act, 1875, required drains to be laid as specified by the city surveyor, and provided a penalty and further daily penalties in the case of a continuing offence. A local Act of 1903 for the first time empowered the corporation to require separate surface water sewers, and the surveyor specified accordingly for a certain new street in which the appellant was building houses. The appellant disregarded the specification, and a formal notice was served on him informing him that he was liable to daily penalties if he continued the offence. He disregarded the notice, and an information was laid against him for carrying out certain works in a new street otherwise than in accordance with the specification of the city surveyor, by draining roof water into a drain other than the surface water sewer, contrary to the bye-laws, no reference being made to the continuance of the offence. The magistrate convicted the appellant, and inflicted a penalty of £5, and a further penalty of £2 a day for each day that the offence continued.

HELD—affirming the conviction, (1) that the same person being responsible for both the original construction of the works and their subsequent maintenance, the construction and maintenance were not separate offences, and might, therefore, be included in one information and summons; (2) that as the appellant had received notice prior to the date of the information that he was offending against the bye-laws, and that he was liable to an additional daily penalty during the continuance of the offence, the magistrate could deal with the continuance, although the information did not refer to it; and (3) that though the bye-laws were made in 1876, and power to require separate surface water sewers was not given to the corporation till the passing of the Act of 1903, the penalties were rightly inflicted for breach of the bye-law, as that Act had extended the requirements which the surveyor might lawfully include in his specification.

AIREY *v.* SMITH, [1907] 2 K. B. 273; 76 L. J. [K. B. 766; 71 J. P. 285; 96 L. T. 691; 23 T. L. R. 447; 5 L. G. R. 713—Div. Ct.

155. *Laying Out—What amounts to—Reservation of Strip of Land between Building Plots and Road—Parts of Strip thrown into Road.*] — By the bye-law of a local authority "every person who shall intend to make or lay out any new street" was to give notice of such intention to the local authority, and to deposit a plan and section of the intended new street as specified in the bye-law.

F. bought a strip of land fronting an occupation road fifteen or sixteen feet wide, of which he did not own the soil. He cut up the land into plots, but reserved a strip six feet wide, along the whole of the frontage to the lane. He sold four of the plots, and on the purchasers erecting houses thereon, he took away the hedge between the reserved strip and the road opposite the plots sold, throwing the portions of the reserved strip opposite the plots sold into the lane.

HELD—that there was no evidence that F. intended to make and lay out a new street within the meaning of the bye-law.

FELLOWES *v.* SEDGELEY URBAN DISTRICT [COUNCIL, (1906) 70 J. P. 412; 4 L. G. R. 970 —Div. Ct.

156. *Laying out New Street—Bye-laws—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55).—B. was the owner of a piece of land on one side of a road 160 yards long, which road was of less width than that required by the local bye-laws for a new street. On the roadside of B.'s land was a wooden fence. This fence B. removed and on its site built a wall and subsequently proposed to build a house inside the wall. The opposite side of the road was defined by a wall enclosing a dwelling-house. The justices were

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of opinion that B. had defined the line of road and had converted the road into a new street, and convicted him of laying out a new street not in accordance with the bye-laws.

HELD—that there was no evidence of laying out a new street and that the conviction ought to be quashed, as what the defendant did was simply to substitute a wall for the wooden fence bounding his property.

BUSHELL *v.* CREER, (1900) 64 J. P. 600—[Div. Ct.

157. *Laying out or constructing a new Street — Bye-laws — Claim for Injunction — Special Remedies provided by Bye-law or Statute—Attorney-General not a Party to Action.*]—The defendants were the owners of a piece of land in the shape of a triangle, two sides of which abutted upon public highways within the plaintiffs' borough, and they erected thereon certain houses without removing the fences, but they made the necessary openings here and there so as to provide means of entrance to and exit from the houses that were being built. They did not attempt to alter or interfere with the roadways. The plaintiffs claimed an injunction to restrain the defendants from laying out or constructing the roads, or either of them, as "new streets" or "a new street" in contravention of the bye-laws, which required "new streets" to be of a specified width.

HELD—(1) that, on the question of fact, the learned judge was quite justified in drawing the inference that the defendants were not laying out or constructing a new street or anything of the kind within the meaning of the bye-laws. (2) That, as no proprietary rights of the plaintiffs were being interfered with, they could not enforce the bye-laws by an action for an injunction in their own name, but only by the special remedies, namely, proceeding for penalties, and removing work done contrary to the bye-laws, as provided by the statute and bye-laws, or by an information by the Attorney-General on their relation. And that therefore the action could not be maintained by the urban authority, even if it was right upon the facts.

Judgment of Buckley, J. in *Attorney-General* v. *Ashbourne Recreation Ground Co.* ([1903] 1 Ch. 101 ; 72 L. J. Ch. 67 ; 67 J. P. 73 ; 51 W. R. 125 ; 87 L. T. 561 ; 19 T. L. R. 39, *see* LOCAL GOVERNMENT, No. 125), approved.

Decision of Joyce, J. ([1902] 2 Ch. 183 ; 71 L. J. Ch. 754 ; 86 L. T. 612 ; 18 T. L. R. 489) affirmed.

DEVONPORT CORPORATION *v.* TOZER, [1903] [1 Ch. 759 ; 72 L. J. Ch. 411 ; 67 J. P. 269 ; 52 W. R. 6 ; 88 L. T. 113 ; 19 T. L. R. 257 ; 1 L. G. R. 421—C. A.

158. *Level, Determination of—Local Authority fixing Minimum Level for New Street—Low-lying Land—Provision necessary for Surface Water and Sewage — Reasonableness — Portsmouth Corporation Act*, 1883 (46 & 47 Vict. *c.* ccxi.), *ss.* 16, 17, 31.]—A public authority, acting under their local Act, required a new street to be constructed (if at all) with a minimum level of nine feet above Ordnance datum. This would necessitate raising the level of some 200 acres at an estimated cost of £220,000.

HELD—that, having regard to the nature of the locality and other circumstances, the requirement was reasonable.

GREAT SALTERNS SYNDICATE *v.* PORTSMOUTH [CORPORATION, (1904) 68 J. P. 48—Qr. Sess.

159. *Name—Named by Owner—Re-named by Local Authority — Defacement by Owner — Offence—Towns Improvement Clauses Act*, 1847 (10 & 11 Vict. *c.* 34), *s.* 64.]—The appellant was minded to lay out a new street upon his estate for building purposes, and upon his plans he called that street "Midhurst Avenue." This was brought to the knowledge of the local authority, but they exercised no judgment in respect of that proposed name. The local authority then determined *bonâ fide* that the street should be called "Collingwood Avenue," and they put up a board in the street with that name upon it. The appellant defaced that name, and was convicted under sect. 64 of the Towns Improvement Clauses Act, 1847.

HELD—that, considering the duty imposed upon the local authority by sect. 64 of the Towns Improvement Clauses Act, 1847, the appellant had no right to deface the name ; that if he had any right as owner to call the street "Midhurst Avenue" he ought to have enforced his right by taking legal proceedings against the local authority to restrain them from putting up the board with another name ; and that the conviction was right.

COLLINS *v.* HORNSEY URBAN DISTRICT [COUNCIL, [1901] 2 K. B. 180 ; 70 L. J. K. B. 802 ; 65 J. P. 600 ; 49 W. R. 620 ; 84 L. T. 839 ; 17 T. L. R. 487—Div. Ct.

(f) Notices.

160. *Amendment of Plans, &c. — Original Resolution of Local Authority—Fresh Notices—Justices' Discretion—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 6, 7, 8.]—Where justices are asked to amend the plans, &c., submitted under the Private Street Works Act, 1892, by a local authority, they have, under sect. 8, jurisdiction to do so without expressly amending the original resolution of the local authority, and also without directing further notices to be given to persons affected who have had notice of the original scheme and have not given notice of objection. An order made in such circumstances, declaring the local authority entitled to a charge on the property of such persons for their proportion of the expense, is therefore valid.

Though sect. 6 gives the justices a discretion in such cases as to adjourning and directing further notices to be served, it is desirable, in cases of importance, that an adjournment should take place, and that notice should be given to persons affected who are not before the Court.

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Decision of Stirling, J. ([1899] 1 Ch. 168; 68 L. J. Ch. 96; 63 J. P. 23; 47 W. R. 328; 79 L. T. 544; 15 T. L. R. 101) affirmed.

TWICKENHAM URBAN DISTRICT COUNCIL *v.* [MUNTON, [1899] 2 Ch. 603; 68 L. J. Ch. 601; 47 W. R. 660; 81 L. T. 136; 15 T. L. R. 457—C. A.

161. *Paving and Sewering Expenses Notice—"Back Roads"—"Cross Roads"—Action in High Court—Limitation of Time—Summary Jurisdiction Act*, 1848 (11 & 12 Vict. *c.* 43), *s.* 11—*Blackburn Improvement Act*, 1882 (45 & 46 Vict. *c.* ccxliii.), *s.* 232.]—By sect. 232 of the Blackburn Improvement Act, 1882, all expenses recoverable under the Act may be recovered in a summary manner, or in the superior Courts, or any court of competent jurisdiction. The plaintiffs made up and paved a road in their district under the provisions of the said Act and served notices on the frontagers demanding payment of the expenses thereof. Upon default in payment the plaintiffs, more than six months after the service of the notice, sued the frontagers to recover the expenses. The paving notices upon frontages in two cross roads described the two roads as "back roads" only. The local Act defined a "back road" and also a "cross road."

HELD that the notice was ample, as the mistake in the description of the roads as "back roads," could not have misled the defendants; that the limitation of six months imposed by sect. 11 of the Summary Jurisdiction Act, 1848, did not apply to the alternative proceedings in the High Court; and that, therefore the action was not brought too late.

West Ham Local Board v. *Maddams* ((1876) 40 J. P. 470; 33 L. T. N. S. 809, and *Tottenham Local Board* v. *Rowell*, (1876) 1 Ex. D. 514; 46 L. J. Q. B. 432; 25 W. R. 135; 35 L. T. 887—C. A.) distinguished.

Hammersmith Vestry v. *Lowenfeld* ([1896] 2 Q. B. 278; 65 L. J. Q. B. 662; 60 J. P. 600; 45 W. R. 60; 75 L. T. 182—Div. Ct.) overruled.

Decision of Mathew, J. ((1901) 17 T. L. R. 175) affirmed on first point and reversed on last point.

BLACKBURN CORPORATION *v.* SANDERSON, [1902] 1 K. B. 794; L. J. K. B. 590; 66 J. P. 152; 86 L. T. 304; 18 T. L. R. 436—C. A.

162. *Service of Notices—Condition precedent to recovery of Expenses—"Reputed Owners"—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 6, 12, *Sch., Part I.*]—A local authority, who were going to carry out private street works, sent a notice of the provisional apportionment to "The H. Quarry Co., Ld., D. Robinson, manager," who were described in the apportionment as "owners, or reputed owners," of certain premises liable for a share of the costs; they were in fact ex-lessees, and the defendant, the real owner of the premises, never received a notice, or heard of the plans of the authority. After completion of the works a final apportionment was sent, addressed in the same way; and then the authority, discovering their mistake, served an amended final apportionment upon the defendant, and sued him for the apportioned amount.

HELD—that they could not recover, for the due service of the notices was a condition precedent; and that, though the Quarry Co. were in fact the "reputed owners," service on the premises of a notice addressed to them, and not to "the owner," did not satisfy the statute.

WIRRAL RURAL DISTRICT COUNCIL *v.* CARTER, [1903] 1 K. B. 646; 72 L. J. K. B. 332; 67 J. P. 31; 51 W. R. 414; 89 L. T. 171; 19 T. L. R. 153; 1 L. G. R. 206—Div. Ct.

163. *Service of Notices—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 150, 267.]—The respondent was the owner of a strip of unenclosed land adjoining a new street, which the local authority resolved should be made up. The local authority prepared the usual notice under sect. 150 of the Public Health Act, 1875, requiring the street to be sewered, levelled, paved, &c., addressed it to "the owner," and affixed it in a conspicuous place on the strip of land pursuant to sect. 267 of the Public Health Act, 1875. The owner did not do the work. The local authority thereupon did the work and apportioned the expenses on the owner. The owner did not pay. In proceedings to recover the amount before the justices, they found that the owner and his place of residence were known to the surveyor and the assistant surveyor of the local authority, but not to the clerk who drew and posted the notice, and that the notice did not come to the knowledge of the owner. The justices held that the notice was not properly served, and dismissed the complaint.

HELD—that the justices were wrong, and the notice was properly served under sect. 267 of the Public Health Act, 1875.

SHARPLEY *v.* BEAR, (1904) 67 J. P. 442—Div. [Ct.

(g) Objections.

164. *Arbitration—Paving and Sewering Expenses—Apportionment—Items of Total Amount—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 150, 257]—Where a local authority executes paving and other works in a street under sect. 150 of the Public Health Act, 1875, and the apportionment is disputed, the arbitrators appointed to settle the dispute have no jurisdiction to inquire into the items of the total amount certified by the surveyor.

Bayley v. *Wilkinson* ((1864) 16 C. B. (N. S.) 161; 33 L. J. M. C. 161; 12 W. R. 797) followed.

CAWSTON *v.* BROMLEY URBAN DISTRICT [COUNCIL, (1901) 17 T. L. R. 25—Div. Ct.

165. *Arbitration—Apportionment—Justices—Jurisdiction to entertain Objections—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 150, 257, and 268.]—The only power which an arbitrator appointed to apportion paving expenses under sect. 150 of the Public Health Act, 1875, has, is to divide up the total sum which the local

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authority have decided to be the cost of the work. He has no jurisdiction to entertain objections to the total cost of the work as given to him by the local authority.

In proceedings against a frontager under sect. 257 of the Public Health Act, 1875, for the recovery of paving expenses the justices have power to entertain objections which offer an answer to the whole of the frontager's liabil ty, but have no power to entertain objections as to the amount of his liability.

The only method in which a frontager can take objection to the decision of the local authority as to the works to be carried out under sect. 150 of the Act is by appeal to the Local Government Board under sect. 268.

Hornsey Local Board v. *Davis* ([1893] 1 Q. B. 756 ; 62 L. J. Q. B. 427 ; 57 J. P. 612 ; 68 L. T. 503) discussed.

Quære, whether in carrying out private street works under sect. 150 an authority is entitled to add 5 per cent. in respect of office expenses to the actual cost of the work.

In re Hanwell Urban District Council [and Smith, (1904) 68 J. P. 496 ; 2 L. G. R. 1350—Channell, J.

166. *Determination by Court of Summary Jurisdiction — Right of appeal to Quarter Sessions—Right of appeal to Local Government Board — Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 269—*Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 1, 6, 7, 8.]—If an owner of premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing works under the Private Street Works Act, 1892, objects to the proposals under sect. 7 of the Act, and the urban authority applies to a court of summary jurisdiction to determine the matter of such objections, he has a right of appeal from such determination to quarter sessions under sect. 269 of the Public Health Act, 1875, as sect. 1 of the Private Street Works Act, 1892, provides that it is to be construed as one with the Public Health Acts.

Semble—under the Act of 1892, there is an appeal to the Local Government Board.

Hayles v. *Sandown Urban District Council* ([1903] 1 K. B. 169 ; 72 L. J. K. B. 48 ; 67 J. P. 177 ; 51 W. R. 348 ; 88 L. T. 61—Div. Ct., No. 168, *infra*) explained.

Pearce *v.* Maidenhead Corporation, [1907] [2 K. B. 96 ; 76 L. J. K. B. 591 ; 71 J. P. 230 ; 96 L. T. 639 ; 5 L. G. R. 622—Div. Ct.

167. *Memorial by Owners—Objection, What is an—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *s.* 7.]—An urban authority resolved to sewer, level, pave, &c., a certain road within their district under the provisions of the Private Street Works Act, 1892, and a provisional apportionment of the expenses of the works was prepared and approved. The owners of certain premises shown in the provisional apportionment as liable to be charged with part of the expenses of executing the works, delivered to the authority a memorial stating that they had no desire that the road should be taken over by the sanitary authority, and that the proposed works were unreasonable and unnecessary, and asking that before further steps were taken to carry out the works inquiry shoul l be made into the matter.

Held—that such a memorial was not notice of objection within the meaning of sect. 7 of the Private Street Works Act, 1892, and therefore that it did not cast upon the urban authority the obligation of taking the proceedings prescribed by sect. 8 (1) of that Act.

Southampton Corporation *v.* Lord, (1903) [67 J. P. 189 ; 1 L. G. R. 324—C. A.

168. *No Objection taken in Prescribed Manner —Final Apportionment—Attempt to raise Objection before Justices—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *s.* 12.]—The appellant was a frontager of a street which had been "made up," &c., under the Private Street Works Act, 1892. When proceedings were taken before the justices to recover from him his apportioned share of the expenses, he attempted to establish that the surveyor had allowed the contractor to deviate from the specifications, and that the works had never been "completed."

Held—that such an objection could probably have been raised under sect. 12 at the proper time ; but that, in any case, the justices were right in not allowing it to be raised before them.

Hayles *v.* Sandown Urban District [Council, [1903] 1 K. B. 169 ; 72 L. J K. B. 48 ; 67 J. P. 177 ; 51 W. R. 348 ; 88 L. T. 61 ; 1 L. G. R. 187—Div. Ct.

And see No. 166, *supra*.

169. *No Objection taken in Prescribed Manner —Completion of Works—Final Apportionment of Expenses—Inclusion of Cost of Sewer already in the Street made under Agreement with Local Authority — Frontager — Right to Question Apportionment before Justices — Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 6, 7, 12.]—The respondent purchased a house in a street which had in front of it a sewer made by a private individual under an agreement with the appellants. The respondent knew nothing of the agreement. The appellants having decided to make up and sewer the street under sect. 6 of the Private Street Works Act. 1892, caused a notice to be served on the respondent as a frontager, and no notice of objection was given by the respondent under sect. 7 of the Act. The work having been done by the urban authority, notice of the final apportionment (which included the cost of the sewer previously laid as aforesaid) was served on the respondent, and no objection was taken by her under sect. 12. Upon proceedings before the justices to recover the amount of the final apportionment,

Held—that the respondent having failed to object either under sect. 7 or sect. 12 of the Act, no objection could be raised by her that the cost

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of the said sewer ought not to have been included in the apportioned expenses.

TEDDINGTON URBAN DISTRICT COUNCIL *v.* [VILE, (1906) 70 J. P. 381 ; 4 L. G. R. 782 —Div. Ct.

170. Res judicata — *Highway Repairable by the Inhabitants at Large—Judgment* in rem—*Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 6, 7, 8.]—Certain sections of the Wakefield Corporation Act, 1887 (50 & 51 Vict. c. lxxi.), are similar to sects. 6, 7 and 8 of the Private Street Works Act, 1892. In 1898 the Corporation of Wakefield served notices under those sections of their local Act to do up a street called Sludge Lane, and it was objected that the street was a highway repairable by the inhabitants at large. A court of summary jurisdiction heard and determined the objection and found that the street was a highway repairable by the inhabitants at large. In 1901 the corporation served notices under the sections in respect of the same street with the addition of some 80 yards. On objection being taken that the matter was *res judicata*, the court of summary jurisdiction so held.

HELD—that the matter was *res judicata*.

R. v. *Hutchins* ((1881) 6 Q. B. D. 300 ; 50 L. J. M. C. 35 ; 45 J. P. 404 ; 29 W. R. 724 ; 44 L. T. 364) distinguished.

Decision of C. A. ([1903] 1 K. B. 417 ; 72 L. J. K. B. 345 ; 67 J. P. 121 ; 51 W. R. 305 ; 88 L. T. 225 : 19 T. L. R. 214) affirmed.

WAKEFIELD CORPORATION *v.* COOKE, [1904] [A. C. 31; 73 L. J. K. B. 88 ; 68 J. P. 225 ; 52 W. R. 321 ; 89 L. T. 707 ; 20 T. L. R. 115 ; 2 L. G. R. 270—H. L. (E.).

(h) Owners.

See also METROPOLIS.

171. "*Adjoining*" *or* "*fronting on*" *Street—Railway Line running under Street—Bridge and Parapets—Greenock Corporation Act*, 1893 (56 & 57 Vict. *c.* clxxx.), *s.* 34.]—By a local Act, liability for paving a street was imposed upon all "lands or heritages" in it or fronting or adjoining both sides of the line thereof. A railway company, in order to carry their line under the street at right angles, bought and demolished houses on each side of the street ; they then excavated the ground to form a cutting, and carried the roadway across on a bridge ; this bridge, with its parapets and steps leading down to a station in the cutting, was the property of the company.

HELD—that the company were owners of property "adjoining" the street.

Great Eastern Ry. v. *Hackney Board of Works* ((1883) 8 App. Cas. 687 ; 52 L. J. M. C. 105 ; 48 J. P. 52 ; 31 W. R. 769 ; 49 L. T. 509—H. L.) distinguished.

CAMERON *v.* CALEDONIAN RY., (1905) 6 F. 763 [—Ct. of Sess.

172. Extra Commercium *Premises—Mode of Provisional Apportionment — Pleasure Ground owned by Urban District Council — Whether* Extra Commercium—*Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 6, 7, 10.]—The appellants resolved to execute certain private street works as defined by the Private Street Works Act, 1892, and the respondents, as owners of premises abutting on the street, by written notice objected to the provisional apportionment on the ground that certain land which was the property of the appellants and which abutted on the street ought to be inserted. At the hearing of the objections it was proved before the justices that the land in question had been bought by the appellants under the Public Health Act, 1875, for a public pleasure ground, and that under the covenants in the conveyance they were bound to keep it open as a recreation and pleasure ground for the use of the public for ever. The appellants contended that they were not "owners" within the Public Health Act, 1875, and the Private Street Works Act, 1892, the land being incapable of being let at a rack rent, and that such land was not premises on which the expenses could be apportioned. The respondents contended that the land was within the terms of sects. 6 and 10 of the Private Street Works Act, 1892, and must, therefore, be included in the apportionment. The justices were of opinion that the latter contention was correct, and that the expenses should be apportioned on all the premises abutting on the street, including the land in question, and they directed the provisional apportionment to be amended accordingly.

HELD—(1) that all premises abutting on a street, even though *extra commercium*, must be included in a provisional apportionment under the Private Street Works Act, 1892, although eventually nothing may be charged against them ; (2) that the pleasure ground in question was not land *extra commercium*.

HERNE BAY URBAN DISTRICT COUNCIL *v.* [PAYNE & FARLEY, [1907] 2 K. B. 130 ; 76 L. J. K. B. 685 ; 71 J. P. 282 ; 96 L. T. 666 ; 23 T. L. R. 442 ; 5 L. G. R. 631—Div. Ct.

173. "*Owner*"—*Premises Let at a Rack-rent.*] —F. held certain premises in the city of Dublin under a lease from A. at the yearly rent of £34. The Poor Law valuation was £38. F. had sublet portions of the premises to weekly tenants, and received from these lettings £107 a year. F. was herself in occupation of the residue of the premises, the letting value of which was estimated at £19 10*s.* a year.

HELD—that F. was the "owner" of the premises within the meaning of sect. 2 of the Public Health (Ireland) Act, 1878, where the definition of "owner" is the same as in sect. 4 of the English Act of 1875.

RICE *v.* WHITE, [1904] 2 Ir. R. 8—K. B. D.

174. "*Owner*"—*Change of Ownership before Demand for Payment.*]—At the date of the making and publishing of an order for the paving, &c., of a street the defendant was an owner of lands, subject to a mortgage, adjoining the street

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in question, and he continued as owner for more than a month after the last publication of the order. The defendant never executed the required works, and his share of their estimated expense was demanded from him by the plaintiffs. At the time of making such demand the defendant had ceased to be owner, the mortgagees having entered into possession and receipt of rents.

HELD—that the defendant was liable for the amount demanded notwithstanding that he had ceased to be owner when the demand was made.

BELFAST CORPORATION *v.* HILL, [1904] 2 Ir. R. [105—K. B. D.

175. "*Owner*"—*Absence of Objection to Apportionments — Liability of "Owner" of Premises shown in a Provisional Apportionment —Estoppel.*]—An urban authority, under the provisions of a local Act analogous to the Private Street Works Act, 1892, resolved to execute certain private street works, and served statutory notices on a firm of estate agents as "owners" within the meaning of sect. 4 of the Public Health Act, 1875, of premises fronting, adjoining, or abutting on the street. The agents made no objection to the provisional or final apportionment of expenses. Some time after the works had been completed and the final apportionment made, the agents discovered that the boundary wall fronting the street was not part of their premises, but was the property of other owners, and they therefore denied liability for the apportioned expenses, on the ground that their premises did not in fact abut on the street.

HELD—that inasmuch as their names appeared in the provisional apportionment as owners of the premises fronting the street, and, although served with the statutory notices, they had made no objection to the proposals of the urban authority on the ground that their premises ought to be excluded from the provisional apportionment, the agents were liable for the apportioned expenses.

WALLASEY URBAN DISTRICT COUNCIL *v.* [WALKER & CO., (1906) 70 J. P. 199; 4 L. G. R. 1042—Bray, J.

176. "*Owner*"—*Mortgagee in Possession—Service of Notices—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 6 (3), 12 (1), 13 (1) —*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 4.]—An urban district council served a copy of a resolution to execute certain private street works under the Private Street Works Act, 1892, upon a mortgagor of two houses as "owner" of the houses. They executed the works and served notice of final apportionment upon the mortgagor as "owner." At the time when the copy resolution and the notice were served, mortgagees of the premises were in possession. Upon action by the mortgagees to restrain the council from selling under sect. 13 (1) of the Act in order to recover the sums apportioned.

HELD—that as the mortgagees were in possession when the copy resolution and the notice were served on the mortgagor, the council had not served the "owner" as defined by sect. 4 of the Public Health Act, 1875, and that they were not, therefore, entitled to sell the premises.

MAGUIRE *v.* LEIGH-ON-SEA URBAN DISTRICT [COUNCIL, (1906) 70 J. P. 479; 95 L. T. 319; 4 L. G. R. 979—Div. Ct.

177. "*Owner in default*"—*Change of Ownership after completion of Works and before Demand for Payment—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 150, 257.]—The appellant was the owner of certain premises in June, 1899, and had served upon him as such owner a notice under sect. 150 of the Public Health Act, 1875, calling upon him to sewer, level and pave the street upon which his premises abutted. The respondents, in default of compliance with such notice, executed the work, which was completed in December, 1901. Formal notice of the apportionment of the expenses of such work was served on the appellant in November, 1902, and on May 20th, 1903, a demand in writing for the amount apportioned in respect of the premises was served upon him. In April, 1902, before the demand was made, the appellant had ceased to be the owner of the premises.

HELD—that as the appellant was the owner of the premises when the works were completed, he was liable to pay the amount apportioned in respect thereof.

Dicta in *R.* v. *Swindon Local Board* ((1879) 4 Q. B. D. 305; 48 L. J. Q. B. 119; 43 J. P. 431; 27 W. R. 732; 40 L. T. 424—C. A.) disapproved.

Decision of Div. Ct. (66 J. P. 245; 90 L. T. 489; 20 T. L. R. 289) reversed.

MILLARD *v.* BALBY-CUM-HEXTHORPE URBAN [DISTRICT COUNCIL (2), [1905] 1 K. B. 60; 74 L. J. K. B. 45; 53 W. R. 165; 69 J. P. 13; 91 L. T. 730; 21 T. L. R. 8; 2 L. G. R. 1248—C. A.

178. "*Owner in Default*"—*Notice to do the Work—Purchase by Respondent after Notice Given, but before Completion of Work—Re-sale by Respondent after Completion, but before Apportionment—Public Health Act*, 1875 (38 & 39 Vict. *c.* 54), *ss.* 150, 267.]—On August 25th, 1900, the local authority served a notice on the owner of property adjoining a certain highway, not repairable by the inhabitants at large, to do certain works in the said street. The terms of the notice were not complied with by the then owner.

On March 27th, 1901, the respondent purchased the said property without any notice or knowledge of the said notice. The works were done by the local authority, and were completed in July, 1901. On June 25th, 1902, the respondent sold the premises. The respondent was served with notice of apportionment, and demand for payment on March 10th, 1904.

HELD—that the respondent was liable to pay the apportionment.

Dictum of Collins, M.R., in *Millard* v. *Balby-*

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cum-Hexthorpe Urban District Council, supra, followed.

AYLETT *v.* EAST HAM URBAN DISTRICT [COUNCIL, [1905] 2 K. B. 22; 74 L. J. K. B. 471; 69 J. P. 205; 53 W. R. 492; 92 L. T. 420; 21 T. L. R. 406; 3 L. G. R. 541—Div. Ct.

(i) Property in Street.

179. *Land Acquired for the Purposes of Streets —Conveyance of to Trustees in fee—"Vest in and be under the Control of the Urban Authority"—* Usque ad Cœlum *— Overhead Wires—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 149—*Turnpike Roads Act*, 1822 (3 Geo. 4, *c.* 126).]—In sect. 149 of the Public Health Act, 1875, "vest" means that property in something passes, and "street" means so much of the soil, and the air above, as is required for the purposes of the street.

The Regent's Park Road was originally constructed by turnpike trustees, appointed under a local Act of Parliament passed in 1826. The site or part of the site of the road where the plaintiffs' wires crossed it was originally glebe land, and was in 1828 conveyed to the trustees in fee simple by the rector of the parish, under the Turnpike Roads Act of 1822. The plaintiffs carried two guide or supporting wires across the road at a height of 34 feet. These wires were intended to support a cable carrying a supply of electricity to the house of one of the plaintiffs' customers. The road became vested in the defendants under sect. 149 of the Public Health Act, 1875.

HELD—that the fact that originally the fee simple was conveyed to the trustees was no evidence that the soil *ad inferos* and the air *ad superos* were, or are, necessary for "street purposes," and so vested in the defendants. The extent of the "area of uses" is a question of fact; and, so long as they do not encroach upon that area, the plaintiffs are entitled to carry their wires across the street.

Decision of Farwell, J. ([1902] 1 Ch. 866; 71 L. J. Ch. 450; 66 J. P. 502; 50 W. R. 470; 86 L. T. 286; 18 T. L. R. 449) reversed.

FINCHLEY ELECTRIC LIGHT CO. *v.* FINCHLEY [URBAN DISTRICT COUNCIL, [1903] 1 Ch. 437; 72 L. J. Ch. 297; 67 J. P. 97; 51 W. R. 375; 88 L. T. 215; 19 T. L. R. 238; 1 L. G. R. 244—C. A.

180. *Soil of Street—Presumption of Ownership — Adjoining Landowners — Regent Street —* 53 Geo. 3, *c.* 121.]—The Crown, under an Act of 1813 (53 Geo. 3, c. 121), acquired land for the purpose of constructing a new street in London (now Regent Street), and by sect. 34 it had power to sell, exchange, or lease premises not wanted for the purposes of the Act. While the street was in course of formation the Crown granted a lease of premises fronting the street. The description of the property in the parcels, and the delineation of it on the plan, included no part of the soil of the street; and it was described as abutting on "a street now forming there."

HELD—without deciding whether the presumption of ownership *usque ad medium filum* applied to a street in a town, or against the Crown, or whether sect. 34 gave the Crown any power to demise any part of the street—that the circumstances showed that no part of the soil of the street was intended to pass under the lease.

MAPPIN BROTHERS *v.* LIBERTY & CO., [1903] [1 Ch. 118; 72 L. J. Ch. 63; 67 J. P. 91; 51 W. R. 264; 87 L. T. 523; 19 T. L. R. 51; 1 L. G. R. 167—Joyce, J.

181. *Subway Connecting Owner's Property on each Side of Street—Electric Wires laid under Floor of Subway—Right of Urban Authority to Remove—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 26.]—The defendants, who were the owners of property abutting on either side of a street in the plaintiffs' district, without the consent of the plaintiffs as required by sect. 26 of the Public Health Act, 1875, constructed a tunnel under the roadway with a concrete floor. In the middle of the floor they cut a trench throughout the length of the tunnel down to the clay, and in it laid pipes carrying electric mains for the purpose of lighting their premises on both sides of the road. At the instance of the plaintiffs the defendants removed the top of the tunnel and filled it in, leaving their electric mains in the soil of the roadway. The plaintiffs gave the defendants notice to remove the tunnel, and then brought an action against them for a declaration that they were entitled to remove it.

HELD—that the council were entitled to a declaration that they were entitled to alter, pull down or otherwise deal with the tunnel as they thought fit; and that the company was entitled to an injunction to restrain the council from cutting, disturbing, or injuring the company's pipes or mains or electrical wires lying under the street or otherwise trespassing upon the company's land under the street.

WALKER URBAN DISTRICT COUNCIL *v.* WIGHAM, [RICHARDSON & CO., LD., (1902) 66 J. P. 152; 85 L. T. 579; 18 T. L. R. 107—Farwell, J.

(k) "Street."

182. *Admissibility of Evidence—Objection— "Not a Street within Act"—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *s.* 7 (a) (b).]—The appellant was the owner of freehold land situated in a road which was proposed to be paved by the respondents, the sanitary authority, under sect. 6 of the Private Street Works Act, 1892, and notice of apportionment was served upon him. The appellant gave notice under the Private Street Works Act, 1892, s. 7 (*a*), of objection to the apportionment on the ground that the alleged part of a street did not form part of a street within the meaning of the Act. At the hearing the justices refused to let the appellant call evidence that the street was a highway, repairable by the inhabitants at large, on the ground that no notice of such objection

Private Street Works—*Continued.*

had been given under sect. 7 (*b*) of the Private Street Works Act, 1892.

HELD—that such evidence was admissible under sect. 7 (*a*).

CAREY *v.* BEXHILL CORPORATION, [1904] 1 [K. B. 142; 73 L. J. K. B. 74; 68 J. P. 78; 90 L. T. 58; 2 L. G. R. 367—Div. Ct.

183. *Agreement with Local Authority—Road to be a Highway repairable by Inhabitants at Large—Reservation to Local Authority of Powers under Public Health Acts—Enforcing Reservation—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 146, 150—*Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57).]—By an agreement made in 1879 between a railway company, certain owners of property, and the appellants, it was agreed that a certain road should be dedicated to the public and accepted by the appellants as a highway repairable by the inhabitants at large, subject, nevertheless, to the appellants retaining the same powers of requiring the respective frontagers for the time being to make up such parts of the road as were not already properly made up, and reserving to the appellants all the powers under sect. 150 of the Public Health Act, 1875. The road was properly made up by the railway company at the date of the agreement, but the footway was not paved. The appellants subsequently adopted the Private Street Works Act, 1892, and purported to pave the footpath under the powers conferred by that Act, and sought by means of summary proceedings to recover from the frontagers the expenses incurred.

HELD—that as by the terms of the statute the powers sought to be enforced by the appellants did not apply to a highway repairable by the inhabitants at large, and as the road had been accepted as such, the parties to the agreement could not give the justices jurisdiction in the matter.

FOLKESTONE CORPORATION *v.* MARSH, (1906) [70 J. P. 113; 94 L. T. 511; 4 L. G. R. 382—Div. Ct.

184. *Agreement with Local Authority—Contract between Urban Authority and Frontagers as to making up of Roads*—Ultra *or* Intra Vires—*Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 7, 8, 14.]—The owners of, and frontagers on, certain roads, agreed with the urban authority, by deed made in 1879, that from January 1st, 1880, the roads should be dedicated to the public, and should be accepted by the urban authority as public highways, repairable by the inhabitants at large, and should be maintained and repaired accordingly, and that the urban authority should be at liberty to plant trees, and to erect and maintain seats for public use thereon, and to do all other acts, and to exercise all other powers, under a local Act of 1855 and the Public Health Act, 1875. It was, however, in and by the said deed further agreed that the urban authority was to retain and have the same powers of requiring the frontagers, so soon and to such extent only as their lands should be actually occupied for building purposes, to sewer, level, pave, &c., such of the said roads as should for the time being not be sewered, levelled, paved, &c., to the satisfaction of the urban authority, and such powers of executing and of recovering expenses, and of taking proceedings in relation to the matters aforesaid, as the urban authority would for the time being have or be capable of exercising under the Public Health Act, 1875, or the local Act, if the said roads had, for the time being, not been accepted by the urban authority as public highways, and were not highways repairable by the inhabitants at large.

The corporation, who had adopted the Private Street Works Act, 1892, sued a successor in title of one of the frontagers on one of the said roads, under sect. 14 of that Act, for the apportioned expenses of private street works executed on the road.

The frontager had taken no objection to the provisional or to the final apportionment under sects. 7 and 12 of the Act.

HELD—that if the meaning of the deed was that the roads were, as between the parties, to be deemed highways repairable by the inhabitants at large, and that—by implication—the corporation undertook not to put into force the Private Street Works Act, 1892, against the frontagers, it was *ultra vires*. If the deed had no such meaning, it was no bar, in the present case, to proceedings under sect. 14 of that Act.

FOLKESTONE CORPORATION *v.* ROOK, (1907) 71 [J. P. 550; 6 L. G. R. 69—Div. Ct.

185. *Passage*—Cul-de-sac—*Premises of Frontagers having no means of Access—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 4, 150.]—A passage forming a *cul-de-sac* may be a "street" within sect. 150 of the Public Health Act, 1875, and the owner of premises abutting thereon is liable to pay his apportioned share of the costs incurred by the local authority in making it up, notwithstanding the fact that he has no means of access into the passage from his premises.

WALTHAMSTOW URBAN DISTRICT COUNCIL *v.* [SANDELL, (1904) 68 J. P. 509; 2 L. G. R. 835—Buckley, J.

186. *Path in Epping Forest—Notice to pave—Objections—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 7, 8.]—A path in Epping Forest, subject to the Epping Forest Act, 1878, may, with the consent of the conservators, be dealt with as a street under the Private Street Works Act, 1892, that Act being in force in the district in which such path is situate. The question whether the path is a street within the meaning of the Act of 1892 cannot be raised at all unless duly raised under sect. 7 of that Act. Notices, duly served in accordance with sect. 267 of the Public Health Act, 1875, are to be deemed to have been duly served although, in point of fact, they never reach the party to whom they are addressed.

WOODFORD URBAN DISTRICT COUNCIL *v.* [HENWOOD, (1900) 64 J. P. 148—Div. Ct.

187. *Public Footway prior to* 1835—*Objections to Apportionment of Sewering Expenses—Repair-*

Private Street Works—*Continued.*

able by the Inhabitants at Large—Private Street Works Act, 1892 (55 & 56 Vict. *c.* 57), *ss.* 2, 3, 5, 6.]—B. P. street in H. was formed between the years of 1806 and 1815. It was then and always has been open at both ends into old highways, and it was admitted that, since its formation, it had been used as a public footway without interruption. There was evidence before the magistrates that on one occasion a horse and cart was stopped, and that practically no repairs had been done to the street at any time, but that only refuse had been cleared away. The magistrates found that it was not a highway repairable by the inhabitants at large, and that, therefore, the appellant was liable for the apportionment made upon him for the expenses of sewering the streets.

HELD, allowing the appeal, that this was not a street within the meaning of the Private Street Works Act, 1892, being a footway repairable by the inhabitants at large.

ALSO HELD, that, the *onus probandi* is upon the authority to show that a street is a street within the meaning of the Private Street Works Act, 1892.

Per curiam that, where the necessity for re-sewering a street arises not from any change of things in the street but from a new general system of sewering adopted in the district, the authority having been previously satisfied with the sewering, it should not be done at private expense.

RISHTON *v.* HASLINGDEN CORPORATION, [1898] [1 Q. B. 294 ; 62 J. P. 85 ; 67 L. J. Q. B. 387; 77 L. T. 620 ; 14 T. L. R. 155—Div. Ct.

188. *Roadway made over Land acquired by a Railway Company under Statutory Powers—Whether a "Street" within sect. 150 of the Public Health Act—Covenant to make such Roadway in Purchase Deeds Fifty years Old—Whether Dedication* Ultra Vires *and Invalid—Presumption of Validity of Covenant—Dedication not inconsistent with the Objects of the Railway Company—Accommodation Road — Superfluous Land — Paving Expenses — Local Authority altering proportions of Footway and Roadway—Owners of Soil of Cross Streets, when liable as Frontagers —Declaration of Charge on Property of Railway Company—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 150—*Railways Clauses Act*, 1845 (8 & 9 Vict. *c.* 20), *s.* 68—*Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. *c.* 18), *s.* 127.]—Where a roadway runs over land previously acquired by a railway company under its compulsory powers, and the application to such roadway of sect. 150 of the Public Health Act, 1875, would be inconsistent with the appropriation of the land to the objects of the company, sect. 150 cannot (*semble*) be put into operation ; *secus*, where the making and dedication of such roadway, so far from being inconsistent with the company's objects, must have been contemplated by the framers of its special Act.

Per Vice-Chancellor of the County Palatine of Lancaster :—The rule laid down in *Robertson* v. *Bristol Corporation* ([1900] 2 Q. B. 198 ; 69 L. J. Q. B. 590 ; 64 J. P. 389 ; 48 W. R. 498 ; 82 L. T. 516—C. A., No. 146, *supra*) applies only where the relative proportions of roadway and footway have been intentionally determined by the owner of the soil.

The owner of the soil of a cross street is not liable for paving expenses as a frontager in respect to the width of such cross street if he has dedicated it to the public irrevocably.

STRETFORD URBAN DISTRICT COUNCIL *v.* [MANCHESTER SOUTH JUNCTION AND ALTRINCHAM RY. CO., (1904) 19 T. L. R. 546 ; 1 L. G. R. 683 ; 68 J. P. 59—C. A.

189. *Strip added to Street—Road and Ditch in Space between Fences—Whether Ditch can be part of Land Dedicated—Ditch filled up — Whether Highway is widened—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 150.]—There is no rule of law that a ditch running alongside a road between the road and the fence cannot be dedicated as part of the highway. Whether it is part of the highway or private property is a question of fact.

Where it is found that there has been a dedication including such a ditch, and such ditch has been filled up, so that it can be used for passage, the road ought not to be treated as a street which consists partly of an old highway and partly of an added strip, so as to constitute a street of which only a part is repairable by the inhabitants at large within the meaning of sect. 150 of the Public Health Act, 1875, and therefore a street in respect of which frontagers are liable for paving expenses under that section.

Semble—in construing the final paragraph of sect. 150, the maxim *De minimis* may be applied.

Decision of Div. Ct. ([1906] 2 K. B. 612 ; 75 L. J. K. B. 793 ; 70 J. P. 500 ; 95 L. T. 443 ; 22 T. L. R. 714 ; 4 L. G. R. 1066) affirmed.

CHORLEY CORPORATION *v.* NIGHTINGALE, [1907] 2 K. B. 637 ; 76 L. J. K. B. 1003 ; 71 J. P. 441 ; 97 L. T. 465 ; 23 T. L. R. 651 ; 5 L. G. R. 1114—C. A.

190. *Strip added to Street—Addition to Ancient Highway—Improvement Expenses—Liability of Frontagers—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 150.]—By an agreement, dated in 1883, the owners of an estate, through which ran an ancient highway about thirty feet wide, repairable by the inhabitants at large, agreed with the plaintiffs, who were the borough council, that as and when the estate should be laid out for building the owners would straighten and lay out the road so as to make it forty feet wide throughout. The agreement recited that it was entered into for the purpose of settling a question which had arisen as to the extent of the public rights over the road. When the whole of the road had been laid out in accordance with the agreement, the plaintiffs made it up under the powers of sect. 150 of the Public Health Act, 1875, and sought to recover the expenses from the owners of premises abutting on the road.

HELD—that the additions to the road, being

Private Street Works—*Continued.*

made as part of a bargain with the authority for good consideration, must be treated as repairable by the inhabitants at large, and that the frontagers were not liable.

Evans v. *Newport Urban Sanitary Authority* ((1889) 24 Q. B. D. 264; 59 L. J. M. C. 8; 54 J. P. 374; 61 L. T. 684; 38 W. R. 400—Div. Ct.) distinguished.

Decision of Joyce, J. (71 J. P. 299; 97 L. T. 43; 23 T. L. R. 449; 5 L. G. R. 536) reversed.

Portsmouth Corporation *v.* Hall, (1907) [71 J. P. 564; 24 T. L. R. 76—C. A.

XIII. MISCELLANEOUS.

191. *Duty of District Council to protect Public Right of Way—Instituting or defending Legal Proceedings—Surveyor or Private Individual—Transfer of such Powers and Duties to County Council—Contributions to Costs—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 26.]—Sect. 26, sub-sect. 1, of the Local Government Act, 1894, imposes upon every district council the duty of protecting all public rights of way, and preventing as far as possible the stopping or obstruction of any such rights; sub-sect. 3 provides that "a district council may, for the purposes of carrying into effect this section, institute or defend any legal proceedings, and generally take such steps as they deem expedient": and sub-sect. 4 provides that if a district council refuses or fails to take proceedings upon a representation from a parish council the latter may petition the county council, and if that council so resolve, the powers and duties of the district council under the section shall be transferred to the county council.

Held—that under sect. 26, the county council could defend an action brought against the surveyor of the district council, or could defend an action brought against private individuals, if they thought it a proper action to be defended; and that the county council could contribute towards the defendant's costs in the action.

Rex *v.* Norfolk County Council, [1901] 2 [K. B. 268; 70 L. J. K. B. 575; 65 J. P. 454; 49 W. R. 543; 84 L. T. 822; 17 T. L. R. 437—Div. Ct.

HIRE OF GOODS.

See Bailment.

HIRE-PURCHASE.

See Bailment; Bankruptcy; Bills of Sale.

HOLIDAYS.

See Time.

HOMICIDE.

See Criminal Law.

HONG KONG.

See Dependencies and Colonies.

HORSE RACING.

See Gaming and Wagering.

HORSE SLAUGHTERERS.

See Animals, 9.

HOSPITALS.

See Charities; Land Tax, 1; Public Health.

HOTELS.

See Inns and Innkeepers.

HOUSE AGENT.

See Agency; Revenue; Sale of Land; Valuers and Appraisers.

HOUSEBREAKING IMPLEMENTS, POSSESSION OF.

See Criminal Law and Procedure.

HOUSE OF LORDS.

See Courts; Parliament.

HOUSING OF THE WORKING CLASSES.

See Compulsory Purchase; Metropolis; Public Health.

HUSBAND AND WIFE.

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See also BANKRUPTCY; BASTARDY; CONFLICT OF LAWS; CRIMINAL LAW; EXECUTORS, 72–76, 78, 92, 186; INSURANCE CASES, 55, 56; POOR LAW; PRACTICE AND PROCEDURE. 58; WILLS, 145–148, 271–278, 302, 303.

I. PROMISE TO MARRY.

See also CONFLICT OF LAWS, 6; LUNATICS, 34.

1. *Marriage Contract — Consideration — Promise by Wife's Father that Daughter will have a Share of what he leaves—Specific Performance.*]—Testator wrote to the plaintiff, his intending son-in-law: "You are, of course, aware that, with my large family E. (his daughter) will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in a comfortable independence if I leave her a widow." The plaintiff married the daughter, relying upon the letter. The testator, dying subsequently, leaving eight children, left E. a legacy of much less than one-eighth of his estate.

HELD—that if the letter was an offer, the Court would presume it to be accepted; and

HELD, also, that the letter was not an offer resulting in a contract, but a mere statement of intention as to the future, and which, although relied on, gave no right either to specific performance or damages.

HELD, also, that, if the letter imposed an obligation upon the testator, it was satisfied by the bequest of the legacy.

IN RE FICKUS, FARINA *v.* FICKUS, [1900] [1 Ch. 331; 69 L. J. Ch. 161; 48 W. R. 250; 81 L. T. 749—Cozens-Hardy, J.

2. *Promise to Marry after obtaining Divorce —Public Policy—Cohabitation pending Divorce Suit—Divorce obtained by concealment thereof —Action for Breach of Contract—Not maintainable.*]—A married woman commenced divorce proceedings against her husband. Pending the hearing she cohabited with W., relying (as she alleged) upon his promise to marry her if she obtained a decree.

Upon the hearing she concealed her misconduct with W. and obtained a decree *nisi*, which was subsequently made absolute.

She now sued W. for breach of his alleged promise to marry her.

HELD—that, even assuming the promise to have been made, as a divorce was necessary for performance of the contract and was only obtained by deceiving the Court, the action was

Promise to Marry—*Continued.*

founded upon deceit and immorality, and it would be against public policy to permit it to be maintained.

PREVOST *v.* WOOD, (1905) 21 T. L. R. 684—Darling, J.

3. *Corroboration—Letter written in England to Plaintiff in Denmark—Intention of Parties—Danish Law*—Lex Fori.]—The defendant, who resided in England, wrote to the plaintiff, who was a Danish lady residing in Denmark, a letter which was held to be a conditional offer of marriage, and which she accepted by letter. Both the defendant's and plaintiff's letters were written in English. The plaintiff was at the time in the employment in Denmark of a company which was registered in England and formed to take over the defendant's business. It was intended that the marriage should take place in England, and that the married home should be here. According to the evidence as to the Danish law, only in certain circumstances (which did not exist in the present case) could an action for breach of promise of marriage be brought in Denmark, and no action lay if those circumstances did not exist.

HELD—(1) that the intention of the parties was that the contract should be governed by English law, and that the action was maintainable; and (2) that, if the contract was to be governed by Danish law, the evidence did not show that there was no valid and binding contract according to that law, but only that in the circumstances of the present case there was no remedy in Denmark, and that therefore, the remedy being purely a question of procedure, the action could be maintained.

HANSEN *v.* DIXON, (1907) 96 L. T. 32; 23 T. L. R. [56—Bray, J.

4. *Promise to Marry on Death of Wife—Legality—Public Policy.*]—A promise by a married man to a woman to marry her on the death of his wife, the woman knowing at the time that he is married, is not void as being contrary to public policy.

WILSON *v.* CARNLEY, (1907) 23 T. L. R. 757 (*see* [*also* 23 T. L. R. 578)—Lord Coleridge, Comm.

5. *Promise to Marry on Death of Wife—Legality—Public Policy—Knowledge of Promise.*]—A promise by a married man to a woman, who knows that he is married, to marry her on his wife's death is against public policy, and affords no cause of action if not fulfilled.

SPIERS *v.* HUNT, (1907) 24 T. L. R. 183—Phillimore, J.

6. *Breach—Mere Postponement—Justification—Supervening Insanity.*]—A fortnight before the date fixed for his marriage, a man, feeling that his mind was giving way, wrote to his *fiancée's* father stating that the marriage could not take place at the date fixed. Ten days later he entered an asylum as a voluntary patient, and was shortly afterwards certified and detained as a lunatic. He never recovered, and died in the asylum two years afterwards. After his death the lady raised an action of damages against his testamentary trustees.

HELD—first, that the man had merely postponed the marriage, and had never been able subsequently to fulfil his engagement, and that therefore the pursuer was not entitled to damages for breach of promise to marry; and secondly, that she was not entitled to recompense for salary which she lost owing to ill-health caused by her trouble.

Semble (per the Lord Justice Clerk)—even if there had been a breach of the promise, the breach was, in the circumstances, justifiable.

Hall v. *Wright* ((1860) 29 L. J. Q. B. 43; E. B. & E. 746) commented on.

LIDDELL *v.* EASTON'S TRUSTEES, [1907] S. C. [154—Ct. of Sess.

II. MARRIAGE.

See also CONFLICT OF LAWS.

(a) Presumption.

7. *Long Cohabitation.*]—An English man and woman went over to France for a few days with the admitted intention of getting married, and there went through some form of ceremony. They returned to England, and, after a lapse of three weeks, cohabited continuously as man and wife for thirty years. The children were recognised as legitimate.

There was no reasonable explanation of their thinking it necessary to go to France in order to be married, and no evidence of the nature of the ceremony performed.

HELD—that, even assuming such a marriage to have been a legal impossibility by French law, yet the presumption in favour of marriage arising from the cohabitation was not rebutted.

Sastry Velaider Aronegary v. *Sembecutty Vaigalie* ((1881) 6 App. Cas. 364; 50 L. J. P. C. 28; 44 L. T. 895—P. C.) applied.

IN RE SHEPHARD, GEORGE AND THYER, [1904] [1 Ch. 456; 73 L. J. Ch. 401; 90 L. T. 249—Kekewich, J.

8. From 1856 to 1866 a man and woman lived together as man and wife and had five children. There was evidence they had been treated as man and wife by friends and neighbours, and that their children had been recognised by the head of the father's family. In 1866 the woman left the man, who in 1874, while she was still alive, married another woman. In 1904 the question of the legitimacy of the children was raised.

HELD—that the presumption in favour of a marriage having taken place had been established.

RE THOMPSON, LANGHAM *v.* THOMPSON, (1905 [91 L. T. 681—Kekewich, J

9. *Repute—Divided Repute.*]—A. T. (or H.) and J. H. and their two children lived together from 1878 to 1893; they were generally reputed to be husband and wife, but there was some evidence of contrary repute.

Marriage—*Continued.*

The eldest child had been born in 1873 in her maternal grandmother's house, and was registered in her mother's maiden name, no father's name being registered. The second child was born in 1879, and was registered as the child of A. H. (late A. T.) and J. H.

HELD—that A. T. (or H.) and J. H. must be presumed to have been married, but that the second child alone was legitimate.

RE HAYNES, HAYNES *v.* CARTER, (1906) 94 L. T. [431—Kekewich, J.

(b) **Proof.**

10. *Colonial Law—Expert—Affidavit.*]—In an undefended suit by the wife for restitution of conjugal rights the Court accepted the affidavit of a former Governor of the Colony of Hong-Kong, as the only lawyer in this country who could be found to give the expert evidence usually required in such cases demanded a prohibitive fee.

COOPER-KING *v.* COOPER-KING, [1900] P. 65; [69 L. J. P. 33—Barnes, J.

11. *Ireland — Copy of Register — Certificate by Clergyman.*]—Where a marriage takes place in Ireland, according to the rites of the Church of Ireland, the said marriage may be proved by the production of a certificate which purports to be a copy of an entry in the register of the church, which said copy purports to be signed and certified as a correct copy of the entry by the clergyman of the parish where the marriage was celebrated.

WHITTON *v.* WHITTON, [1900] P. 178; 69 L. J. [P. 126; 64 J. P. 329—Jeune, P.

12. *French Subjects married at French Consulate in London—Validity.*]—A valid marriage between domiciled French subjects can be proved by proof that they were married at the Consulate-General of France in London according to the forms required by French law.

BAILET *v.* BAILET, (1901) 84 L. T. 272; 17 T. L. R. 317—Barnes, J.

13. *Colonial or Foreign Marriage.*]—In suits arising out of Colonial, or foreign, marriages it is usual to require evidence as to the validity of such marriage to be given by a practising lawyer of the colony or country in question. In exceptional cases, however, the Court will accept the evidence of other persons, who are qualified, for reasons connected with their business or profession, to express an opinion.

On the question of the validity of a marriage celebrated in Malta, the Court accepted the evidence of Dr. Tristram, who had been employed for three years in investigating the marriage laws of Malta for the purpose of advising the Colonial Office upon the subject.

WILSON *v.* WILSON, [1903] P. 157; 72 L. J. P. [52; 89 L. T. 77—Jeune, P.

14. *Foreign Marriage.*]—Foreign law is always a question of fact for the English Courts. Once the actual ceremony of marriage has been established by the party seeking to prove it, the onus of proving that such ceremony is invalid rests on the party disputing the validity of the marriage.

CARLIN *v.* CARLIN, (1906) 70 J. P. 143—Div. Ct.

See also No. 229, *infra*.

(c) **Validity.**

15. *Consular Marriage—Englishwoman and Frenchman—Marriage Settlement — Marriage Void in France, but Valid in England—Consular Marriage Act*, 1849 (12 & 13 Vict. *c.* 68)—*Foreign Marriage Act*, 1892 (55 & 56 Vict. *c.* 23).]—An Englishwoman and a Frenchman were married before the duly authorised British Consul at Bordeaux in 1880, and solemnised in the manner provided by the Consular Marriage Act, 1849, which in 1880 governed such a marriage. An English marriage settlement was made providing for the wife and children, the trustee being an Englishman resident in England, and the trust funds being in this country. The marriage was void in France.

HELD—that on the true construction of the Act, the marriage must be treated as solemnised in England. The consulate must for this purpose be considered as English territory and whether or not the marriage was good in France, it was perfectly good in England.

Simonin v. *Mallac* ((1860) 2 Sw. & Tr. 67; 29 L. J. Mat. Cas. 97; 6 Jur. (N.S.) 561; 2 L. T. (N.S.) 327) followed.

HAY *v.* NORTHCOTE, [1900] 2 Ch. 262; 69 L. J. [Ch. 586; 48 W. R. 615; 82 L. T. 656; 16 T. L. R. 418—Farwell, J.

16. *Capacity—Uncle and Niece—Celebrated Abroad between domiciled British Subjects—Jews—Marriage Act*, 1835 (5 & 6 Will. 4, *c.* 54), *s.* 2—*Marriage Act*, 1836 (6 & 7 Will. 4, *c.* 85), *s.* 2—*Marriage Act*, 1840 (3 & 4 Vict. *c.* 72), *s.* 5.]—A marriage between a niece and an uncle, who are members of the Jewish faith and domiciled British subjects, is invalid, although celebrated abroad where such a marriage would be legal.

IN RE DE WILTON, DE WILTON *v.* MONTEFIORE, [1900] 2 Ch. 481; 69 L. J. Ch. 717; 48 W. R. 615; 83 L. T. 70; 16 T. L. R. 507—Stirling, J.

17. *Domicil—Marriage Ceremony performed by Minister not of the same Religious Community as One of the Contracting Parties—Argentine Code, art.* 183.]—A marriage between a member of the Church of England and an Episcopalian Methodist was held to be good according to Argentine law, although only celebrated once at a Methodist Episcopal Church by a minister of that denomination, and although the husband's domicil was not proved to be Argentine.

Decision of Jeune, P. ((1902) 50 W. R. 494; 87 L. T. 138; 18 T. L. R. 526) affirmed.

LIGHTBODY *v.* WEST, (1903) 88 L. T. 484; 19 [T. L. R. 319—C. A.

Marriage—*Continued.*

18. *Bigamy—Frenchman and Englishwoman—Irregularity by French Law—French Divorce—Subsequent Marriage with Englishman*—Lex domicilii—Lex loci contractus.]—The *lex loci contractus* must govern questions arising out of prohibitions against marriage. The respondent to a petition for nullity of marriage, brought on the ground that at the time of the ceremony she, the respondent, had a husband living, pleaded that her former marriage had been declared null and void by a Court of competent jurisdiction. She was a domiciled Englishwoman and had married in England a domiciled Frenchman temporarily residing in England. That marriage was pronounced void by the French Court on the ground that the Frenchman was not of full age according to French law and had not obtained the necessary permission of his parents to marry.

HELD—that, as the marriage with the Frenchman was valid according to English law, though not according to French law, the petitioner was entitled to a decree of nullity.

Decision of Deane, J. ([1907] P. 107; 76 L. J. P. 9; 96 L. T. 505; 23 T. L. R. 158) affirmed.

OGDEN *v.* OGDEN (otherwise PHILIP), [1907] [W. N. 236; 24 T. L. R. 94—C. A.

19. *Misstatement of Surname—Marriage and Registration Acts' Amendment Act*, 1856 (19 & 20 Vict. *c.* 119), *s.* 2.]—Where a marriage ceremony is performed under the Registration Acts, the fact that the surname of one of the parties and her condition are untruly stated does not render the marriage invalid, or prevent it causing a forfeiture under a will.

Lane v. *Goodwin* ((1843) 4 Q. B. 361) followed.

IN RE RUTTER, DONALDSON *v.* RUTTER, [1907] [2 Ch. 592; 24 T. L. R. 12—Eady, J.

III. PERSONAL RIGHTS AND OBLIGATIONS ARISING FROM MARRIAGE.

20. *Enticing Wife away from Husband—Advice to her to leave her Husband—Liability.*]—When a woman of mature age marries, her relatives, who disapprove of her husband, have no right to persuade, induce or incite her to leave him, and if they do so they will be liable to him in damages.

If they, in answer to a request for advice, *bonâ fide* advise her to leave him, they will not be liable; but *quære* whether they are entitled to offer advice unasked.

SMITH *v.* KAYE AND ANOTHER, (1904) 20 T. L. R. [261—Wright, J.

21. *Husband dying Intestate—Widow's Right to Property—Contingent Interests—Valuation—£500—Intestates' Estate Act*, 1890 (53 & 54 Vict. *c.* 29), *ss.* 1, 5, 6.]—Sects. 5 and 6 of the Intestates Estates Act, 1890 (as to valuation of interests), do not control or cut down the general words in sect. 1, "the real and personal estate." The latter words are not confined to interests in possession.

A husband died intestate, leaving a widow but no issue. Practically his only property was a reversionary interest in certain real and personal property. At the time of his death it had no market value, but ten years later it fell into possession, and proved to be worth £3,500.

HELD—that the value of the intestate's real personal estate must be taken at the date of his death, and that, as it was under £500, the whole (including the reversionary interest) passed to the widow.

IN RE HEATH, HEATH *v.* WIDGEON, [1907] 2 [Ch. 270; 76 L. J. Ch. 450; 97 L. T. 41—Kekewich, J.

IV. EFFECT OF MARRIAGE WITH REGARD TO PROPERTY.

And see BANKRUPTCY, 5, 15, 16, 164, 167, 220, 248.

(a) Conveyance by Wife.

22. *Mortgagee—Trustee—Conveyance to Purchaser—Concurrence of Husband—Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *s.* 1 (1)—*Trustee Act*, 1893 (56 & 57 Vict. *c.* 53), *s.* 16.

In 1895 real property was conveyed by way of mortgage to a married woman to secure money advanced by her, which money formed part of her separate estate. On a sale by the mortgagor of the property, which was still subject to the mortgage, the purchaser required, in addition to the concurrence of the married woman, the concurrence of her husband, and an acknowledgment of the deed of conveyance by her under the Fines and Recoveries Act.

HELD—that the married woman was not a trustee for the mortgagor within the meaning of *Re Harkness and Allsopp's Contract* ([1896] 2 Ch. 358), and that she could convey to the purchaser without the concurrence of her husband and by deed unacknowledged.

RE BROOKE AND FREMLINS' CONTRACT, [1898] [1 Ch. 647; 67 L. J. Ch. 272; 78 L. T. 416; 14 T. L. R. 324; 46 W. R. 442—Kekewich, J.

23. *Conveyance of Real Property—Married Woman entitled to Real Property before* 1883—*Separate Examination—Custom of Borough—Fines and Recoveries Act*, 1833 (3 & 4 Will. 4, *c.* 74), *ss.* 77, 80.]—A woman, who was married in 1877, was then entitled under her father's will to a life interest in certain lands of burgage tenure in the borough of Kendal. Her life estate in the lands was not settled on her marriage. After her marriage she, with her husband's concurrence, conveyed her life interest in the lands by way of mortgage, but she was not separately examined. The wife subsequently brought an action to set aside the mortgage on the ground that the deed was void as she was not separately examined as required by sect. 80 of the Fines and Recoveries Act, 1833. The mortgagee set up a custom of burgage tenure

Effect of Marriage with regard to Property— *Continued.*

in Kendal for a married woman to dispose of her real estate by deed with her husband's concurrence, but without a separate examination.

HELD—that the custom was bad in law.

JOHNSON *v.* CLARK, (1907) 24 T. L. R. 156—[Parker, J.

24. *Security given by Wife for Husband's Debts—Security obtained by Wife's Trustee—Pressure—Concealment—Validity—No Application for Discovery of Documents—Subsequent Discovery of Important Documents — New Trial.*]—D., the husband of the respondent, was in business in Jamaica, and was in pecuniary difficulties and indebted to the appellants, whose agent in Jamaica was C. C. was an executor and trustee of the will of Mrs. D.'s father. Her father died in January, 1898, and Mrs. D. was entitled to one-fifth of her father's residuary estate. It was arranged that C. should have a security for £1,000 on Mrs. D.'s property prepared, and that D. should get her to sign it. Accordingly, in August, 1898, it was prepared by C.'s solicitors from his instructions. C. gave it to D. ; D. got his wife to sign it.

HELD—that it was quite impossible to uphold the security given by Mrs. D., as it was open to the double objection of having been obtained by a trustee from his *cestui que trust* by pressure through her husband, and without independent advice, and of having been obtained from his wife by pressure and concealment of material facts ; that the document was very different from what Mrs. D. supposed it to be, and was a document of the true nature of which she had no conception ; that it was impossible to hold that C. or the appellants were unaffected by such pressure and ignorance, as they left everything to D., and must therefore abide the consequences.

HELD, also, that the appellants, who made no application in the action for discovery of documents, were not entitled to a new trial on the ground that since the trial an important document had been discovered.

TURNBULL & CO. *v.* DUVAL, [1902] A. C. 429 ; [71 L. J. P. C. 84 ; 87 L. T. 154 ; 18 T. L. R. 521—P. C.

25. *Will — Probate—Assent of Husband.*]—Under the present practice the assent of a husband to his wife's will (if necessary) is not implied by reason of his having obtained probate of such will in common form.

RE NATHAN, (1907) 51 Sol. Jo. 428—Warring-[ton, J.

(b) Dower, &c.

26. *Dower of Equitable Estates—Estate* pur autre vie *and Estate in Fee—Contingent Remainder Interposed—Merger—Dower Act*, 1833 (3 & 4 Will. 4, *c.* 105), *s.* 2.]—By a Landed Estates Court conveyance of July 14th, 1864, perpetual yearly rents were granted to X., his heirs and assigns, in trust during the life of A. to permit C. (the purchaser) and his assigns to receive the rents for his and their own use, and after the death of A. to the use that B., the wife of A., should, if she survived him, receive a jointure of £250 a year, and, subject thereto, to the use of the first and other sons of A. and B. in tail male, and in default of such issue male to the use of the first and other daughters of A. and B., and their heirs as tenants in common, and in default of such issue then to the use of C., his heirs and assigns, for ever, subject to certain charges mentioned in the conveyance. On June 27th, 1882, C. mortgaged the perpetual rents to an insurance company. On October 8th, 1886, C. died intestate, leaving D. a widow, and E. and F., daughters of a deceased son by a former marriage, his co-heiresses-at-law. A. died in 1891, without issue, leaving B. surviving. In 1897 D. brought an action against E. and F. to establish, *inter alia*, her right to dower.

HELD—that notwithstanding the interposition of the contingent estate to the issue of A. and B. the estate *pur autre vie* given to C. by the Landed Estates Court conveyance merged in, or united with, the estate in fee in remainder given to him by the same conveyance, and that D. was entitled to dower.

In re Michell, Moore v. *Moore* ([1892] 2 Ch. 87 ; 61 L. J. Ch. 326 ; 40 W. R. 375 ; 66 L. T. 366—Stirling, J.) considered.

Cordal's Case ((1594) Cro. Eliz. 315) questioned.

LEMON *v.* MARK, [1899] 1 Ir. R. 416—M. R. ; [435—C. A.

27. *French Law — Contract of Marriage — Change of Domicil—Movable Property—Community of Goods.*]—Two French subjects, born and domiciled in France, married there, without a contract of marriage, and became therefore subject to the system of "community of goods." They afterwards acquired an English domicil, and the husband died in this country possessed of movable property.

HELD—that the change of domicil did not affect the rights acquired by their marriage in France, and consequently the French law of "community of goods" was still applicable, so that the husband's power of disposition by will was limited to a moiety.

Lashley v. *Hog* ((1804) 4 Paton, 581 ; Robertson, Sc. App. Cas. 4) distinguished.

The decision of the Court of Appeal ([1898] 2 Ch. 60 ; 67 L. J. Ch. 419 ; 46 W. R. 532 ; 78 L. T. 541 ; 14 T. L. R. 428) reversed, and the decision of Kekewich, J. ([1898] 1 Ch. 403 ; 67 L. J. Ch. 274 ; 46 W. R. 326 ; 78 L. T. 152), restored.

DE NICOLS *v.* CURLIER, [1900] A. C. 21 ; 69 L. J. [Ch. 109 ; 48 W. R. 269 ; 81 L. T. 733 ; 16 T. L. R. 101—H. L. (E.).

28. *Intestate's Estates—Widow's Charge*—Lex Domicilii—Lex Loci, *as applied to Proceeds of Sale of Victorian Lands—Order of Application of Assets—Intestates' Estates Act*, 1890 (53 & 54

Effect of Marriage with regard to Property— *Continued.*

Vict. *c.* 29)—*Victorian Intestates' Estates Act.* 1896 (59 Vict. *No.* 1419).]—A domiciled Irishman died in Ireland, intestate, without issue, leaving a widow surviving. His property in Ireland consisted of freeholds, chattels real, furniture, stock and cash. He was also possessed of lands in the colony of Victoria, granted to him in fee by the Crown, which lands, by the law of the colony, were regarded and devolved as personal estate. The only creditors were in Ireland. Administration was taken out in Ireland by the widow, and in Victoria by a person appointed for the purpose, who sold the lands, and remitted the net proceeds to the widow.

By the Victorian Intestates' Estate Act, 1896, a widow is entitled, on the death of her husband and without issue, if his estate is over the value of £1,000, to a charge of £1,000 upon it, and the residue is divisible between the widow and the next of kin.

The widow brought an action against the heir-at-law and one of the next of kin of the deceased, and claimed (1) £1,000 out of the proceeds of sale of the Victorian lands, as well as £500 out of the real and personal estate in Ireland; (2) dower out of the Irish freeholds; and (3) a moiety of the residue of the proceeds of sale of the Victorian lands, and of the Irish personal estate, after payment thereout of the debts of the intestate.

Held—(1) that the plaintiff was entitled, under the Victorian Act, to £1,000 out of the proceeds of sale of the Victorian lands; (2) that the balance was to be taken as personal estate, and added to the Irish personalty, and that the debts were to be paid out of this blended fund; (3) that the widow was entitled to £500 out of the remainder of this blended fund, and out of the Irish real estate, to be apportioned as directed by the Intestates' Estates Act, 1890; (4) that of the residue of the personalty the widow was entitled to one moiety, and the next of kin to the other moiety; (5) that the widow was entitled to dower out of the residue of the realty, which, subject thereto, went to the heir-at-law.

Rea *v.* Rea, [1902] 1 Ir. R. 451—M. R.

(c) Separate Estate.

29. *Restraint on Anticipation—Admission as to Occurrence of Event defeating Life Interest—Estoppel.*]—A married woman was entitled, under a deed dated in 1867, to the surplus rents and profits of certain estates for life for her separate use without power of anticipation, but subject to a proviso that, if she should succeed to an income for life of a certain amount, her life interest in the estates should absolutely cease and determine, and the property should be held upon trust for her husband.

In 1890 the married woman executed a deed-poll, admitting, in good faith but contrary to the fact, that her interest in the estates had determined under the proviso, on the ground of which deed a creditor of her husband's altered his position. Having subsequently discovered that she had executed the deed-poll under a misapprehension, she claimed to receive the surplus rents and profits of the estates notwithstanding her admission.

Held—that a married woman could not by any device, even by fraud, deprive herself of the protection afforded by the restraint upon anticipation; and that, therefore, in the present case she was not estopped from contradicting the admission made by her, and was entitled to the surplus rents and profits.

Decision of Kekewich, J. ([1897] 2 Ch. 223; 66 L. J. Ch. 721; 77 L. T. 71; 13 T. L. R. 470; 46 W. R. 151) affirmed.

Bateman (Lady) *v.* Faber, [1898] 1 Ch. 144; [67 L. J. Ch. 130; 77 L. T. 576; 14 T. L. R. 81; 46 W. R. 215—C. A.

30. *Restraint on Anticipation—Policy of Insurance effected by Wife on Life of Husband—Tontine—Condition restraining Assignment.*]—A married woman effected, in 1885, an insurance on the life of her husband for a period of ten years, and, under the policy, described in the margin as "Wife's policy—Endowment," the amount insured was made payable to her for her sole use, if she and her husband both survived that period (which event happened). The policy was made on condition that certain provisions and requirements annexed to it were to be taken as part of the contract. One of these was "This policy is not assignable."

Held—that there was a restraint upon anticipation, and that an attempted charge upon the policy during the currency of the ten years was void.

In re Lavender's Policy, [1898] 1 Ir. R. 175 [—C. A.

31. *Liability — Contract during Coverture — Jointure accruing on Husband's Death.*]—The defendant, a married woman, made a joint and several promissory note (with her late husband) for £1,000, and interest from its date, January 7th, 1876, payable one month after the death of her husband's father. By the marriage settlement she was given a jointure of £2,000 a year for life in the event of her surviving her husband. Her husband died in 1894. The plaintiff brought an action on the note against the defendant.

Held—that the defendant had no separate estate as a married woman. With regard to the jointure it was not for her separate use, for by the terms of the settlement she was not to enjoy it during marriage, and, therefore it could not be for her separate use as a married woman. Therefore, during coverture, she could not contract with regard to it.

Clarke *v.* Hastie, (1899) 16 T. L. R. 23—[Phillimore, J.

32. *Life Policy in Favour of—Appointment of Trustees—Title of Petition—Married Women's Property Act*, 1870 (33 & 34 Vict. *c.* 93), *s.* 10.]—Where a husband effected a policy in favour of his wife under the provisions of the Married Women's Property Act, 1870 a petition for the

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appointment of trustees need not be entitled "In the matter of the Married Women's Property Act, 1882."

In re Adam's Policy Trusts ((1883) 23 Ch. D. 525; 52 L. J. Ch. 642; 31 W. R. 810; 48 L. T. 727—Chitty, J.) and *In re Turnbull* ([1897] 2 Ch. 415; 66 L. J. Ch. 719; 77 L. T. 47—Stirling, J.) followed.

In re Soutar's Policy Trust ((1884) 26 Ch. D. 236; 54 L. J. Ch. 256; 32 W. R. 701—Pearson, J.) not followed.

In re Kuyper's Policy Trusts, [1899] 1 [Ch. 38; 68 L. J. Ch. 10; 47 W. R. 238; 79 L. T. 486—North, J.

33. *Action against Widow—Form of Judgment.*]—A married woman entered into a contract after the passing of the Married Women's Property Act, 1882, and before the passing of the Married Women's Property Act, 1893, and was sued upon it after the death of her husband.

Held—that the form of the judgment against her must limit the execution to such property as during her coverture was her separate property not subject to any restriction against anticipation.

Softlaw *v.* Welch, [1899] 2 Q. B. 419; 68 [L. J. Q. B. 940; 47 W. R. 626; 81 L. T. 64; 15 T. L. R. 479—C. A.

34. *Settlement — Income for Separate Use without Anticipation — Separate Trading — Bankruptcy — Death of Husband — Title of Trustee in Bankruptcy to Income — Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *s.* 1, *sub-s.* 5. *s.* 19.]—In 1859 real estate was settled upon trusts to pay the rents and profits to a spinster during her life, for her sole and separate use without power of anticipation. She married in 1868. In 1891 she was carrying on a business apart from her husband, and in that year was adjudicated a bankrupt. In 1899 her husband died. She was still an undischarged bankrupt.

Held—that the life interest of the bankrupt immediately on the death of her husband vested in the trustee in bankruptcy by virtue of sect. 1, sub-sect. 5, and sect. 19 of the Married Women's Property Act, 1882, as the restraint upon anticipation then ceased.

Pelton Brothers v. *Harrison* ([1891] 2 Q. B. 422; 60 L. J. Q. B. 742; 39 W. R. 689; 65 L. T. 514—C. A.) discussed.

In re Wheeler's Settlement, Briggs *v.* [Ryan, [1899] 2 Ch. 717; 68 L. J. Ch. 663; 48 W. R. 10; 81 L. T. 172; 15 T. L. R. 545; 6 Manson, 372—Cozens-Hardy, J.

35. *Judgment Debtor—Neglect to Comply with Order for Payment into Court—Default—Writ of Attachment — Separate Estate — Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *ss.* 1, *sub-s.* 2; *ss.* 18, 24.]—A married woman, before 1882, was, as administratrix of a deceased intestate, ordered to pay into Court a sum forming part of the estate. In default a motion was made for leave to issue a writ of attachment against her.

Held—that, in the absence of proof of a breach of trust or *devastavit*, an order for payment by the defendant out of her separate estate would not be appropriate, and that the order for the issue of the writ of attachment ought to go.

In re Turnbull, Turnbull *v.* Nicholas [1900] 1 Ch. 180; 48 W. R. 136; 81 L. T. 439; 16 T. L. R. 45—Stirling, J.

36. *Contract during Coverture—Judgment after Discoverture—Separate Property—Restraint on Anticipation—Married Women's Property Act*, 1893 (56 & 57 Vict. *c.* 63), *s.* 1.]—The plaintiff got judgment against the defendant, a lady, who had been a married woman, but who, in January, 1900, was divorced. The judgment was obtained on June 12th, 1900, on a contract which had been entered into by the defendant on October 8th, 1896, while she was under coverture. At the date the contract was made the lady had property which was subject to a restraint upon anticipation, and the question was what effect that judgment was to have against her.

Held—that the property subject to restraint upon anticipation could not be made available to satisfy any liability or obligation arising out of the contract, but was protected by the proviso to sect. 1 of the Married Women's Property Act, 1893.

Barnett *v.* Howard, [1900] 2 Q. B. 784; 69 [L. J. Q. B. 955; 83 L. T. 301; 16 T. L. R. 558 —C. A.

37. *Restraint on Anticipation—Removal of Restraint — Benefit of Woman — Increase of Income—Fund in Court—Investments—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 39, *sub-s.* 1.]—A married woman was entitled absolutely to a fund in Court, subject only to a restraint on anticipation during the joint lives of herself and her husband. Upon her marriage she made a settlement which contained a covenant on her part to settle after-acquired property; and that settlement contained a power of investment that allowed a larger range of selection than the Court allowed for cash under its control, and larger even than that enjoyed by trustees under the Trustee Act, 1893. She desired that under sect. 39 of the Conveyancing and Law of Property Act, 1881, the restraint on anticipation might be removed, and that the Court should bind her interest so as to be subject to the covenant in her settlement; the effect of which would be that it would again become subject to a restraint on anticipation, and would also be subject to the life interest of her husband. She was fifty-nine, and there were no children. The main object of the scheme was to secure a larger income.

Held—that the Court could not say that it would be for her benefit, within the meaning of sect. 39, that what she wished should be done; and that the application must be refused.

In re Blundell, [1901] 2 Ch. 221; 70 L. J. Ch. [522; 84 L. T. 706—C. A.

Effect of Marriage with regard to Property— *Continued.*

38. *Loan to Husband for the Purpose of his Business—"Money or other Estate"—Furniture—Bankruptcy of Husband—Assets of Husband—Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *s.* 3.]—A married woman lent to her husband for the purpose of his business as hotel-keeper certain furniture to which she was entitled as her separate property. On the husband's bankruptcy his assignees claimed the furniture as his assets.

HELD—that the furniture was to be treated as assets of the husband.

In sect. 3 of the Married Women's Property Act, 1882, the words "other estate" are not to be read as meaning only property *ejusdem generis* with that indicated by the preceding words "any money."

IN RE DONALDSON, [1902] 2 Ir. R. 310—C. A.

39. *Restraint upon Anticipation—Contract by Wife during Coverture—Judgment against her after Husband's Death—Whether such Property liable to Execution—Married Women's Property Act*, 1893 (56 & 57 Vict. *c.* 63), *s.* 1.]—Where a married woman, entitled to separate property subject to a restraint against anticipation during coverture, enters into a contract while *covert*, a judgment subsequently signed against her while *discovert* in respect of such contract cannot be enforced against such property.

Barnett v. *Howard*, ([1900] 2 Q. B. 784; 69 L. J. Q. B. 955; 83 L. T. 301—C. A., No. 36, *supra*) followed.

A wife in 1893, her husband being alive, signed promissory notes; judgment was recovered against her upon the notes after his death.

HELD—that a receiver could not be appointed by way of equitable execution to receive the income of trust funds, to which she was in 1893 entitled subject to a restraint against anticipation during coverture.

BROWN *v.* DIMBLEBY, [1904] 1 K. B. 28; 73 L. J. [K. B. 35; 52 W. R. 53; 89 L. T. 424—C. A.

40. *Acknowledgment of Debt contracted before* 1893—*Married Women's Property Act*, 1893 (56 & 57 Vict. *c.* 63), *s.* 1.]—Where moneys were advanced to a married woman before the Act of 1893 in respect of which she was under no liability, having at the time no separate estate, an acknowledgment of such advances given after the Act does not bind her separate estate (since acquired) by virtue of sect. 1 of the Act. Under that section there must be a contract entered into by the married woman for the first time after the passing of the Act.

IN RE WHEELER, HANKINSON *v.* HAYTER, [1904] 2 Ch. 66; 73 L. J. Ch. 576; 52 W. R. 586; 91 L. T. 227—Warrington, J.

41. *Restraint upon Anticipation—Income due after Judgment—Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *ss.* 1, 19.]—The plaintiffs had obtained against a married woman a judgment, payable out of her separate estate. Such estate was held in trust for her for her life, without power of anticipation.

HELD—that income accrued due after the date of the judgment could not be attached to meet it in the hands of the trustees.

Whiteley v. *Edwards* ([1896] 2 Q. B. 48; 65 L. J. Q. B. 457; 44 W. R. 530; 74 L. T. 720—C. A.) approved.

BOLITHO & CO., LD. *v.* GIDLEY AND OTHERS, [1905] A. C. 98; 74 L. J. K. B. 430; 53 W. R. 498; 92 L. T. 369—H. L.

42. *Reversionary Interest in Land—Marriage before* 1882—*Subsequent Conversion into Money—Whether Separate Estate—Married Women's Property Acts*, 1870 (33 & 34 Vict. *c.* 93), *and* 1882 (45 & 46 Vict. *c.* 75), *s.* 5.]—In 1877 a lady became entitled as heiress of her brother to real estate, subject to the life interest of her mother, who lived till 1906. In 1875 the lady had married, and therefore by the Married Women's Property Act, 1870, the profits belonged to her for her separate use, but she could not dispose of the fee. In 1901 the land was converted into money.

HELD—that such conversion gave no new title to the lady, and that the money did not become her separate property by virtue of sect. 5, subsect. 1, of the Act of 1882; and that, therefore, on her death it passed to her husband.

IN RE BACON, TOOVEY *v.* TURNER, [1907] 1 Ch. [475; 76 L. J. Ch. 213—Eady, J.

V. ANTE-NUPTIAL OBLIGATIONS OF WIFE.

43. *Debts—Wife's ante-nuptial Debts—Judgment for—Separate Property subject to Restraint against Anticipation—Such Property not settled by Wife herself—Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *s.* 19.]—Where a married woman is entitled to separate property subject to a restraint against anticipation, such property is not liable to execution upon a judgment for her ante-nuptial debt so long as the restraint is not imposed by a settlement of her own property made by herself.

A judgment was signed against a married woman living apart from her husband, in respect of her ante-nuptial debts.

HELD—that a receiver could not be appointed to take in execution an annuity, which her husband had by a deed of separation covenanted to pay her during their joint lives for her separate use without power of anticipation.

BIRMINGHAM EXCELSIOR MONEY SOCIETY *v.* [LANE, [1904] 1 K. B. 35; 73 L. J. K. B. 28; 52 W. R. 84; 89 L. T. 656; 20 L. T. R. 47—C. A.

VI. CONTRACTS OF WIFE.

(a) As Agent for Husband.

44 *To Pledge Husband's Credit—Wife living separate from Husband—Necessaries—Education*

Contracts of Wife—*Continued.*

of Children.]—A wife who by her husband's conduct is forced to live separate from him has implied authority to pledge his credit for the education of the children, as a "necessary."

COLLINS *v.* CORY, (1901) 17 T. L. R. 242—[Phillimore, J.

45. *Wife—Authority to Pledge Husband's Credit—Allowance paid by Husband to Wife for Clothing and Personal Expenditure.*]—The question whether a husband is liable for debts incurred by his wife is a question of agency. Where they are living together *primâ facie* the wife can pledge her husband's credit for necessaries for the household.

The plaintiff sued the defendants, husband and wife, for the balance of an account due for various articles of clothing supplied to the wife. It was admitted that the goods were supplied and that the prices were reasonable, and the only dispute was as to whether the wife or the husband was liable. The husband made his wife an allowance of £1,800, of which £500 was for her clothing and personal expenditure, and the husband and wife lived together.

HELD—that the allowance for the wife's personal expenditure rebutted the inference of implied authority to pledge the husband's credit simply on the ground that they were living together.

Debenham v. *Mellon* ((1880) 6 App. Cas. 24; 50 L. J. Q. B. 155; 45 J. P. 252; 29 W. R. 141; 43 L. T. 673—H. L. (E.)) followed.

REMMINGTON *v.* BROADWOOD AND ANOTHER, [(1902) 18 T. L. R. 270—C. A.

46. *Wife having no Separate Property—Contract "otherwise than as Agent"—Married Women's Property Acts*, 1882 (45 & 46 Vict. *c.* 75), *s.* 1, *sub-s.* 2, *and* 1893 (56 & 57 Vict. *c.* 63), *s.* 1.]—By sect. 1 of the Married Women's Property Act, 1893, "every contract hereafter entered into by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not, in fact, possessed of or entitled to any separate property at the time when she enters into such contract."

HELD, by Lord Loreburn, L.C., and Lord Macnaghten, affirming the decision of the Court of Appeal—that, if a wife in fact contracts as agent for her husband, whether the authority is given expressly or impliedly, she does not contract otherwise than as agent within the meaning of sect. 1 of the Married Women's Property Act, 1893, and it is immaterial whether or not at the time when the contract is made the person with whom she contracts knows that she is a married woman.

HELD, by Lord Robertson and Lord Atkinson—that a married woman contracts "otherwise than as agent" if she enters into a contract apparently as principal, though she may, in fact, only be agent for an undisclosed principal—namely, her husband; and the undisclosed fact that she has her husband's authority to contract as his agent is not enough to make her contract as an agent. To make her contract "as agent," both parties must regard her as an agent in the matter.

Decision of C. A. ((1905) 21 T. L. R. 361) affirmed, the Lords being equally divided in opinion.

PAQUIN, LD. *v.* BEAUCLERK (formerly HOLDEN), [1906] A. C. 148; 75 L. J. K. B. 395; 54 W. R. 521; 94 L. T. 350; 22 T. L. R. 395—H. L. (E.).

See also Nos. 55, 111.

(b) With Husband.

47. *Contract of Loan, Marriage Settlement—Wife's Separate Property—Life Interest—Loan to Husband by Trustees—Bond by Husband to Trustees—Interest bearing Security—Damages—Presumption of Payment—Debt Statute-barred*—4 & 5 Anne, *c.* 16, *ss.* 12, 13—*Civil Procedure Act*, 1833 (3 & 4 Will. 4, *c.* 42), *s.* 5.]—By a settlement made in 1847 on the marriage of Jane Heynes, afterwards Mrs. Dixon, her share of certain real estate was conveyed to trustees upon trust for sale and to invest the proceeds "on real or personal securities bearing interest" with power to vary or exchange the investments for others of the like nature; with a proviso that no such investment or change should be made during the lives of the wife and husband or the life of the survivor without her or his consent in writing first obtained. Then the income was to be paid to the wife for life, without power of anticipation, and after her death to the husband for life. There being a sale of the real estate, Mrs. Dixon's share of which was subject to her settlement, the husband bought part of it, and as he was not prepared with all the purchase-money, the trustees advanced to him, with his wife's consent in writing, the sum of £1,928 5*s.* 10*d.*, being her settled share of the purchase-money. Thereupon, with the knowledge of the wife and by her authority, a bond was given by the husband to the trustees on February 13th, 1852, in the usual form, in a penal sum for double the amount, namely, for £3,856 11*s.* 8*d.*, the condition of the bond being that if the husband should repay the sum of £1,928 5*s.* 10*d.* with interest at 4 per cent. on August 13th then next—that is, six months after the date of the bond—the bond should be void. No payment of interest ever took place during the lifetime of the wife, and no repayment of the principal either during her lifetime or after her death. The wife died on May 21st, 1876, and the husband on January 1st, 1896. After the death of the husband the bond was found amongst his papers.

HELD—that the true intent of the bond was to secure the repayment of principal, interest and costs by means of the penalty and not to pay damages;

That treating the bond as having been given to the husband in consideration of an advance of what he knew to be trust money, which advance was in effect a breach of trust, he was not a person entitled to plead the Statute of

Contracts of Wife—*Continued.*

Limitations as a bar to the recovery of the money that was in his hands;

That so long as the husband and wife lived together in amity the form need not have been gone through of handing the money from the one to the other, and the statute did not run; and

That under the circumstances, inasmuch as there was a clear recognition by the husband after the wife's death and twenty-five years after the date of the bond that the bond had not been paid, the inference could not be drawn that it had been paid because it did not happen to have remained with the trustees and had been found amongst the husband's papers.

Cook v. *Fowler* ((1874) L. R. 7 H. L. 27; 43 L. J. Ch. 855) and *Soar* v. *Ashwell* ([1893] 2 Q. B. 390; 42 W. R. 165; 69 L. T. 585; 4 R. 602—C. A.) discussed. *Bonafous* v. *Rybot* ((1763) 3 Burr. 1370) and *Spickernell* v. *Hotham* ((1854) Kay, 669; 2 W. R. 165) followed. *Amos* v. *Smith* ((1862) 1 H. & C. 238; 31 L. J. Ex. 423; 10 W. R. 759; 7 L. T. (N.S.) 66) applied.

Judgment of Byrne, J. ([1899] 2 Ch. 561; 68 L. J. Ch. 689; 48 W. R. 71) affirmed.

In re Dixon, Heynes *v.* Dixon, [1900] 2 Ch. [561; 69 L. J. Ch. 689; 48 W. R. 665; 83 L. T. 129—C. A.

VII. TORTS OF WIFE DURING COVERTURE.

48. *Deed of Separation—Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *s.* 1, *sub-s.* 2.]—A husband, who is living apart from his wife under a separation deed, by which she had a large allowance from her husband, is liable to be sued jointly with his wife for a libel written by her without his knowledge.

Utley *v.* Mitre Publishing Co. and Others, [(1901) 17 T. L. R. 720—Darling, J.

49. *Fraud not Directly connected with Contract—Husband's Liability in Damages—Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *s.* 1, *sub-s.* 2; *ss.* 13, 14, 15.]—In May, 1898, the defendant G. K., the wife of the defendant H. K., induced the plaintiff, a widow, to lend her £5,300, the only security being her I O U. In July, 1898, the plaintiff was asked by G. K. to join her in the purchase of some shares, which she said had been recommended to her by a financier, and for that purpose she asked the plaintiff to raise a sum of £2,000 to be invested in the purchase. The plaintiff, at first unwilling, consented to raise the £2,000 when the shares had been purchased. Shortly after, the plaintiff, relying on the representation of G. K. that she had bought the shares, signed two promissory notes for £1,000 each, and, her solicitor having discounted them, paid the proceeds to G. K., and the plaintiff paid the notes on maturity. G. K. never in fact purchased any shares at all with the moneys. The defendant H. K. was made a co-defendant by amendment. In an action for damages by the plaintiff against the defendants:—

Held—that the contract was effected prior to and independently of the misrepresentation; that the misrepresentation was not the means of effecting or inducing the contract; and that the husband was liable in damages for the wife's tort.

There is nothing in the Married Women's Property Act, 1882, which deprives a plaintiff in such a case, by giving him a right against the separate estate of the wife which may or may not exist, of the right to go against the husband in respect of a tort committed by the wife after the marriage.

Liverpool Adelphi Loan Association v. *Fairhurst* ((1854) 9 Ex. 422; 2 C. L. R. 512; 23 L. J. Ex. 163; 18 Jur. 191; 2 W. R. 233) and *Wright* v. *Leonard* ((1861) 11 C. B. (N.S.) 258; 30 L. J. C. P. 365; 9 W. R. 944; 8 Jur. (N.S.) 415; 4 L. T. (N.S.) 110) applied.

Seroka v. *Kattenburg* ((1886) 17 Q. B. D. 177; 55 L. J. Q. B. 375; 34 W. R. 542; 54 L. T. 649—Div. Ct.) followed.

Decision of Byrne, J. ([1900] 1 Ch. 203; 69 L. J. Ch. 202; 81 L. T. 775; 16 T. L. R. 63) affirmed.

Earle *v.* Kingscote, [1900] 2 Ch. 585; 69 [L. J. Ch. 725; 49 W. R. 3; 83 L. T. 577; 16 T. L. R. 511—C. A.

See also No. 56.

VIII. GIFTS BETWEEN HUSBAND AND WIFE.

50. *Separate Estate—Restraint on Anticipation—Husband's Debts—Exoneration—Removal of Restraint—Indemnity—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 39.]—The doctrine that if a married woman charges her property with money for the purpose of paying her husband's debts, and the money raised by her is so applied, she is *primâ facie* regarded in equity, and as between herself and him, as lending him, and not giving him, the money raised on her property, and as entitled to have her property exonerated by him from the charge she has created, is based on an inference to be drawn from the circumstances of each particular case, including, in the case of orders made under sect. 39 of the Conveyancing and Law of Property Act, 1881, the orders themselves; and until an inference in favour of the wife arises, there is no presumption for the husband to rebut.

Although it cannot be said that an order under sect. 39 of the Act of 1881, silent as to the wife's right to be indemnified by her husband, is fatal to the existence of such right, yet the absence of all allusion to such right is a circumstance to be considered.

Decision of Kekewich, J. ([1898] 1 Ch. 47; 67 L. J. Ch. 1; 77 L. T. 490; 46 W. R. 232) affirmed, but on different grounds.

The Court has jurisdiction to make an order, under sect. 2 of the Married Women's Property Act, 1893, that the costs of an appeal by a married woman from an order dismissing an action brought by her shall be paid out of

Gifts between Husband and Wife—*Continued.*

property of the appellant, although subject to a restraint on anticipation.

PAGET *v.* PAGET, [1898] 1 Ch. 470; 67 L. J. Ch. [266; 78 L. T. 306; 14 T. L. R. 315; 46 W. R. 472—C. A.

51. *Voluntary Deed—Husband and Wife—Presumption.*]—It is settled by authority, although text-writers seem to have adopted the opposite view, that the relation of husband and wife is not one of those to which the doctrine of *Huguenin* v. *Baseley* ((1807) 14 Ves. 273; 1 Wh. & Tu. L. C. 7th ed. p. 247) applies. There is no presumption that a voluntary deed executed by a wife in favour of her husband and prepared by the husband's solicitor is invalid. The *onus probandi* lies on the party who impugns the instrument, and not on the party who supports it.

Nedby v. *Nedby* ((1852) 5 De G. & Sm. 377; 21 L. J. Ch. 446) followed.

BARRON *v.* WILLIS, [1899] 2 Ch. 578; 68 [L. J. Ch. 604; 48 W. R. 26; 81 L. T. 321; 15 T. L. R. 468—Cozens-Hardy, J.

[The decision of Cozens-Hardy, J., was reversed on appeal, [1900] 2 Ch. 121; see under title SOLICITORS, and probably the above expression of opinion should not now be accepted unreservedly.]

52. *Voluntary Benefit to Husband—Presumption of Influence—Guarantee—No Consideration—Ignorance of Effect—No Independent Advice—Guarantee not Enforceable.*]—The relationship of husband and wife is one where, in the case of a large voluntary benefit, influence is presumed to have existed. If a guarantee by a wife for the benefit of the husband is challenged, it lies on the holder to discharge such presumption.

A husband, who was indebted to B., obtained from his wife, the defendant, a guarantee in favour of B. to cover his debts then due to B., a present advance of £500, and future credits, the total liability being limited to £1,500. The wife, who traded on her own account, had on previous occasions given her husband small financial aid, and was aware of his indebtedness to B. B., B's solicitor, the husband, and wife, were the only persons present when the guarantee was signed, and the defendant had no independent advice.

The guarantee, a very complicated document, was twice read over by the solicitor, who suggested to B. that the defendant should be separately represented.

HELD—(1) that the defendant did not sufficiently understand the nature of the guarantee; (2) that B. had not discharged the *onus* placed upon him by the legal presumption; (3) that he was sufficiently put on inquiry to be affected with the equitable flaws in the transaction; and that therefore the defendant was not liable.

BISCHOFF'S TRUSTEE *v.* FRANK, (1903) 89 L. T. [188—Wright, J.

53. *Joint Banking Account—Property purchased in Husband's Name—Payment out of Wife's Money—Presumption of Resulting Trust—Evidence—Payment out of her Income, or out of her Capital.*]—When the money of a woman finds its way into her husband's hands, and property is bought with it in his name, the question in every case is whether a gift to him was, or was not, intended. There is no rule of law that different presumptions arise when the purchase-money comes out of her income and when it comes out of her capital.

A husband and wife kept a joint banking account, consisting mainly of her income, upon which they both drew. Property was bought, and paid for by a cheque signed by the husband, and was conveyed to him alone. They then opened a joint building account, composed mainly of her capital, and built a house on the property.

HELD—that the wife had not made a gift of the purchase-money to her husband, and that the property belonged to her.

Alexander v. *Barnhill* ((1888) 21 L. R. Ir. 511) explained.

MERCIER *r.* MERCIER, [1903] 2 Ch. 98; 72 L. J. [Ch. 511; 51 W. R. 611; 88 L. T. 516—C. A.

54. *Joint Account—Presumption—Transfer of Mortgage to Husband and Wife—No Evidence as to how Money provided.*]—In 1894 a mortgage was transferred to a husband and wife; it was stated that the money was advanced by them on a joint account, but there was no evidence as to how, or in what shares, it was provided. The wife survived, and, upon her death, questions arose as to whether her estate was entitled to the whole sum.

HELD—that whether the husband provided all or only a part of the sum advanced, the whole belonged to the widow's estate.

RE SCOTT, PALMER *r.* VICKERS, (1907) 97 L. T. [537—Kekewich, J.

IX. PROCEEDINGS.

(a) Against Husband and Wife.

55. *Goods consumed in the House—Allowance made to Wife for Housekeeping—Action against both—Judgment under Ord.* 14 *against Wife—Joint and Separate Liability—Ord.* 14, *r.* 5.]—Necessaries were supplied to the order of the wife while she and her husband were living together: in the middle of the period he forbade her to pledge his credit, and arranged to (and did in fact) pay her in the future a sufficient housekeeping allowance. The tradesmen claimed against the husband and wife jointly, and signed judgment against her under Ord. 14, and then went on against him.

HELD—they could not succeed against him on a joint claim; for the supply of necessaries under such circumstances only raised a presumption that the husband had authorised the wife to pledge his sole credit, not their joint credit.

Nor could they now succeed by an amendment alleging an alternative claim, for by signing judgment against the wife they had elected to treat her as principal, whereas the

Proceedings—*Continued.*

husband could only be liable, if she had acted as his agent.

Ord. 14, r. 5, does not apply to the case of alternative liability.

Decision of Phillimore, J. ((1902) 18 T. L. R. 599) reversed.

Decision of C. A. ([1903] 1 K. B. 64; 72 L. J. K. B. 66; 51 W. R. 290; 87 L. T. 635; 19 T. L. R. 43—C. A.) affirmed.

MORELL BROS., LD. *v.* WESTMORELAND (EARL [OF), [1904] A. C. 11; 73 L. J. K. B. 93; 20 T. L. R. 38; 52 W. R. 353; 89 L. T. 712—H. L. (E.).

56. *Torts of—Libel—Common Law Action against Husband and Wife jointly—Inconsistent Defences—Husband admitting Liability—Wife denying Publication—Striking out inconsistent Defence—R. S. C., Ord. 22, r. 1.*]—Where a husband and wife are sued jointly in a common law action of tort for a libel alleged to have been published by the wife, they cannot plead inconsistent defences.

In such a case where the husband paid money into Court in satisfaction of the claim and the wife put in a defence denying liability :—

HELD—that the wife's defence must be struck out.

BEAUMONT *v.* KAYE AND WIFE, [1904] 1 K. B. [292; 73 L. J. K. B. 213; 52 W. R. 241; 90 L. T. 51; 20 T. L. R. 183—C. A.

57. *Wife's Contract for Goods—Judgment against Wife for Part of Price—Final Election—Abandonment of Right to Sue Husband.*]—Household groceries to the value of £26 were supplied by the plaintiff upon the order of a wife living with her husband. He sued both wife and husband, and signed judgment against both in default of appearance. This judgment was set aside on payment of £20, leave being given to defend as to the balance. Upon the hearing of a summons under Ord. 14 the Master, in view of the wife's admission that she had owed £24 originally, made an order against her for £4 on account of the claim generally and not of particular items, and gave both defendants leave to defend as to the balance. A jury found that a further sum was due, but that the husband only was liable.

HELD—that, the jury having negatived any joint liability, the judgment against the wife precluded the plaintiff from now recovering against the husband.

Morell Bros. v. *Westmoreland*, ([1904] A. C. 11; 73 L. J. K. B. 93; 52 W. R. 353; 89 L. T. 712—H. L., No. 55, *supra*) applied.

Decision of Div. Ct. ([1905] 2 K. B. 580; 74 L. J. K. B. 853; 93 L. T. 202) reversed.

FRENCH *v.* HOWIE AND WIFE, [1906] 2 K. B. [674; 75 L. J. K. B. 980; 95 L. T. 274—C. A.

58. *Joint Account—Overdraft—Security given by Wife—Inference of Joint Liability.*]—A husband had, on December 4th, 1902, the date of his marriage, an account at a bank in S. This account was, on December 17th, 1902, transferred to the joint names of himself and his wife, and drawn on by both husband and wife. On May 18th, 1903, in the husband's absence, the bank asked for security, the account being overdrawn; the wife thereupon deposited the deeds of a house belonging to her, and charged them for the debt then or thereafter to become due to the bank from her either solely or jointly with any other person, and agreed to execute a legal mortgage containing a covenant for payment and a power of sale and other property clauses. The wife died on August 27th, 1904, leaving her furniture (worth £300) to her husband absolutely, and the house in question (worth about £1,400) to him for life, with remainder to her next of kin. The overdraft on May 18th, 1903, was £107, and at the date of her death £414. She had paid about £100 into the account.

HELD—that the true inference was that the husband and wife agreed to provide jointly for current household expenses, and that each of them ought to pay one moiety of the overdraft.

RE RHODA SHAW, SHAW *v.* JONES, (1906) 94 [L. T. 93—Eady, J.

(b) Between Husband and Wife.

59. *Re-marriage of Peeress by Courtesy to Commoner—Title of Honour—Continued Use of Title—Injunction—Jurisdiction.*]—The former wife of a peer, who had divorced the appellant, her husband, on the ground of his misconduct, married a commoner. In accordance with the usages of society she continued to use his title of honour. The appellant complained, and applied for an injunction to prevent her doing so.

HELD—that on her marriage she lost her right to the title, but that the appellant had not suffered either legal wrong or damage; and that if it was a disturbance of a dignity it was not a matter within the cognisance of a Court of law.

Decision of Court of Appeal ([1900] P. 305; 69 L. J. P. 121; 49 W. R. 19; 83 L. T. 218; 16 T. L. R. 563) affirmed.

EARL COWLEY *v.* COUNTESS COWLEY, [1901] [A. C. 450; 70 L. J. P. 83; 50 W. R. 81; 85 L. T. 254; 17 T. L. R. 725—H. L. (E.).

60. *Husband interfering with Wife's Separate Property—Declaration that Property was Wife's—Order restraining Husband from interfering.*]—A woman was possessed of a licensed public-house in which she lived and carried on business. On her marriage the house and business remained her separate property, and the husband agreed not to interfere with the business. The husband lived in the house with the wife. Subsequently he ill-treated her, and systematically interfered with the business, and acted as if he was the owner of it, to the serious detriment of the business.

The Master of the Rolls on the hearing of an originating summons brought by the wife against the husband under sect. 17 of the Married Woman's Property Act, 1882, made an order declaring the wife entitled to the property, and

Proceedings—*Continued.*

restraining the husband from interfering with the business, but declined to make any order preventing the husband from entering the house.

GAYNOR *v.* GAYNOR, [1901] 1 Ir. R. 217—M. R.

61. *Protection of Property acquired by Wife — Husband's Address unknown — Desertion — Practice—Citation of Husband dispensed with —Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 21—*Matrimonial Causes Act*, 1858 (21 & 22 Vict. *c.* 108), *s.* 7.]—A summons was taken out by a married woman by reason of the desertion of her by her husband to protect any money or property in England which she might have acquired by her own lawful industry, and any property which she might have become possessed of, or which she might at any time become possessed of after such desertion, against her husband and his creditors and any person claiming under him. Inquiries had been made and it was believed that the husband was somewhere in Melbourne, Australia.

HELD—that the order might be made without the husband being cited.

Ex parte Hall ((1858) 27 L. J. P. & M. 19—Cresswell, J. O.) followed.

IN RE MORRIS, [1902] P. 104; 71 L. J. P. 56; [86 L. T. 596—Jeune, P.

62. *Slander—No Action lies.*]—As in England, so in Scotland, a husband or a wife cannot sue the other for slander.

Phillips v. *Barnet* ((1876) 1 Q. B. D. 436; 45 L. J. Q. B. 277; 24 W. R. 345; 34 L. T. 177) followed.

YOUNG *v.* YOUNG (1903) 5 F. 330—Ct. of Sess.

63. *Action by Wife against Husband—Detention of Goods—Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *ss.* 12, 17.]—A married woman may, by virtue of sect. 12 of the Married Women's Property Act, 1882, sue her husband for the return of her personal property detained by him.

LARNER *v.* LARNER, [1905] 2 K. B. 539; 74 [L. J. K. B. 797; 54 W. R. 62; 93 L. T. 537; 21 T. L. R. 637—Div. Ct.

(c) Wife's Liability for Costs.

64. *Restraint on Anticipation*—"*Proceeding instituted*"—*Interpleader Proceedings—Married Women's Property Act*, 1893 (56 & 57 Vict. *c.* 63), *s.* 2—*County Court Rules*, 1889, *Ord.* 27, *rr.* 1, 2, 4 (*a*).]—A married woman gave notice to the high bailiff of a county court that the goods taken in execution were claimed by her as her separate property under her marriage settlement. An interpleader summons was issued by the high bailiff. The married woman failed in her claim.

HELD—that the claim by the married woman was a proceeding instituted within the meaning of sect. 2 of the Married Women's Property Act, 1893, and the Judge had power to order payment of the costs out of her separate estate subject to a restraint upon anticipation.

NUNN & CO. *v.* TYSON, [1901] 2 K. B. 487; 70 [L. J. K. B. 854; 50 W. R. 16; 85 L. T. 123; 17 T. L. R. 624—Div. Ct.

65. *Form of Order—Divorce Proceedings—Subsequent Summons to vary Order*—"*Initiated by the Married Woman*"—*Married Women's Property Act*, 1893 (56 & 57 Vict. *c.* 63), *s.* 2.]—A divorce decree *nisi* directed that the husband should have the custody of the child of the marriage. After the decree had been made absolute the wife married the co-respondent, and subsequently took out a summons to vary the decree and an order which had been made *ex parte* requiring her to deliver up the child.

The summons was dismissed with costs.

HELD—that both in substance and in form the summons was an application made by the wife in the divorce suit, and was not an independent action or proceeding initiated by her within the meaning of sect. 2 of the Married Women's Property Act, 1893; and that, therefore, there was no power to order the costs to be paid out of her separate property, which was subject to a restraint against anticipation.

GORDON *v.* GORDON AND GORDON, [1904] P. 163; [73 L. J. P. 41; 52 W. R. 389; 90 L. T. 597—C. A.

66. *Restraint on Anticipation—Unsuccessful Action by Married Woman—Unsuccessful Application for New Trial—Married Women's Property Act*, 1893 (56 & 57 Vict. *c.* 63), *s.* 2.]—A married woman brought an unsuccessful action, and her application for a new trial was dismissed with costs.

HELD—that under sect. 2 of the Married Women's Property Act, 1893, the Court had power to order such costs to be paid out of her separate property, subject to a restraint on anticipation.

Hood Barrs v. *Catheart* ([1894] 2 Q. B. 559; 63 L. J. Q. B. 602, 798; 42 W. R. 633; 71 L. T. 7—C. A.) and *Hood Barrs* v. *Heriot* ([1897] A. C. 177; 66 L. J. Q. B. 356; 45 W. R. 507; 76 L. T. 299—H. L.) distinguished.

DRESSEL *v.* ELLIS AND OTHERS, [1905] 1 K. B. [574; 74 L. J. K. B. 401; 53 W. R. 353; 92 L. T. 816—C. A.

67. *Restraint on Anticipation—Plaintiff in Unsuccessful Action—Receiver—Married Women's Property Act*, 1893 (56 & 57 Vict. *c.* 63), *s.* 2.]—When, in an action by a married woman, judgment has been given for the defendant with costs, if an application be made under sect. 2 of the Married Women's Property Act, 1893, for payment of such costs out of her separate property, subject to a restraint against anticipation, the *onus* is on the married woman to show why such an order ought not to be made.

PAWLEY *v.* PAWLEY, [1905] 1 Ch. 593; 74 [L. J. Ch. 344; 53 W. R. 375; 92 L. T. 457—Buckley, J.

Proceedings—*Continued.*

68. *Restraint on Anticipation — Unsuccessful Appeal—Married Women's Property Act*, 1893 (56 & 57 Vict. *c.* 63), *s.* 2.]—A married woman and her husband, co-plaintiffs, appealed unsuccessfully against an order striking out their statement of claim as being an abuse of the process of the Court.

HELD—that the defendant's costs should be paid out of her separate estate, subject to a restraint against anticipation.

HUNTLEY (MARCHIONESS) *v.* GASKELL, [1905] [2 Ch. 656; 75 L. J. Ch. 66; 93 L. T. 785; 22 T. L. R. 20—C. A.

See also No. 50, *supra*.

X. SEPARATION DEEDS.

69. *Covenant not to molest—Breach—Intention to annoy — Divorce Proceedings in Foreign Country.*] — A husband and wife, who were British subjects domiciled in the United Kingdom, were living apart under a separation deed which contained a covenant by the husband not to molest the wife. The husband subsequently went to Texas, and at once commenced proceedings there with a view to obtain a divorce, upon the ground of desertion. Documents and notices were served on the wife at her residence in England in connection with those proceedings.

HELD (reversing the judgment of Wright, J.)—that in the absence of proof of an intention to annoy there was no evidence of a breach of the covenant not to molest.

HUNT *v.* HUNT, [1897] 2 Q. B. 547; 67 L. J. Q. B. [18; 77 L. T. 421; 14 T. L. R. 52—C. A.

70. *Breach of Covenant—Restitution of Conjugal Rights.*]—To a wife's petition for restitution of conjugal rights the husband may set up a deed of separation, and he is not debarred from so doing unless he has committed a clear, deliberate, substantial and serious breach of the covenants—a single default in the payment of a weekly allowance is insufficient.

KUNSKI *v.* KUNSKI, (1899) 61 L. J. P. 18— [Jeune, P.

71. *Deed not pleaded by Husband—Cruelty before and Adultery after Separation Deed—Covenant not to take Proceedings in respect of Previous Misconduct.*] — The Court granted a wife a decree for dissolution of the marriage on the ground of her husband's cruelty and adultery, the cruelty being before the date of a separation deed, notwithstanding a covenant in the deed providing that no proceedings should be taken in respect of such misconduct, on the ground that the deed had not been pleaded.

Rose v. *Rose* ((1883) 8 P. D. 98; 52 L. J. P. 93) distinguished.

DOWLING *v.* DOWLING, [1898] P. 228; 68 L. J. P. [8; 47 W. R. 272—Barnes, J.

72. *Absence of Chastity Clause — Subsequent Adultery — Discredited Denials of Adultery — Impeachment of Separation Deed—Costs.*]—It is well settled that, in the absence of a provision limiting the annuity, granted to a wife by a deed of separation during chastity, the mere fact of subsequent adultery does not put an end to the provision for the wife. Where a deed of separation was impeached on the ground that the husband was induced to execute it by fraudulent representations that his wife was a virtuous woman, it will not be set aside if it appears that he credited her denials no more than she credited his.

In pauper cases the rule prevailing in the House of Lords ought to be adopted by the Privy Council.

WASTENEYS *v.* WASTENEYS, [1900] A. C. 446; [69 L. J. P. C. 83—P. C.

73. *Maintenance—Wilful Neglect causing Wife to live separately—Limit of Time for Proceedings —Wife's Costs—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 Vict. *c.* 39), *ss.* 4, 8.] —A valid agreement for separation is a bar to proceedings before justices for a separation order under the Summary Jurisdiction (Married Women) Act, 1895, for wilful neglect to provide reasonable maintenance and thereby causing the wife to leave and live separate and apart from the husband. Such proceedings may also be barred by lapse of time under sect. 11 of the Summary Jurisdiction Act, 1848.

Where a wife has obtained a decision in her favour under the Summary Jurisdiction (Married Women) Act, 1895, and comes to the High Court to support it, she will have her costs.

MEDWAY *v.* MEDWAY, [1900] P. 141; 69 L. J. P. [56; 64 J. P. 120; 48 W. R. 622; 82 L. T. 627 —Div. Ct.

74. *Covenant by Husband to pay Annuity to Wife—Default in Payment—Ultimate Trust for Husband — Husband's Bankruptcy — Right of Trustees of Deed to retain Trust Property — Valuable Consideration.*]—In 1864 by a separation deed, after reciting that the husband and wife had agreed to live apart, the husband assigned certain leaseholds to trustees upon trust to pay the rents to his wife for life or until she should attempt cohabitation, and then for sale and distribution, and ultimately for children and husband, and he covenanted to make up any deficiency of income to £300 a year, and to allow his wife to live apart. The husband paid nothing under the covenant. In 1868 the husband became bankrupt and obtained his discharge. He died in 1872, and his wife died in 1899, leaving no issue. The assignee in bankruptcy claimed the leaseholds. It was conceded that the husband's bankruptcy did not free him from his future obligations under the covenant, and that the assignee was in no better position than the husband.

HELD—that the trustees of the separation deed were entitled to retain the leaseholds until the amount payable under the covenant was satisfied, and that the assignee, without making good such amount, was not entitled to claim the leaseholds, or any part thereof, and that the

Separation Deeds—*Continued.*

husband could not be heard to say that the deed was not executed for value.

In re Weston, Davies *v.* Tagart, [1900] 2 Ch. [164; 69 L. J. Ch. 555; 48 W. R. 467; 82 L. T. 591—Stirling, J.

75. *Weekly Payments—Arrears—Subsequent Cohabitation—Accord and Satisfaction.*]—Under a separation deed the husband agreed to allow his wife, so long as they lived separate, a certain sum per week. The weekly payments having fallen into arrear, the parties resumed cohabitation.

Held—that the husband was not thereby discharged from liability to pay the arrears, as until they went to live together again the wife was possessed of a cause of action for each week's arrears, and the subsequent cohabitation did not amount to accord and satisfaction of the cause of action.

Macan *v.* Macan, (1901) 70 L. J. Q. B. 90; 17 [T. L. R. 131—Bigham, J.

76. *Maintenance—Bar to Summons for Desertion—Jurisdiction of Justices—Reasons of Justices to be stated upon the Notes—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 Vict. *c.* 39).]—A husband, it was assumed, deserted his wife in April, 1896. In the June following his wife entered into a deed of separation, the deed being arranged between the husband's solicitor on the one side and the wife's solicitor on the other. There was no evidence to impugn its validity. The husband did not pay the allowance provided by the deed. In April, 1902, the wife took out a summons against her husband for desertion.

Held—that the effect of the separation deed was to put an end to the desertion, for by executing it the wife bargained away whatever rights she had in return for what was apparently a good consideration, which, moreover, she appeared to have, later on, to some extent, enforced; and that although the jurisdiction of the justices might perhaps have been invoked under the Summary Jurisdiction Acts, that could only have been done within six months from the date when the desertion was put an end to.

Held, also, that the justices and their clerk should have shown upon the notes the reasons which induced the justices' decision.

Piper *v.* Piper, [1902] P. 198; 71 L. J. P. 100; [87 L. T. 150—Div. Ct.

77. *Allowance for Maintenance of Boy—Boy to reside with or under the Tutelage or Care of his Mother—Boy sent to Christ's Hospital—Liability of Husband to continue Payments.*]—A husband by a separation deed agreed to pay to his wife 10*s.* per week for the maintenance, &c., of their son so long as he was under 21 years of age and resided with or under the tutelage or care of the wife. The son became a pupil at Christ's Hospital, and that school relieved the mother from all expense, except in the matter of providing boots and underclothing.

Held—that the boy was still under his mother's care and tutelage, and that the father was bound to continue his weekly payments: also, that a consent order to the effect that the boy should spend half his holidays with the father was consistent with the provisions of the deed, and did not relieve the father from his liability thereunder.

Decision of Wright, J. reversed.

Rowell *v.* Rowell, (1903) 89 L. T. 288; 19 [T. L. R. 657—C. A.

78. *Settlement on Wife for Life and Existing Children—Subsequent Resumption of Cohabitation—Settlement not avoided.*]—By a separation deed a husband conveyed property to a trustee upon trust for the wife for life, and after her death for the three children of the marriage.

Subsequently cohabitation was resumed and other children born.

Held—that the settlement in favour of the first three children was not avoided.

Ruffles v. *Alston* ((1875) L. R. 19 Eq. 539; 44 L. J. Ch. 308; 23 W. R. 465; 32 L. T. 236—Malins, V.-C.) followed.

In re Spark, Spark *v.* Massey, [1904] 1 Ch. [451; 73 L. J. Ch. 259; 52 W. R. 426; 90 L. T. 54—Kekewich, J.

On appeal the Court approved a compromise. [1904] 2 Ch. 121; 73 L. J. Ch. 576; 53 W. R. 41; 91 L. T. 237—C. A.

79. *Construction—Covenant to pay Annuity—"So long as she shall continue to live separate and apart"—Death of Husband before Wife.*]—A husband by a separation deed covenanted to pay to his wife an annuity during her life if she should so long continue to live separate and apart.

The husband predeceased his wife.

Held—that upon his death the annuity ceased, as she could no longer be said to be living separate and apart.

In re Gilling, Proctor *v.* Watkins, (1905) [74 L. J. Ch. 335; 53 W. R. 427; 92 L. T. 533 —Kekewich, J.

80. *Covenant not to Sue—Covenant not Pleaded in Answer—Restitution of Conjugal Rights.*]—A husband separated from his wife under a deed, by which each covenanted not to take legal proceedings to compel the other to cohabit with him or her. The wife subsequently brought a suit for restitution of conjugal rights, to which the husband did not file any answer, and did not appear.

Held—that in the absence of a plea founded on the covenant in the deed the Court would grant a decree of restitution.

Gleig *v.* Gleig, (1906) 22 T. L. R. 716— [Deane, J.

81. *Deed of Separation—Covenant not to sue for Restitution—Substantial Breach of Covenant by Respondent—Effect.*]—A husband and wife agreed to live apart, and a separation deed was

Separation Deeds—*Continued.*

executed under which the husband covenanted to pay his wife an allowance, and the wife covenanted not to sue for restitution of conjugal rights. The husband subsequently ceased to pay his wife the allowance, and stated his intention not to make any more payments to her. The wife brought a suit for restitution of conjugal rights, to which the husband filed no answer, and the suit was undefended.

HELD—that, though the husband had not set up the covenant in the separation deed not to sue for judicial separation, the Court could and ought to take notice of it; but that, as the husband had broken his covenant to pay the allowance and had expressed his intention to make no more payments, and had thus rendered the deed useless to the wife, the Court would not refuse to make an order for restitution.

Tress v. *Tress* ((1887) 12 P. P. 128; 56 L. J. P. 93; 51 J. P. 504; 57 L. T. 501; 35 W. R. 672—Hannen, P.) commented on.

KENNEDY *v.* KENNEDY, [1907] P. 49; 76 L. J. P. [34; 96 L. T. 476; 23 T. L. R. 139—Barnes, P.

82. *Allowance to Wife—Power to Alter—Notice to Trustee—Waiver.*]—By a separation deed the husband agreed to pay to the trustee of the deed a sum of £400 a year in trust for his wife for her separate use without power of anticipation; and the deed contained a provision that at the end of the year the husband might give notice to the trustee with a view to the reduction of the allowance, and if the parties could not agree within one month's time the deed was to be at an end. The trustee authorised the wife's solicitor to receive the allowance on her behalf. Before the end of the year the husband's solicitor asked the wife's solicitor if he was prepared to accept service of a notice to reduce the allowance, and the wife authorised her solicitor to waive the notice to the trustee. Negotiations followed, but no settlement was reached, and both parties treated the deed as at an end. For some years the husband paid sums to or for the benefit of his wife, such sums falling considerably short of the allowance provided for by the deed. Subsequently the trustee sued to recover the arrears alleged to be due under the deed.

HELD—that the provision as to notice to the trustee was directory only, and not imperative; and that, even if it was imperative, it would be inequitable to allow the wife to take advantage of it.

Decision of the High Court of Australia (2 Commonwealth L. R. 615) affirmed.

MACNAGHTEN *v.* PATERSON, [1907] A. C. 483; [76 L. J. P. C. 94; 97 L. T. 442; 23 T. L. R. 727—P. C.

83. *Cruelty—Acts of Cruelty subsequent to Deed—Judicial Separation.*]—A husband and wife separated under a separation deed which provided that the wife should not take any proceedings of any sort against her husband in respect of anything done up to that date. Subsequently, while they were living apart, the husband committed two acts of cruelty towards his wife.

HELD—that she was not precluded by the separation deed from suing for a judicial separation.

KUNSKI *v.* KUNSKI, (1907) 23 T. L. R. 615—[Bucknill, J.

See also No. 159, *infra.*

XI. MATRIMONIAL CAUSES IN THE HIGH COURT.

(a) Alimony and Maintenance.

See also ACTION, 8; BANKRUPTCY, 209; INCOME TAX, 63.

84. *Order on Husband to secure Annual Sum for Wife—Power of Wife to Release or Alienate—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 32.]—Where a decree for dissolution of marriage has been made and the husband has been ordered, under sect. 32 of the Matrimonial Causes Act, 1857, to secure an annual sum to the wife, she can release or alienate it.

A decree for dissolution of marriage having been made on a wife's petition, an order was made directing her husband to secure to her on certain property the sum of £90 per annum, payable monthly, as permanent maintenance, and directing him to execute an assignment of the property to secure that sum.

By agreement between the parties the deed was not executed, and after several payments had been made under the order the wife by deed released her husband from further payments in consideration of a gross sum then paid to her.

HELD—that, although monthly payments were directed, the order was made under sect. 32 of the Matrimonial Causes Act, 1857, and that the wife had power to release the husband.

HELD, also, that, although the deed of assignment had not been executed as directed, the Court had no jurisdiction to direct the order to be perfected now by the execution of the deed.

Decision of Barnes, J., reversed.

MACLURCAN *v.* MACLURCAN, (1897) 77 L. T. [474—C. A.

85. *Permanent Maintenance — Registrar's Report—Very large Income—Test to be applied*—Quantum *and Duration of Allowance—Limitations*—Dum casta et sola vixerit.]—In dealing with questions of permanent maintenance, the circumstances of each particular case are to be considered, and, where very large incomes are involved, the ordinary practice of allotting such amount as will bring up the petitioner's income (if any) to one-third of the joint income of the parties does not apply. The petitioner, however, is entitled in such a case to have allotted to her a very handsome allowance, and one of the tests to be applied in fixing the amount is: What, in a case of settlement, would be an adequate jointure to settle on a widow in the position of the respondent's former wife?

The practice is to order the allowance to be

Matrimonial Causes in the High Court—*Continued.*

secured during the petitioner's life, and not to limit it during their joint lives.

As to whether the limitation *dum casta* or *dum sola vixerit* should be attached to the payment, in a case of a large allowance where the petitioner has already a separate and very substantial income, the same rule of practice does not apply as in the case of an order for a bare subsistence only; and the Court is entitled, in cases of very large incomes, to consider, upon this point also, all the circumstances of the particular case before it, and, in doing so, a consideration of the "conduct of the parties" is not confined to the limits of their married life, as now put an end to by the final decree of the Court; but the fact, for instance, that the petitioner had been previously married and divorced is a circumstance which the Court may properly take into account; as, also, the further circumstance that the petitioner brought nothing to the respondent, and that her present separate income had been wholly derived from him.

The petitioner (wife) obtained a decree absolute, dissolving her marriage on the ground of the adultery and cruelty of the respondent, and, upon her petition for permanent maintenance, the registrar found that her separate income, derived entirely from property given to or settled upon her by the respondent, amounted to £1,400 per annum, and that the respondent's income was £19,000 a year; and the registrar recommended that, out of the latter, £1,600 a year should be secured to the petitioner for her life, in addition to the £1,400 a year which already belonged to her absolutely.

The registrar left it for the Court to determine whether the £1,600 allowance should be limited to the petitioner *dum sola et casta vixerit*.

Upon motion by the petitioner to vary the report, by ordering the respondent to secure to the petitioner for her life an annual sum of £3,600 at least, and without any clause of limitation:—

HELD—that the amount recommended by the registrar was sufficient, and that his report thereon should be confirmed.

HELD, further, that the said sum of £1,660 per annum should be secured to the petitioner in the way most convenient to the respondent, and that the deed to secure that allowance should contain a clause limiting the payments to be made to the petitioner *dum sola et casta vixerit*.

KETTLEWELL *v.* KETTLEWELL, [1898] P. 138; [67 L. J. P. 16; 77 L. T. 631; 14 T. L. R. 96—Jeune, P.

87. *Basis of Calculation.*]—On an application for permanent maintenance by a wife who had obtained a decree *nisi* on the ground of her husband's cruelty and adultery, the registrar, treating the husband's property as producing 4 per cent. per annum, recommended that an annual sum should be secured to the wife on the husband's property, such sum amounting to one-third of the income thereof at 4 per cent.

The Court varied the report by ordering that this sum should be secured on a third only of the husband's property, and that, as to the difference between this sum and the sum produced by such third invested in trust securities, the wife must be content with the husband's personal covenant.

On appeal:—

HELD—that this order was right, and that the appeal must therefore be dismissed.

Decision of Sir Francis Jeune affirmed.

SHORTHOUSE *v.* SHORTHOUSE, (1898) 78 L. T. [687; 79 L. T. 366—C. A.

88. *Reversionary Interest*—Dum sola *without* dum casta *Clause — Allowance for Child — Security.*]—Upon a wife's petition for permanent maintenance, the income of the respondent, derived mainly from money invested on mortgage, was found to be £972 a year. He was also entitled in reversion to one-sixth share of a fund of £47,955, producing to the life tenant, his mother, now aged 62 years, an income of £1,340 per annum.

The present cash value of the respondent's reversionary interest was said to be £5,383.

The petitioner was possessed of no separate means, and the registrar recommended that the respondent should be ordered to secure to the petitioner, as permanent maintenance for herself, an annual sum of £400, and, as maintenance for the child of the marriage, a further annual sum of £100.

The registrar further recommended that the suggestion put forward by the respondent that the petitioner was about to contract a fresh marriage with a gentleman possessing some means did not warrant the recommendation either of a clause of limitation *dum sola vixerit* or of a reduction in the amount of maintenance upon re-marriage.

Upon motion, the Court varied the report by ordering the respondent to secure to the petitioner £350 a year now, and an additional £50 a year, payable on the reversion falling in; and, further, that the £100 a year for the child should be ordered to be paid by the respondent without security.

The Court further ordered that the *dum sola* clause should be inserted in regard to the additional £50 only.

SMITH *v.* SMITH, [1898] P. 29; 67 L. J. P. 54; [78 L. T. 27—Jeune, P.

89. *Variation of Order—Practice—Appeal.*]—A wife obtained a dissolution of marriage and filed a petition for maintenance.

A large portion of the respondent's income was derived from a mortgage producing 5 per cent.

The registrar made his report and the Court confirmed it on the basis of the respondent's income during the subsistence of this mortgage. Notice that the mortgage was to be paid off had now been given.

Application was now made to vary the order on the ground that after payment of the mortgage interest at the rate of 5 per cent. could not be obtained, and that under the circumstances

Matrimonial Causes in the High Court—*Continued.*

the respondent would be deprived of an undue amount of income.

HELD—that the point not having been taken or reserved at the hearing of the motion to confirm the registrar's report, the Court had now no power to vary the order, and that, except by consent, no variation thereof could be obtained except by appeal.

Shorthouse v. *Shorthouse* ((1898) 78 L. T. 687, *supra*) distinguished.

SMITH *v.* SMITH (No. 2), (1898) 79 L. T. 124.

90. *Permanent Maintenance — Capital Sum without Settlement—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 32.]—Upon a dissolution of marriage at the suit of the wife, when the husband disappeared and had not been heard of for several years, and the only assets available was a sum of £320 standing in his name in a suit in the Chancery Division, the wife being entirely without means, the Court, on a petition, ordered the balance (about £200), after payment of the wife's costs, to be paid to the wife (without any settlement) for the benefit of herself and children.

Morris v. *Morris* ((1861) 31 L. J. P. 33) followed.

STANLEY *v.* STANLEY, [1898] P. 227; 68 L. J. P. [227; 47 W. R. 272; 79 L. T. 104—Barnes, J.

91. *Alimony* pendente lite—*Prior Agreement for Separation—Inquiry as to Husband's Means—Questions to be tried together—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 35—*Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 4.]—A wife filed a petition for the dissolution of her marriage.

Alimony proceedings brought by the wife were peremptorily stopped by the President of the Probate Division, because the practice of that Division, as alleged, was never, upon an application for alimony *pendente lite*, to go outside an agreement previously entered into by the parties for a separation, and, when there is such an agreement, never to inquire into the husband's means.

HELD that, notwithstanding such an agreement, application may be made under sect. 35 of the Matrimonial Causes Act, 1857, and sect. 4 of the Matrimonial Causes Act, 1859, for a provision for the maintenance and education of the children of the marriage; that there need not be a preliminary investigation as to the existence of the agreement; that the inquiry as to the husband's means should proceed in the usual way; and that the questions of the existence and effect of the agreement should be tried together with the other questions which were raised in the divorce petition.

BARRY *v.* BARRY, [1901] P. 87; 70 L. J. P. 17; [49 W. R. 370; 84 L. T. 33—C. A.

92. *Gross Sum of Money—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 32.]—The petitioner (wife) obtained a decree dissolving her marriage with the respondent. There was no issue of the marriage. The petitioner presented her petition for permanent maintenance. The respondent failed to comply with an order for the production of all books, vouchers, and other documents relating to his income. On leave given to the petitioner she proved that the respondent's income was £1,471 from business and investments, and he had moneys in hand and property together of the value of about £21,300.

HELD—that it be ordered that a gross sum of £6,000 be paid by the respondent to the petitioner.

KIRK *v.* KIRK, [1902] P. 145; 71 L. J. P. 78; [87 L. T. 148—Barnes, J.

Disapproved in *Twentyman* v. *Twentyman*, No. 94, *infra*.

93. *Maintenance for Guilty Wife—No Means of Support, and Bad Health — Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 32.]—A wife against whom there was a finding of adultery on a petition by the husband for a dissolution of marriage applied for an allowance from her husband. She had no means and no relatives to go to, and she was in very bad health. She could not possibly support herself or earn her own living.

HELD—that the decree *nisi* was not to be made absolute until the petitioner had secured to her by deed £1 per week for life—*dum sola et casta vixerit*.

Decision of Barnes, J., ((1902) 87 L. T. 152; 18 T. L. R. 752) affirmed.

ASHCROFT *v.* ASHCROFT AND ROBERTS, [1902] [P. 270; 71 L. J. P. 125; 87 L. T. 229; 18 T. L. R. 821; 51 W. R. 292—C. A.

N.B.—This case is not to be brought up too much in Court, as it was an exceptional case, in which the wife had neither means nor the health to support herself. See *Lewis* v. *Lewis*, 18 T. L. R. 792—Barnes, J.

94. *Gross Sum of Money—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 32.]—A wife, being successful in her divorce suit, asked that the respondent might be ordered to pay over to her a gross sum of money for her absolute use.

HELD—that the Court had no power to make such an order: when a gross sum of money is ordered as permanent maintenance it must be secured, and not paid over to the petitioner, and it can only be secured for some period not exceeding her lifetime.

Kirk v. *Kirk* ([1902] P. 145; 71 L. J. P. 78; 87 L. T. 148 —Barnes, J., *supra*) disapproved and not followed.

TWENTYMAN *v.* TWENTYMAN, [1903] P. 82; 72 [L. J. P. 36; 51 W. R. 575; 88 L. T. 571—Jeune, P.

95. *Compromise of Divorce Suit—Whether to be Paid free of Income Tax—Income Tax Acts*, 1842 (5 & 6 Vict. *c.* 35), *ss.* 102, 103, and 1853 (16 & 17 Vict. *c.* 34), *s.* 40.]—A divorce suit was

Matrimonial Causes in the High Court—*Continued.*

compromised by a deed of separation, and by a supplemental deed the husband agreed to pay to the wife £450 per annum, being the amount fixed by an arbitrator to whom the question was referred in accordance with the terms of the deed of separation.

HELD—that the husband might deduct income tax from the annuity.

Decision of Kekewich, J. ([1906] 1 Ch. 768; 75 L. J. Ch. 415; 54 W. R. 448; 94 L. T. 537) affirmed.

IN RE BARRY'S TRUSTS, BARRY *v.* SMART, [1906] 2 Ch. 358; 75 L. J. Ch. 676; 54 W. R. 621; 95 L. T. 165—C. A.

96. *Right to maintain Action for Arrears.*]—An order of the Divorce Court for permanent alimony is not a final and conclusive judgment upon which an action of debt can be maintained if the payments ordered are in arrear.

ROBINS *v.* ROBINS, [1907] 2 K. B. 13; 76 L. J. [K. B. 649; 96 L. T. 786; 23 T. L. R. 428—Joyce, J.

97. *Restitution of Conjugal Rights—Subsequent Decree for Judicial Separation—Application for Permanent Alimony—Wife in Penal Servitude—Matrimonial Causes Act*, 1884 (47 & 48 Vict. *c.* 68), *ss.* 2, 5.]—A wife obtained a decree for restitution of conjugal rights, and an order was made under sect. 1 of the Matrimonial Causes Act, 1884, for alimony at the rate of £330 a year. Subsequently she filed a petition for judicial separation, and she also filed a petition for alimony *pendente lite* which was by consent fixed at £330 a year. A decree for judicial separation was made; and she did not file a petition for permanent alimony, but applied to the registrar under the alimony petition in the restitution suit and asked for permanent alimony in that suit. Before the hearing of the application she was sentenced to five years' penal servitude.

HELD, first, that the wife by proceeding for a judicial separation had abandoned her rights as to alimony under the Matrimonial Causes Act, 1884; and, secondly, that permanent alimony would not be granted to a wife who had just been sentenced to a term of penal servitude.

LESLIE *v.* LESLIE, (1907) 24 T. L. R. 148—[Deane, J.

See also No. 192, *infra*.

(b) Costs.

98. *Pauper's Suit—Queen's Proctor's Intervention.*]—The costs of the intervention of the Queen's Proctor in the case of a pauper petitioner are entirely in the discretion of the judge, and an unsuccessful pauper is, therefore, liable to an order condemning him in the full costs of the intervention.

WHITE *v.* WHITE, [1898] P. 124; 67 L. J. P. [63—Jeune, P.

99. *Husband's Liability to pay Costs where no real Defence.*]—The costs of a wife who is respondent will not be allowed as against the husband where facts have come to the knowledge of her solicitors or their London agent which ought to convince them of her guilt.

Such costs may, however, be ordered to be taxed against the co-respondent by the husband, and if recovered to be paid to the wife's solicitors.

TOWNSON *v.* TOWNSON, (1898) 67 L. J. P. 68; [78 L. T. 54—Jeune, P.

100. *Husband's Right to Costs against the Co-respondent.*]—The question of condemning the co-respondent in costs is entirely in the discretion of the Court.

If a co-respondent who has misconducted himself with a woman in ignorance of the fact that she was a married woman continues to live in adultery with her after being informed of that fact, he will not necessarily be condemned in costs.

ROBINSON *v.* ROBINSON AND WILSON, (1898) 78 [L. T. 391; 14 T. L. R. 363—Barnes, J.

101. *Pauper Petitioner — Queen's Proctor intervening.*]—A pauper petitioner for divorce, when the decree *nisi* is rescinded on the intervention of the Queen's Proctor, is liable to be condemned in the costs of the intervention.

White v. *White* ((1898) P. 124; 67 L. J. P. 63—Jeune, P., *supra*) followed.

GUY *v.* GUY AND FOSTER, (1901) 17 T. L. R. 4 [—Jeune, P.

102. *Wife's Petition for Judicial Separation—Husband's Petition for Divorce—Consolidation Order—Co-respondent ordered to pay Costs of Wife's Petition—Appeal—Leave—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 34—*Supreme Court of Judicature Act*, 1890 (53 & 54 Vict. *c.* 44), *s.* 5.]—A wife presented a petition for judicial separation on the ground of her husband's cruelty. The husband presented a petition for dissolution of marriage on the ground of his wife's adultery. These suits were consolidated by an order of the Court. At the trial the wife's petition was withdrawn, and a decree was made on the husband's petition for dissolution of marriage with costs against the co-respondent. Upon taxation of the costs Jeune, P., held that, by reason of the consolidation order, the two suits had become one, and he had power under sect. 34 of the Matrimonial Causes Act, 1857, to order the co-respondent to pay the costs of both suits.

HELD—that the order for payment of costs was part of a final order, and not an interlocutory one, and that an appeal lay without the leave of the Court.

The City of Manchester ((1880) 5 P. D. 221; 49 L. J. P. 81; 42 L. T. 521—C. A.) and *Marsden* v. *Lancashire and Yorkshire Ry. Co.* ((1881) 7 Q. B. D. 641; 50 L. J. Q. B. 318; 29 W. R. 580; 44 L. T. 239—C. A.) followed.

HELD, also, that sect. 34 of the Matrimonial Causes Act, 1857, is limited to persons who are

Matrimonial Causes in the High Court—*Continued.*

parties to "the proceedings," *i.e.*, the proceedings upon a petition presented by a husband; that the co-respondent was not a party to the wife's petition as the consolidation order did not make him one; and that the learned President had no jurisdiction to order the co-respondent to pay the costs of the wife's petition.

FORBES-SMITH *v.* FORBES-SMITH, [1901] P. [258; 70 L. J. P. 61; 50 W. R. 6; 84 L. T. 789; 17 T. L. R. 587—C. A.

103. *Decree* nisi — *Intervention of King's Proctor—Rescission of Decree and Dismissal of Petition.*]—A petitioner claimed a decree of nullity on the ground of the non-consummation of the marriage, owing to the husband's incapacity. A decree *nisi* was made. The King's Proctor, acting under the directions of the Attorney-General, intervened on the ground of collusion. The petitioner sought to have the decree rescinded and the petition dismissed.

HELD—that the decree might be rescinded and the petition dismissed, and that, if the King's Proctor chose to waive his claim for costs, the Court would be slow to question the propriety of his so acting.

A. *v.* A., [1901] P. 284; 70 L. J. P. 90; 85 L. T. [171; 17 T. L. R. 564—Jeune, P.

104. *Husband's Petition — Disagreement of Jury—No Security for Wife's Costs—Wife's Costs of Abortive Trial.*]—A husband sued for dissolution of marriage on the ground of his wife's adultery. No application was made by the wife that the husband should give security for her costs. At the trial the jury were unable to agree as to the wife's adultery. The wife thereupon applied for an order that the husband should pay her costs in respect of the abortive trial.

HELD—that the application must be refused.

Decision of Jeune, P. (65 J. P. 344; 49 W. R. 672; 84 L. T. 571; 17 T. L. R. 490) affirmed.

WAUDBY *v.* WAUDBY AND BOWLAND, (1901) [84 L. T. 829; 17 T. L. R. 620—C. A.

105. *New Trial—Motion for—Property of Petitioner—Security for Costs—Supreme Court of Judicature Act*, 1890 (53 & 54 Vict. *c.* 44), *s.* 1 —*R. S. C., Ord.* 58, *r.* 15.]—Security for the costs of a motion in the Court of Appeal for a new trial of a divorce petition will not be required on the ground of the poverty of the petitioner.

Practice in *Heckscher* v. *Crosley* ([1891] 1 Q. B. 224; 60 L. J. Q. B. 75; 39 W. R. 211—C. A.) followed.

RICKABY *v.* RICKABY, [1901] P. 134; 70 L. J. P. [24; 84 L. T. 182—C. A.

106. *Wife's Petition for Judicial Separation —Abandonment of Suit—No Security for Costs —Wife's Solicitor's Costs.*]—If a wife's solicitor neglects to obtain security for his costs, it is too late to apply for security for or to bring in his bill of costs against the husband for taxation after he has ceased to act for her.

NAIRNE *v.* NAIRNE. (1901) 65 J. P. 777: 18 [T. L. R. 16; 71 L. J. P. 37; 85 L. T. 649—Barnes, J.

107. *Petitioner an Undischarged Bankrupt—Claim for Damages against Co-respondent—Security for Costs.*]—Where in a petition for dissolution of marriage the husband claims damages against the co-respondent, the fact that the petitioner is an undischarged bankrupt is not a ground for ordering him to give security for the co-respondent's costs. There is no settled practice to the contrary.

Smith v. *Smith and Palk* ((1882) 7 P. D. 227; 31 W. R. 124; 47 L. T. 355) overruled.

Decision of Jeune, P. ((1902) 18 T. L. R. 443) affirmed.

BLACKETT *v.* BLACKETT, [1902] P. 170; 71 [L. J. P. 69; 50 W. R. 516; 86 L. T. 669; 18 T. L. R. 566—C. A.

108. *Cross Petitions—Abortive Trial—Second Trial—Husband's Adultery condoned—Wife's Adultery—Petition dismissed—Wife's Costs—Co-respondent's Costs—Discretion of Court.*]—A husband petitioned for a dissolution of marriage on the ground of his wife's adultery with the co-respondent. The respondent alleged that the petitioner had been guilty of cruelty and adultery, and the jury were discharged without giving a verdict, as they were not able to agree on all the issues. The wife had not applied for security for costs before the trial, and the Court declined to make any order after the trial, on the ground that, as a second trial was pending, the application was premature. The wife then obtained security for her costs of the second trial. The jury at that second trial found that the respondent and co-respondent had committed adultery, and that the petitioner had committed adultery, but that it had been condoned by the respondent. The petition was dismissed by reason of the petitioner's adultery, which was one of a very serious character, namely, the seduction of a servant-girl in the house of the petitioner during the wife's temporary absence from home.

HELD—that there was no substantial question with regard to the costs of the second trial and the wife was entitled to her costs of that trial; and that the wife was also entitled to have her costs paid by the petitioner in respect of the abortive trial.

HELD, also, that the Court would exercise its discretion by condemning the co-respondent in the costs of the issue upon which he had failed, such order to apply to both trials.

Morgan v. *Morgan and Porter* ((1869) L. R. 1 P. & M. 644; 38 L. J. P. 41; 17 W. R. 688; 20 L. T. (N.S.) 588) and *Grosvenor* v. *Grosvenor* ((1885) 34 W. R. 140) commented upon.

WAUDBY *v.* WAUDBY AND BOWLAND, [1902] [P. 85; 71 L. J. P. 43; 66 J. P. 280; 50 W. R. 176; 86 L. T. 123; 18 T. L. R. 150—Barnes, J.

Matrimonial Causes in the High Court—*Continued.*

109. *Co-respondent—Adultery of Wife—No Knowledge that Respondent was a Married Woman.*]—The rule that where a co-respondent has found out when too late to repair the wrong done that the woman with whom he has taken up is a married woman, he ought not, because he does not then desert her, to be held liable for costs, is not to be construed too literally. Therefore when a co-respondent said that he knew a fortnight after the first act of adultery was committed with the respondent that she was a married woman :—

HELD—that the co-respondent must pay the costs of and incidental to the petition.

BILBY *v.* BILBY, [1902] P. 8 ; 71 L. J. P. 31 ; [86 L. T. 123—Jeune, P.

110. *Wife's Matrimonial Suit — Husband becoming Bankrupt—Wife's Liability to her Solicitor for Costs.*] — Although a wife, who institutes a matrimonial suit, can hold out to her solicitor the inducement that, if the case proceeds and is not an obviously bad one, the husband will be liable for the costs, yet she is still liable, and must pay them in the event of the husband becoming bankrupt.

PEAD *v.* PRICE, (1903) 19 T. L. R. 563—[Phillimore, J.

111. *Husband abandoning his Defence—Intervener defending successfully—Order for her Costs against both Petitioner and Respondent.*]—At the last moment the respondent in a divorce suit stated that he could not contest the charges of adultery ; thereupon one of the ladies named in the petition obtained leave to intervene, and disproved the particular charge made against herself.

HELD—that she was entitled to an order for her costs against the respondent as well as against the petitioner, for he ought to have fought out the case so far as it concerned her.

WADE *v.* WADE (BROOKS intervening), [1903] [P. 16 ; 72 L. J. P. 1 ; 51 W. R. 464 ; 87 L. T. 751—Barnes, J.

112. *Implied Authority of Wife to pledge Husband's Credit—Retainer of Solicitor—Duration of Retainer—Judicial Separation—Second Divorce Suit — Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 26.]—A husband having commenced divorce proceedings, his wife, acting under implied authority from him, retained a solicitor to defend such proceedings, and to bring an action for detinue against him in respect of her clothes.

The husband's petition was dismissed with costs, and the wife obtained a decree of judicial separation ; after such decree she obtained an order increasing her *interim* alimony and finally an order for permanent alimony. She was also successful in the detinue action.

In the meantime a second divorce petition by the husband was dismissed with costs.

The wife's solicitor then obtained an order of course to tax against her husband her costs in respect of the alimony proceedings, the detinue action, and the second divorce suit.

HELD—(1) that the husband was not liable for the costs of the second divorce suit, for the effect of sect. 26 of the Matrimonial Causes Act, 1857, is to put an end to a wife's authority to pledge her husband's credit during the continuance of a judicial separation, so long as the decreed alimony is duly paid ; the fact that the expense to her has been occasioned by his misconduct makes no difference.

Turner v. *Rookes* ((1839) 10 Ad. & E. 47 ; 50 R. R. 320) no longer applies to such a case.

(2) That he was liable for the costs of the action, for the retainer given on his behalf before the separation endured to the conclusion of the action, as he had not withdrawn it.

And (3) that he was liable for the costs of the alimony proceedings, for they were part of the proceedings in the first divorce suit.

IN RE WINGFIELD AND BLEW, [1904] 2 Ch. [665 ; 73 L. J. Ch. 797 ; 91 L. T. 783—C. A.

113. *Rescission of Decree* nisi — *Decree* nisi *and Damages against Co-respondent—Subsequent Condonation — Decree* nisi *rescinded — Effect upon Damages—Costs—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *ss.* 33, 51.]—A husband obtained a decree *nisi* for dissolution of his marriage, and was also awarded damages against the co-respondent. Before decree absolute the parties resumed cohabitation, and the King's Proctor intervened to obtain rescission of the decree. The decree being accordingly rescinded:—

HELD—that the husband was not entitled to the damages, and must (in the first instance) pay the Proctor's costs ; but that the co-respondent must still pay the costs of the original hearing, and also indemnify the husband against the Proctor's costs at the intervention.

HYMAN *v.* HYMAN AND GOLDMAN, [1904] P. [403 ; 73 L. J. P. 106 ; 91 L. T. 361 ; 20 T. L. R. 696—Jeune, P.

114. *Wife's Petition — Security for Costs of Wife—Previous summary Separation Order — Effect of—Alimony not fully paid—Summary Jurisdiction (Married Women) Act*, 1895 — *Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 26.]—In 1902 a wife obtained a summary separation order with £2 per week maintenance. In 1904 she filed a petition for divorce and applied for security for her costs thereof.

HELD—(1) that notwithstanding the wording of sect. 26 of the Matrimonial Causes Act, 1857, there was power to order such security whether the alimony had been "duly paid" or not.

In re Wingfield and Blew ([1904] 2 Ch. 665 ; 73 L. J. Ch. 797—C. A., *supra*) considered.

And (2) that in the particular case the alimony had not been "duly paid," and that the proviso to sect. 26 applied and would justify an order being made.

SHEPPARD *v.* SHEPPARD, [1905] P. 185 ; 74 [L. J. P. 102 ; 53 W. R. 608 ; 93 L. T. 443 ; 21 T. L. R. 526—Barnes, P.

Matrimonial Causes in the High Court—*Continued.*

115. *Scotch Law—Costs as between Agent and Client.*]—The rule of law in Scotland is to give a wife who successfully defends a divorce suit her costs as between agent and client.

GRANT *v.* GRANT AND ANOTHER, [1905] A. C. [466—H. L. (Sc.)

116. *Husband's Petition successful—Counter-charges—No reasonable Ground for.*]—Upon a husband's petition for divorce the wife's answer alleged cruelty and condonation. A decree *nisi* was pronounced, and the usual order as to the wife's costs was applied for.

The judge read the proofs of the wife's witnesses, and was of opinion that they did not justify the counter-charges in the answer.

He, therefore, ordered a sum of £50 paid into Court by the husband for the wife's defence to be paid out to him.

MARKS *v.* MARKS AND ANOTHER, (1905) 21 [T. L. R. 209—Barnes, J.

117. *Husband's Petition — Wife abandoning Defence—Husband agreeing to pay her Taxed Costs—Husband's Petition dismissed—Validity of Agreement.*]—In consolidated suits the wife, being unable to deny adultery, withdrew her brief to counsel upon the husband agreeing to pay her taxed costs.

When the cause came on the husband admitted his own misconduct, and his petition was dismissed.

HELD—that in dealing with the costs the Court was not bound to give effect to the agreement: that, as neither of the suits ought to have been instituted and the wife had some means of her own, the husband's suit must be dismissed with costs and the wife's dismissed without costs, the money secured to the wife being applied in payment of the husband's costs.

WEEKES *v.* WEEKES, (1905) 21 T. L. R. 227— [Barnes, P.

118. *Separate Estate—Allowance under Separation Deed.*]—By a separation deed a husband agreed to allow to his wife £1 a week during their joint lives, the deed not containing a *dum sola et casta* clause. The wife had no other separate estate. She subsequently committed adultery. Upon a petition by the husband for divorce, the Court pronounced a decree *nisi*, and condemned the wife in costs, the petitioner undertaking not to levy more than 10*s.* a week.

CLARK *v.* CLARK AND SALDJI, [1906] P. 331; [95 L. T. 550; 22 T. L. R. 796; 76 L. J. P. 16 —Barnes, P.

119. *Failure of Wife's Suit for Restitution—Usual Order refused—Unreasonable Suit—Discretion of Court.*]—Where a wife filed a petition for restitution of conjugal rights, and failed on the ground that her intemperance justified her husband in refusing to return to her, the Court refused to make the usual order for her costs to be paid by the husband, being of opinion that her suit was an unreasonable one and ought to have been recognised as such.

BEER *v.* BEER, (1906) 22 T. L. R. 367—Barnes, [P.

120. *Wife Respondent—Bonâ fide Defence.*]—Security for the costs of the wife's defence to a suit for dissolution of marriage is only ordered upon the basis that the wife has a *bonâ fide* defence. In order that the solicitor for the wife, who is unsuccessful in the suit, should obtain an order for the wife's costs there must have been reasonable grounds for defending. It is not enough that the solicitor thought that the husband would not be able to establish his case.

KERSHAW *v.* KERSHAW AND BERRY, (1907) 23 [T. L. R. 296—Barnes, P.

121. *Intervention by Private Individual—Matrimonial Causes Acts*, 1857 (20 & 21 Vict. *c.* 85), *s.* 51, *and* 1878 (41 & 42 Vict. *c.* 19), *s.* 2.]—Where a member of the public intervenes to show cause against a decree *nisi* being made absolute and succeeds, the same rule as to costs applies as in the case of an intervention by the King's Proctor: as a general rule solicitor and client costs will not be allowed.

WOODHEAD *v.* WOODHEAD, (1907) 23 T. L. R. [334—Barnes, P.

122. *Jury discharged—Sheriff's Fee.*]—A cause set down in the jury list entitles the sheriff to his fee for summoning a jury, even though it is eventually taken by the judge alone.

BLACKBURN *v.* BLACKBURN, (1907) 51 Sol. Jo. 345—Barnes, P.

See also Nos. 65, 138, 152, 266, *infra.*

(c) Cruelty.

123. *Revival of Cruelty—Covenant in separate Deed not to take Proceedings for Misconduct anterior to Date of Deed—Deed not pleaded.*]—In 1897 a wife and husband agreed to separate owing to his cruelty to her. Under the term of a separation deed, which was then executed, it was provided (*inter alia*) that neither of them should take proceedings against the other to obtain a divorce or judicial separation in respect of any misconduct which had theretofore taken place; and, also, that if they should become reconciled and return to cohabitation, or if the marriage should be dissolved, or they should be judicially separated by reason of any misconduct on the part of either, occurring after the date of the deed, then and in such case the covenants therein contained should become void. The husband subsequently committed adultery and a petition was filed against him, but in answer to this he did not plead the deed. The Court held that the fact that the respondent had not pleaded the deed distinguished the case from *Rose* v. *Rose* (8 P. D. 98), and that his subsequent adultery revived his previous cruelty, and that the petitioner was entitled to a decree *nisi* for a dissolution of her marriage.

DOWLING *v.* DOWLING, [1898] P. 228; 68 L. J. P. [8; 47 W. R. 272—Barnes, J.

Matrimonial Causes in the High Court—*Continued.*

124. *Debauchery of Servants—Conviction under the Criminal Law Amendment Act, 1885—Disgrace and Shock destroying Wife's Health.*]—The Court granted a decree *nisi* for dissolution of marriage by reason of the husband's adultery and cruelty; the charge of cruelty being proved by showing that the husband, a clergyman, had debauched the servants in his house, and had been convicted under sect. 5, sub-sect. 1, of the Criminal Law Amendment Act, 1885, the disgrace and shock therefrom destroying his wife's health.

THOMPSON *v.* THOMPSON, (1901) 85 L. T. 172; [17 T. L. R. 572—Jeune, P.

125. *Rape — Indecent Assault — Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 27.]—Where in a suit for dissolution of marriage on the ground of rape the respondent was proved to have been convicted at the quarter sessions of a series of indecent assaults upon children :—

The Court granted the petitioner a decree *nisi* on the ground that the charge against the respondent that he had committed rape had been sufficiently established by the evidence of the children.

Coffey v. *Coffey* ([1898] P. 169; 67 L. J. P. 86; 78 L. T. 796—Barnes, J., No. 185, *infra*) followed.

AND HELD—that such conduct of the respondent, causing nervous shock to the petitioner, amounted to cruelty.

Thompson v. *Thompson* ((1901) 85 L. T. 172; 17 T. L. R. 572—Jeune, P., *supra*) followed.

BOSWORTHICK *v.* BOSWORTHICK, (1902) 50 W. R. [217; 86 L. T. 121; 18 T. L. R. 104—Barnes, J.

126. *Making false Charge against Wife—Leaving her unprovided for—Injury to her Health.*]—A husband left his wife and children unprovided for, and subsequently filed a petition, groundlessly alleging that he was not the father of her infant, born after his desertion: conduct which had the effect of impairing her health.

HELD—that the Court might hold such facts to be legal cruelty.

JEAPES *v.* JEAPES, (1903) 89 L. T. 74; 19 T. L. R. [451—Jeune, P.

127. *State of Wife's Health.*]—Acts falling short of actual physical violence may for the purposes of divorce proceedings constitute "legal cruelty." In many cases it must depend upon the wife's health and constitution, and the consequent effect upon her of the particular acts.

Thus, where a wife was in a delicate state of health, rough treatment, such as violent shakings and threats which frightened her, though they were never intended to be carried into execution, were held to amount to cruelty in law upon proof that they had in fact injured her health.

BARRETT *v.* BARRETT, (1904) 20 T. L. R. 73— [Bucknill, J.

128. *Revival of Cruelty—Separation Deed—Subsequent Adultery.*]—In a suit by a wife for judicial separation on the ground of cruelty, an agreement was arrived at and a separation deed was executed which provided that all further proceedings in the suit should be stayed, and the wife agreed in no wise to attempt to revive the same in any manner whatever. The suit accordingly was stayed and the parties lived separate. Subsequently the husband committed adultery, and the wife filed a petition for dissolution of marriage.

HELD, that, notwithstanding the deed, the cruelty was revived by the subsequent adultery, and the wife, on proof of adultery, was entitled to a decree.

NORMAN *v.* NORMAN, (1907) 24 T. L. R. 37— [Deane, J.

See also No. 179, *infra*.

(d) Custody of Children.

129. *Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 Vict. *c.* 39), *ss.* 5, 11—*Rules of the Supreme Court, Ord.* 59, *rr.* 4*a and* 7—*Separation Order—Enforcement of Order.*]—An order made by the High Court of Justice (Probate, Divorce, and Admiralty Division) under rr. 4a and 7 of Ord. 59 of the Rules of the Supreme Court, and sects. 5 and 11 of the Summary Jurisdiction (Married Women) Act, 1895, that a wife be no longer bound to cohabit with her husband, on the ground of his desertion of her, and that the custody of the child whilst under the age of 16 be committed to the wife, may be enforced as to the custody of the child by motion for attachment.

BROWN *v.* BROWN (No. 2), (1898) 62 J. P. 568— [Phillimore, J.

130. *Irish Divorce Bill.*]—In an Irish Divorce Bill, the House of Lords will sanction a clause whereby the custody of the children is given to the innocent party, notwithstanding the fact that no separate action had been instituted in Ireland to obtain the custody of children after a decree for separation *a mensa et thoro* had been given.

HART'S DIVORCE BILL, [1898] A. C. 305— [H. L. (Ir.)

131. *Judicial Separation—Husband's Adultery—Guardianship of Infants Act*, 1886 (19 & 50 Vict. *c.* 27), *s.* 7.]—Where a wife obtained a decree for judicial separation upon the ground of her husband's desertion and adultery, the husband not having for some years contributed to the support of his children and having lived with another woman, the Court refused to make an order under sect. 7 of the Guardianship of Infants Act, 1886, declaring him to be unfit to have the custody of the children.

Skinner v. *Skinner* ((1888) 13 P. D. 90; 57 L. J. P. 104; 52 J. P. 539; 36 W. R. 912; 58 L. T. 923—Hannen, P.) distinguished.

WOOLNOTH *v.* WOOLNOTH, (1902) 86 L. T. 598; [18 T. L. R. 453—Jeune, P.

Matrimonial Causes in the High Court—*Continued.*

132. *Order of Court to Give up—Undertaking—Disobedience to Order—Attachment and Committal Order*—Ex parte *Application.*]—A respondent in a divorce suit had given an undertaking not to remove her child out of the jurisdiction; but, upon an order being made that she should "forthwith" give it up to the petitioner, she did so remove it.

HELD—that under the circumstances both a writ of attachment and an order for committal might be granted *ex parte*, although there had been no legal service of the order.

Farard v. *Farard* ((1896) 76 L. T. 664—Jeune, P.) followed.

GORDON *v.* GORDON AND GORDON, [1903] [P. 141; 72 L. J. P. 33; 89 L. T. 73—Jeune, P.

133. *Question of Paternity must be raised by Respondent in the Answer to the Petition.*]—Attention was called to the rule that if a respondent intends to raise a question as to the paternity of a child, whose custody the petition asks for, the point must be specifically taken in the answer.

GORDON *v.* GORDON AND BELL, [1903] P. 92; [72 L. J. P. 34; 88 L. T. 573—Jeune, P.

134. *Decree in Husband's Suit—Child Begotten before Marriage—Husband not the Father.*]—The petitioner obtained a decree of divorce from his wife, and applied for the custody of two children, both of whom were born during the marriage. The elder child was begotten before the marriage, and the petitioner was not the father of it. The respondent contended that the eldest child was illegitimate, and the petitioner was not entitled to its custody.

HELD—that the husband should have the custody of both children, the wife having limited access during good behaviour.

M. *v.* M., (1906) 22 T. L. R. 325—Deane, J.

135. *Access — Terms as to — Irish Divorce Bill.*]—In an Irish Divorce Bill the House of Lords approved a clause giving to the innocent party the custody of the children, but said that provisions as to access by the guilty party must be left to arrangement between them.

KILLERY'S DIVORCE BILL, [1907] A. C. 306—[H. L. (Ir.)

136. *Judicial Separation — Maintenance.*]—Where the Court granted a wife the custody of her children without limitation as to age, and afterwards in another suit defined the age of custody from 16 to 21:—

HELD—that in a subsequent order for maintenance the judgment of the Court was retrospective, and applied to the original order for custody.

JEFFRIES *v.* JEFFRIES, (1907) 51 Sol. Jo. 468—[County Court.

See also Nos. 162, 183, *infra.*

(e) Damages.

See also BANKRUPTCY, Nos. 78, 79, 160.

137. *Breaking up Home—Insult and Wrong—Separation at Time of Adultery.*]—A husband and wife separated, after living together for a few months, on account of the wife's violent assaults and refusing to let him enter the house. They after that lived apart. The respondent after the separation committed adultery with the co-respondent.

HELD—that the petitioner was entitled to damages. The breaking up of the home was one main ground; subjection to intolerable insult and wrong another ground. The fact of the husband and wife being separated was an element to be taken into account.

Weedon v. *Timbrell* ((1793) 5 T. R. 357) considered.

EVANS *v.* EVANS AND PLATTS, [1899] P. 195; [68 L. J. P. 70; 81 L. T. 60—Jeune, P.

138. *Knowledge of Co-respondent that Respondent was a Married Woman*—Onus Probandi—*Damages.*]—It is for the petitioner to show that the co-respondent knew that the respondent was a married woman, and, unless he does so, the co-respondent is not condemned in costs.

Damages may be recovered from a co-respondent whether he knew the respondent was a married woman or not.

If the co-respondent did not know that the respondent was married, then the wrong he did the petitioner was done unwittingly, and in assessing the amount of damages that fact should be borne in mind.

Rule laid down by Tindal, C.J., in *Calcraft* v. *Harborough* (*Earl of*) ((1831) 4 C. & P. 499, at p. 501) applied.

LORD *v.* LORD AND LAMBERT, [1900] P. 297; 69 [L. J. P. 54—Barnes, J.

139. *Verdict for greater Damages than claimed—Non-appearance of Co-respondent—Amendment of Petition—Service of Summons.*]—Where, in a petition by a husband for dissolution of marriage, a claim for damages was made against the co-respondent, who was not represented, and did not appear at the trial, and the jury awarded a larger sum for damages than that claimed, the proper practice is for the petitioner to take out a summons for leave to amend and reserve the petition, giving notice to the co-respondent, who is entitled to be heard thereon.

BECKETT *v.* BECKETT, [1901] P. 85; 70 L. J. P. [17; 84 L. T. 272; 17 T. L. R. 120—Jeune, P.

140. *Husband and Wife living apart — Subsequent Adultery.*]—A husband is not precluded from recovering damages from a co-respondent by reason of the fact that there had been a separation between himself and his wife before adultery was committed by her.

GARDNER *v.* GARDNER AND BAMFIELD, (1901) [17 T. L. R. 331—Barnes, J.

Matrimonial Causes in the High Court—*Continued.*

141. *Married Woman—No Evidence of Co-respondent's Knowledge.*]—Where a man commits adultery with a woman he takes the risk of having to pay damages, if she is in fact a married woman. But the damages should be very small where she has held herself out as ready to commit adultery as though she were not married.

WATSON *v.* WATSON AND ANOTHER, (1905) 21 [T. L. R. 320—Barnes, P.

142. *Claim for Damages only—Misconduct of Petitioner—Principles Applicable—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *ss.* 31, 33, 59.]—Where a husband under sect. 33 of the Matrimonial Causes Act, 1857, presents a petition claiming damages only, the same provisions are applicable to such a petition as are applicable to other petitions under the Act.

Therefore, if he has himself been guilty of misconduct, and the Court would in its discretion have refused him a divorce, had he asked for one, he is on the ground of such misconduct debarred from recovering damages.

COX *v.* COX AND WARDE, [1906] P. 267 ; 75 [L. J. P. 75 ; 95 L. T. 546 ; 22 T. L. R. 557 —Barnes, P.

143. *Adultery proved — Whether Absolute Right to Nominal Damages.*]—A jury are not bound to award nominal damages merely because a husband petitioner claims damages and proves adultery of his wife with the co-respondent.

See also Nos. 113, 207.

GIBSON *v.* GIBSON AND ANOTHER, (1906) 94 [L. T. 619 ; 22 T. L. R. 361—Barnes, P.

(f) Desertion.

144. *Intention at Time of Leaving—Criminal Proceedings pending.*]—A husband left his wife in 1895 after divorce proceedings in which he had appeared as co-respondent (the jury disagreeing). At the last interview, he left her under the impression that this was the cause of his departure, and that he would return in a few months. He was in financial embarrassment, his firm immediately became bankrupt, and ultimately the official receiver applied for a warrant against him. He had carried on an intrigue with an actress in 1893 and 1894 unknown to his wife. He sent one letter to his wife begging for money, but with no address ; but otherwise he did not communicate with or see her.

HELD—that at the time he left his wife he intended to desert her, and, adultery being proved, granted a decree *nisi* for dissolution of marriage.

WYNNE *v.* WYNNE (No. 1), [1891] P. 18 ; 67 [L. J. P. 5 ; 46 W. R. 560—Jeune, P.

145. *Adultery of Husband—Offer by Husband to resume Cohabitation.*]—A husband, shortly after deserting his wife, had requested her to resume cohabitation, which request his wife disregarded as not made *bonâ fide*, and had, on the few isolated occasions on which they met casually, disregarded her or made insulting gestures, but not otherwise communicated with her for nine years.

HELD—that the facts constituted such a sufficient desertion as, coupled with adultery, to give the wife a right to a divorce.

MARTIN *v.* MARTIN (No. 2), (1898) 78 L. T. 568 [—Barnes, J.

146. *Continuous and Intermittent Cohabitation —Agreement to Live apart.*]—Cohabitation may be of two sorts, one continuous and the other intermittent. The parties may reside together constantly, or there may be only occasional intercourse between them, which may nevertheless amount to cohabitation in the legal sense of the term. Such cohabitation may exist together with an agreement to live apart. Business duties, domestic service, and other things may separate husband and wife, and yet, notwithstanding, there may be cohabitation. Where husband and wife agreed to live apart for a time until a home could be got together, and that in the meantime they intended to meet, and did occasionally meet, and cohabitation existed up to the time when the husband wrote, "I am not going to have anything more to do with you as man and wife":—

HELD — that there was desertion by the husband from that date.

Bradshaw v. *Bradshaw* ([1897] P. 24 ; 66 L. J. P. 31 ; 61 J. P. 8 ; 45 W. R. 142) followed.

HUXTABLE *v.* HUXTABLE, (1899) 68 L. J. P. 83 [—Div. Ct.

147. *Husband's Refusal to Cohabit — No Refusal on the Wife's Part.*]—A husband left his wife immediately after the marriage. They never cohabited, and the husband determined not to consort with his wife. On her part, there was no refusal to cohabit ; nor did she bargain not to live with him. She was always willing to live with him. She did not consent to his living apart.

HELD — that under the circumstances the husband's refusal to cohabit constituted desertion.

DE LAUBEUQUE *v.* DE LAUBEUQUE, [1899] [P. 42 ; 68 L. J. P. 20 ; 79 L. T. 708— Jeune, P.

148. *Husband's Adulterous Intercourse with Servant, and his Refusal to Discharge her—Wife leaving Home.*]—A husband refused to break off his relations with and to discharge a servant with whom he had committed adultery and in consequence of which his wife had left him and refused to return home.

HELD—that the conduct of the husband amounted in law to desertion.

Graves v. *Graves* ((1864) 3 Sw. & Tr. 350 ; 33 L. J. P. 66) and *Pizzala* v. *Pizzala* (The Times, June 5th, 1896) followed.

Matrimonial Causes in the High Court—*Continued.*

See also *Dickinson* v. *Dickinson* ((1890) 62 L. T. 330—Butt, J.).

KOCH *v.* KOCH, [1899] P. 221; 68 L. J. P. 90; [81 L. T. 61—Barnes, J.

149. *Husband's Adultery during Cohabitation — Withdrawal of Wife from Cohabitation on Husband refusing to give up his Adulterous Connection.*]—A wife is entitled to obtain a divorce from her husband if he has been guilty of (*inter alia*) adultery coupled with desertion without reasonable excuse for two years or upwards.

In order to constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other. The party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion.

There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him.

A wife whose husband is carrying on an adulterous intercourse with another woman or other women is not bound to remain in cohabitation with him: she can at once obtain a judicial separation. She may, however, be willing to remain with her husband provided he will give up the connection complained of, and, if he refuses to do so, a wife with any self-respect has only one course to take—that is, to withdraw from cohabitation. The husband in such a case must be taken to intend the consequences of his action—that is to say, that his wife shall not live with him. The situation then produced is just the same as if the guilty husband left his wife, and if the attitude of the parties remain the same for two years the offence of desertion contemplated by the statute is complete.

SICKERT *v.* SICKERT, [1899] P. 278; 68 L. J. P. [114; 48 W. R. 268; 81 L. T. 495; 15 T. L. R. 506—Barnes, J.

150. *Husband's Conduct not justifying Desertion.*]—The same law which takes away the personal liberty of a person of diseased mind necessarily implies that some interference with liberty is permissible by a husband or father or other near relative in order to secure proper care and treatment. And in exercising such firmness it is very difficult to draw strict lines of demarcation.

A husband sought a divorce from his wife on the ground of desertion. In 1887 the wife left her husband under an insane delusion as to his conduct. In 1888 the husband, in the belief that his wife ought, owing to her mental condition, to be placed under some control, had her roused out of bed at midnight, in an inn to which she had gone, and taken to a house about seven miles off, where she was detained, and in 1891 he caused his wife to be taken to a private asylum under an urgency order.

HELD—that if the husband erred, it was an error of judgment only, and he did not exceed the limits of discreet firmness; that his wife's desertion was entirely without justification, and a decree of divorce must be granted.

CATHCART *v.* CATHCART, (1900) 2 F. 404.

151. "*Reasonable Excuse*"—*Wife's Refusal to allow Full Marital Rights—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 27.]—Husband and wife were living apart by mutual consent, though there was a strong desire on the part of the husband to live with his wife in the ordinary way, and a refusal on the part of the wife to do so. The husband during the separation committed adultery.

HELD—that there had been no desertion by the husband, and that if there had been desertion there was "reasonable excuse" for it, so that it could not give the wife a right to treat it as a matrimonial offence and as the foundation of a case for dissolution of the marriage.

Decision of Jeune, P. ([1900] P. 180; 69 L. J. P. 106; 64 J. P. 454; 83 L. T. 224; 16 T. L. R. 388, 402) affirmed.

SYNGE *v.* SYNGE, [1901] P. 317; 70 L. J. P. 97; [85 L. T. 83; 17 T. L. R. 718—C. A.

152. *Adultery condoned—Subsequent Desertion —Adultery revived by such Desertion.*]—The Court, after considering the cases, laid down that desertion has the effect of reviving adultery previously condoned. Condonation means forgiveness, conditional on future good conduct, and the general law regards desertion as a serious matrimonial offence.

Cooke v. *Cooke* ((1863) 3 Sw. & Tr. 126) and *Dent* v. *Dent* ((1865) 4 Sw. & Tr. 105) considered.

Where judgment has been reserved, the Court may allow the time for decree absolute to run from the date of the hearing, instead of from that of the actual decree *nisi*.

HOUGHTON *v.* HOUGHTON, [1903] P. 150; 72 [L. J. P. 31; 89 L. T. 76; 19 T. L. R. 505; 52 W. R. 272—Jeune, P.

153. *Two Years not elapsed at Date of Petition — Supplemental Petition — Petition rendering Husband's Return impossible—Costs—Charges unreasonably put forward by Wife.*]—A husband and wife lived together at her father's house till July 7th, 1900, when the husband left, in consequence (as the judge held) of the behaviour of his wife and father-in-law. On February 14th, 1901, the husband declined to return; on May 29th, 1902, the wife filed a petition alleging cruelty and adultery, and in December, 1903, she filed a supplemental petition alleging two years' desertion. A jury found that there had been a desertion on February 14th, 1901, but no adultery or cruelty. Upon the wife's application for a judicial separation:—

HELD—that the application must be refused because on February 14th, 1901, cohabitation had already ceased owing to the wife's act—*Bradshaw* v. *Bradshaw* ([1897] P. 24; 66 L. J. P. 31; 61 J. P. 8; 45 W. R. 142; 75 L. T. 391; 13

Matrimonial Causes in the High Court—*Continued.*

T. L. R. 82) followed—and also because, before the two years' desertion was complete, the wife had rendered her husband's return impossible by making false charges against him in her petition.

The husband was ordered to pay the costs of the issue of desertion, but the wife to pay the costs of the unreasonable charges of adultery and cruelty.

KAY *v.* KAY, [1904] P. 382 ; 73 L. J. P. 108 ; 91 [L. T. 360 ; 20 T. L. R. 521—Barnes, J.

154. *Revival—Condonation of Statutory Desertion—Revival by Subsequent Adultery—Matrimonial Causes Act*, 1884 (47 & 48 Vict. *c.* 68), *s.* 5.] — Although statutory desertion on a husband's part, by disobedience to a decree for restitution of conjugal rights, has been condoned by subsequent cohabitation, it is revived by an act of adultery after such condonation, and the wife may obtain a divorce founded upon such desertion and adultery.

PAINE *v.* PAINE, [1903] P. 263 ; 73 L. J. P. 1 ; [52 W. R. 271 ; 89 L. T. 588 ; 20 T. L. R. 12—Barnes, J.

155. *Effect of—Revival of Adultery.*]—The rule laid down in *Houghton* v. *Houghton* ([1903] P. 150 ; 72 L. J. P. 31 ; 89 L. T. 76 ; 19 T. L. R. 505) applies equally whether the petitioner be husband or wife ; and, therefore, adultery on the part of a wife which has been condoned will be revived by her subsequent desertion.

COPSEY *v.* COPSEY AND ERNEY, (1904) 91 L. T. [363 ; 20 T. L. R. 728 ; [1905] P. 94 ; 74 L. J. P. 40—Barnes, J.

156. *Desertion — Subsequent Adultery of Husband — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 Vict. *c.* 39, *s.* 5.]—A wife obtained a summary separation order in 1901 on the ground of desertion. In 1904, her husband having committed adultery, she filed a petition.

HELD—that she was entitled to a decree *nisi* on the ground of adultery and desertion for two years.

LEVY *v.* LEVY, (1905) 21 T. L. R. 157—[Jeune, P.

157. *Parties living separate under a verbal Agreement — Husband making an Allowance thereunder to the Wife—Connubial Relations continuing during Separation—Husband's Refusal to continue Allowance on ground of alleged Misconduct of Wife — Desertion — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 Vict. *c.* 39).]—Husband and wife verbally agreed to live apart from each other, and the husband agreed to pay a weekly sum for the wife's maintenance. Acts of connubial intercourse continued during the time they lived apart. The husband, on the ground, as he alleged, that whilst so living apart the wife had committed adultery, refused to continue the weekly allowance.

HELD—that under the circumstances there was evidence of desertion.

Rowell v. *Rowell* ([1900] 1 Q. B. 9 ; 69 L. J. Q. B. 55 ; 81 L. T. 429—C.A., *see* SETTLEMENTS, No. 209) distinguished.

EDWARDS *v.* EDWARDS, (1905) 69 J. P. 344—[Div. Ct.

158. *Summary Separation Order—Effect of — Husband leaving Wife with intention to desert her—Adultery of Husband—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 16—*Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 Vict. *c.* 39), *ss.* 4, 5.]—In April, 1901, a husband deserted his wife, leaving her without means, in order to live with another woman, and in May of that year she obtained an order from a court of summary jurisdiction, under sect. 5 of the Summary Jurisdiction (Married Women) Act, 1895, that he should pay her a weekly sum and that she should be no longer bound to cohabit with him. The husband never made any payments under the order, and the wife more than two years after her husband deserted her brought a suit for divorce on the ground of his adultery and desertion.

HELD—that, as the husband left his wife without any means of support, with the intention of deserting her, and had persisted in doing so and had lived in adultery with another woman, there was desertion coupled with adultery which entitled the wife to a divorce.

Dodd v. *Dodd* (No. 298, *infra*) distinguished.

Smith v. *Smith* ([1905] P. 249 ; 74 L. J. P. 113 ; 93 L. T. 457—Deane, J., No. 297, *infra*) followed.

FAILES *v.* FAILES, [1906] P. 326 ; 75 L. J. P. 95 ; [95 L. T. 547 ; 22 T. L. R. 687—Bucknill, J.

159. *Previous Separation Deed — Wife not in fact a Consenting Party thereto—Deed disregarded.*]—A husband, before leaving his wife, told her that, if she would sign a deed of separation, he would make her an allowance of £1 a week, otherwise he would give her nothing. He thereupon took her to his solicitor's office, where the deed of separation was already drawn up. The solicitor told her that the only way to get any money from her husband was to sign the deed. At first she refused to do so, but at length consented, her child being then three months old. She had no independent advice. She received the allowance under the deed for some years. The husband having subsequently committed adultery, she brought an action for divorce, alleging adultery and desertion.

HELD—that, on the facts, the wife was not a consenting party to the deed, having been forced into signing it by the circumstances of her position, and that therefore she was not prevented from relying on the desertion.

ADAMSON *v.* ADAMSON, (1907) 23 T. L. R. 434—[Bucknill, J.

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160. *Separation Order by Justices—Payment of Maintenance—Adultery of Husband—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 Vict. *c.* 39), *ss.* 4, 5.]—A husband deserted his wife, and she applied to justices under the Summary Jurisdiction (Married Women) Act, 1895, for an order upon him for the payment to her of an allowance. The justices made an order for separation, though it had not been asked for, and also for the payment of an allowance. The husband, who was living in adultery with a woman, made some payments under the order, and some years afterwards he was committed for non-payment of arrears of the allowance, and the wife filed a petition for divorce upon the ground of his adultery and desertion. Subsequently she agreed to accept a smaller sum than the full amount due for the arrears of the allowance, and he was released from prison.

HELD—that after the order of the justices there was no desertion, and that the petition for divorce upon that ground must fail.

TAYLOR *v.* TAYLOR, (1907) 23 T. L. R. 566—[Bucknill, J.

See also Nos. 180, 189, 297, 298.

(g) Discretion of Court.

161. *Conduct conducing to Adultery.*]—Where a wife has committed several acts of adultery with a co-respondent, and the husband has been guilty of conduct conducing to some of these acts, the husband will not lose his right to a divorce if the first of these acts occurred prior to any such conduct.

MILLARD *v.* MILLARD, (1898) 78 L. T. 471—[Barnes, J.

162. *Wife's Adultery—Husband's Cruelty—Bar to Divorce Court's Discretion—Terms—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31].—The exercise of the discretion conferred upon the Court by sect. 31 of the Matrimonial Causes Act, 1857, always requires very careful consideration. The refusal of a decree incurs the great responsibility of leaving the parties in a deplorable condition. The discretion conferred upon the Court is not an absolute or arbitrary, but a judicial discretion, and the principle upon which the discretion is to be exercised turns upon the consideration whether the cruelty of the petitioner has in any sense caused the adultery of the respondent, or has been of such a wanton or unprovoked character that the Court ought to withhold a decree.

Where there was a child of the marriage, and the father and mother of the respondent have offered to look after the child, and the respondent was willing to waive any claim for an allowance, being of an opinion that to press for it as a condition of the decree would only aggravate the difficulties, looking to the smallness of the petitioner's means, and would throw obstacles in the way of the child's welfare :—

The Court gave the formal custody of the child to the respondent on the distinct condition that the respondent's parents would look after the child.

PRYOR *v.* PRYOR, [1903] P. 157 ; 69 L. J. P. 99—[Jeune, P.

163. *Petitioning Wife's Adultery—Misconduct of Husband conducing to Adultery—Prostitution forced upon her—Continuing Result of Husband's Misconduct — Solicitor's Duty — Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31.]—In an undefended suit by the wife for dissolution of marriage on the ground of cruelty and adultery, it was proved that by continued gross cruelty and brutality her husband forced the petitioner to obtain money by prostitution from August, 1889, to March, 1890. She then left her husband, and gave up her life of prostitution. From 1892 to November, 1895, she habitually committed adultery with a man. She then was again compelled, through the exigencies of her situation, to act as she had done before, and earn money by prostitution. She afterwards lived a respectable life and supported herself.

HELD—that, looking at the petitioner's surroundings and position and at her husband's conduct toward her, the petitioner's life was a continuing result of her husband's misconduct, and that, therefore, his misconduct conduced to all that took place from the time she left him, as it certainly did directly cause what took place while she still remained with him, and that a decree *nisi* should be granted.

Symons v. *Symons* ([1897] P. 167 ; 66 L. J. P. 81 ; 77 L. T. 142—Jeune, P.) followed.

HELD, also, that in such cases as this it is not for the solicitor to judge whether a statement of the petitioner of one kind or another is the stronger ; but, in sending the case forward, the facts as told by the client should be inserted.

BURDON *v.* BURDON, [1901] P. 52 ; 69 L. J. P. 118—[—Barnes, J.

164. *Conduct conducing to Wife's Adultery—"Voluntary Blindness" of the Husband—Decree refused.*]—The Court will not grant a divorce to a man who has stood by, virtually without protesting, and acquiesced in conduct which has resulted sooner or later in his wife committing adultery.

ROBINSON *v.* ROBINSON AND DEARDEN, [1903] P. [155 ; 89 L. T. 74—Bucknill, J.

165. *Desertion and Adultery of Wife conducing to Subsequent Adultery of Husband—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31.]—It is only in an exceptional case that a husband, who has himself committed adultery, will be granted a divorce ; and mere desertion of him by his wife cannot be regarded as conduct so conducive to his adultery as to excuse it. But when a wife leaves her husband with the intention (known to him) of living with another man, such conduct may be regarded as conducing to the husband's subsequent adultery ; and the Court may in its discretion grant him a divorce.

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Semble, in a similar case it might weigh with the Court that only, if a divorce were granted, could the pecuniary relations between the parties be adjusted.

CONSTANTINIDI *v.* CONSTANTINIDI AND LANCE, [1903] P. 246; 72 L. J. P. 82; 89 L. T. 340; 19 T. L. R. 699; 52 W. R. 190—Jeune, P.

Not followed in *Todd* v. *Todd and Another*, (1907) 24 T. L. R. 28, No. 175 *infra*; and *see* No. 272 *infra*.

166. *Petitioner's Misconduct — Husband's Petition—Not heard for five years—Adultery by Husband shortly before Hearing—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31.]—A husband presented a petition in 1897 on the ground of his wife's adultery; late in 1902 it came on for hearing as an undefended action, and a decree *nisi* was granted.

It was subsequently discovered by the King's Proctor that the husband had been since March, 1902, living with another woman.

HELD—that the Court would, nevertheless, dissolve the marriage in the exercise of its discretion.

Constantinidi v. *Constantinidi and Lance* ([1903] P. 246; 72 L. J. P. 82; 89 L.T. 340; 19 T. L. R. 699—Jeune, P., *supra*) followed.

COOMBS *v.* COOMBS AND HOPKINS, (1904) 73 [L. J. P. 23; 89 L. T. 343 (*n*)—Jeune, P.

167. *Petitioner's Misconduct—Wife's Petition—Wife's Misconduct—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31.]—It is only where a petitioner's own misconduct has been directly caused by the respondent's offence that the Court will exercise the discretion given to it by sect. 31 of the Matrimonial Causes Act, 1857, and will grant a divorce in spite of such misconduct.

It is not sufficient that the respondent's behaviour indirectly conduced to such misconduct, or that it was comparatively excusable.

Constantinidi v. *Constantinidi and Lance* ([1903] P. 246; 72 L. J. P. 82; 89 L. T. 340; 19 T. L. R. 699—Jeune, P., *supra*) distinguished.

WYKE *v.* WYKE, [1904] P. 149; 73 L. J. P. 38; [90 L. T. 173; 20 T. L. R. 193—Bucknill, J.

168. *Petitioner's Misconduct — Husband's Petition—Adultery of Petitioner after filing Petition—Warning by Solicitor—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31.]—In 1883 a wife, the present respondent, disappeared with the co-respondent, and they could not be traced. The petitioner was apparently in ignorance of the provisions as to "substituted service." At a later date he began to live with a lady, and would have married her if he could have obtained proof that his wife was (as he believed she was) dead. In 1903 the respondent and co-respondent were found in Australia, and thereupon the petition was filed.

The petitioner was advised by his solicitor to cease relations with the lady, and did so for a time; he admitted, however, that intimacy had been renewed before the hearing.

HELD—that the Court ought not in the exercise of its discretion to dissolve the marriage.

Morgan v. *Morgan and Porter* ((1869) L. R. 1 P. & M. 644; 38 L. J. Mat. 41; 17 W. R. 688; 20 L. T. 588) and *Wyke* v. *Wyke* (*supra*) followed.

HYNES *v.* HYNES AND LAKE, (1904) 20 T. L. R. [781—Barnes, J.

169. *Petitioner's Misconduct—Wife's Petition—Adultery of Petitioner—Conduct of Husband directly conducing to her Adultery—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31.]—A husband had been guilty of cruelty and adultery, but this had been condoned. He and his wife then separated by mutual consent, and she went to live with another man.

Subsequently the husband met and assaulted her, and later on committed bigamy; on learning of this fact the wife filed a petition.

HELD—that, as at the time she left her husband she had no cause of action against him, it could not be said that his misconduct had directly conduced to her adultery, and that the Court ought not to grant her a divorce.

Wyke v. *Wyke* (No. 167, *supra*) followed as being more analogous to the present case than *Symons* v. *Symons* ([1897] P. 167; 66 L. J. P. 81; 77 L. T. 142; 13 T. L. R. 353—Jeune, P.).

SHAW *v.* SHAW (King's Proctor intervening), (1904) 20 T. L. R. 795—Barnes, J.

170. *Judicial Separation on ground of Husband's Cruelty—Subsequent Adultery of Wife—Adultery not due to Husband's Cruelty—Discretion of Court—Provision for Wife*—Dum casta—*Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *ss.* 31, 32.]—In 1900 a wife obtained a judicial separation on the ground of her husband's cruelty. In 1904 he found that she had committed adultery, and presented a petition.

The Court, being of opinion that his cruelty had not directly or indirectly conduced to her adultery, granted a decree *nisi* not to be made absolute till the husband secured to her an allowance of £1 per week.

Under the circumstances the allowance was only to be paid *dum sola et casta vixerit*.

Lander v. *Lander* ([1891] P. 161; 60 L. J. P. 65; 39 W. R. 416; 64 L. T. 120; 55 J. P. 152—Hannen, J.) not followed.

SQUIRE *v.* SQUIRE AND O'CALLAGHAN, [1905] [P. 4; 74 L. J. P. 1; 92 L. T. 472; 21 T. L. R. 41—Jeune, P.

171. *Petitioner concealing own Adultery—Decree* nisi*—Subsequent Intervention of King's Proctor—Matrimonial Causes Acts*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31, and 1860 (23 & 24 Vict. *c.* 144), *s.* 7.]—Where a divorce decree *nisi* has been pronounced, and the King's Proctor intervenes on the ground that the petitioner has been guilty of adultery and concealed the fact from the Court, the Court will not on that ground

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discharge the decree as a matter of course. It will inquire whether, if the fact had been disclosed at the trial, the Court would in the exercise of its discretion have nevertheless granted a decree *nisi*, and, if so, will make the decree absolute.

Roche v. *Roche* (No. 224, *infra*) not followed, *Alexandre* v. *Alexandre* ((1870) 2 L. R. P. & M. 164; 39 L. J. Mat. 84; 18 W. R. 1087; 23 L. T. 268—Lord Penzance) followed.

HUNTER *v.* HUNTER, [1905] P. 217; 74 L. J. P. [157; 53 W. R. 666; 93 L. T. 451; 21 T. L. R. 602—Barnes, P.

172. *Misconduct of Petitioner—Petition by Husband—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31.]—A husband, who was a butler, separated from his wife on account of her drunken habits. He subsequently obtained a decree *nisi* for a divorce upon the ground of adultery, but this decree was rescinded upon the intervention of the King's Proctor, when it was proved that the husband had committed adultery with a fellow-servant and had two children by her. The husband subsequently presented another petition for divorce founded upon the adultery of the respondent, committed since the decree in the former suit was rescinded. The petitioner had not committed adultery since the King's Proctor's intervention.

HELD—that the Court in its discretion should have regard to the interests of society and public morality, and should dismiss the petition.

EVANS *v.* EVANS AND ANOTHER, [1906] P. 125; [75 L. J. P. 27; 94 L. T. 616; 22 T. L. R. 322—Barnes, P.

173. *Misconduct of Petitioner—Wife's Petition—Conduct conducing to Adultery—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31.]—To enable the Court to exercise its discretion in favour of a wife who is petitioning for a divorce and who has herself committed adultery, she must show that her adultery was the necessary and unreasonable consequence of her husband's conduct.

TULK *v.* TULK, (1906) 23 T. L. R. 120—Barnes, [P.

174. *Misconduct of Petitioner—Wife's Petition—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31.]—The petitioner, an actress, was seduced by D., who afterwards married her; she was then an orphan aged sixteen. Subsequently he ill-treated her and compelled her to earn money for him by prostitution. After two years she ran away, and, being destitute, occasionally resorted to the same mode of living.

HELD—that the Court would exercise its discretion in her favour, and grant her a divorce upon proof of D.'s adultery.

HODGSON *v.* HODGSON, (1906) 54 W. R. 220—[Deane, J.

175. *Adultery of Petitioner—Petition by Husband—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31.]—A wife left her husband, and some years afterwards he committed adultery with another woman. On the husband's petition for dissolution of marriage on the ground of his wife's adultery, Deane, J., in the exercise of his discretion, refused to follow *Constantinidi* v. *Constantinidi* ([1903] P. 246; 72 L. J. P. 82; 89 L. T. 340; 19 T. L. R. 699—Jeune, P.), and dismissed the petition.

HELD—that the C. A. would not interfere with his decision.

Decision of Deane, J., (23 T. L. R. 9) affirmed.

TODD *v.* TODD AND ANOTHER, (1907) 24 T. L. R. [28—C. A.

176. *Adultery of Petitioner—Wife's Petition—Adultery under Coercion of Husband—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31.]—A wife was, by the violence and threats of her husband, coerced into committing adultery on three occasions in order to provide him with money. Subsequently she left him, and since that time had not committed adultery. The wife having filed a petition:—

HELD—that the Court would exercise the discretion given to it by sect. 31 of the Matrimonial Causes Act, 1857, and grant her a decree notwithstanding her own adultery.

BARKER *v.* BARKER, (1907) 24 T. L. R. 31—[Deane, J.

(h) Foreign Divorce.

177. *Husband having Foreign Domicil—Decree of Divorce recognised by State where Husband domiciled—Recognition by English Court—Legitimacy Declaration Act*, 1858 (21 & 22 Vict. *c.* 93), *s.* 1.]—English Courts will recognise as binding a decree of divorce obtained in a State where the respondent husband was not domiciled, if the Court of his own domicil would so recognise it.

The petitioner, who was an Englishwoman by birth, married a man who was domiciled in the State of New York, in the United States of America, and she subsequently acquired a domicil of her own in the State of South Dakota, as she was enabled to do by American law, and obtained a divorce from her husband in the Courts of that State upon the grounds of cruelty and desertion. It appeared that the State of New York, where the husband was domiciled, would only grant a divorce on the ground of adultery, but it would recognise the Dakota divorce as binding upon the husband upon the ground that he had appeared and taken part in the suit.

HELD—that the Court would recognise as binding in this country the decree of the Dakota Court, though the husband was not domiciled there, inasmuch as it was recognised as binding in the State where he was domiciled.

ARMITAGE *v.* ATTORNEY-GENERAL (GILLIG [cited), [1906] P. 135; 75 L. J. P. 42; 94 L. T. 614; 22 T. L. R. 306—Barnes, P.

178. *Jurisdiction of Foreign Court—Domicil—American Law—English Marriage—American*

Matrimonial Causes in the High Court *—Continued.*

Decree of Divorce—Residence in America—Validity of Decree in England.]—A divorce granted by a foreign Court cannot be questioned in this country, even on the ground of fraud by a person not a party to the divorce proceedings.

Castrique v. *Behrens* ((1861) 30 L. J. Q. B. 163 ; 4 L. T. 445) approved.

Jurisdiction to dissolve a marriage depends upon the domicil of the parties at the time, although they were formerly domiciled, and were married, in another country.

Le Mesurier v. *Le Mesurier* ([1895] A. C. 517 ; 64 L. J. P. C. 97 ; 72 L. T. 873—H. L.) followed.

Lolly's Case ((1812) Russ. & Ry. 237) discussed.

A. (husband) and B. (wife) were domiciled and married in England. A. having failed to obtain a divorce, owing to his own cruelty, went to New York, where he acquired a domicil and lived in adultery. B. then went to New York, and without collusion obtained a divorce there.

HELD—that as A. was domiciled in New York, and B. had adopted his domicil for the purpose of the divorce proceedings, the divorce must be recognised in England although B. had concealed her own adultery from the New York Court, such non-disclosure not going to the root of the jurisdiction of the Court.

Decision of Barnes, P. (21 T. L. R. 517) affirmed.

BATER *v.* BATER (or LOWE), [1906] P. 209 ; 75 [L. J. P. 60 ; 94 L. T. 835 ; 22 T. L. R. 408—C. A.

(i) Judicial Separation.

And see ACTION, 8.

179. *Cruelty — Habitual Drunkenness — Charges of Præ-marital Misconduct—Admissibility of Evidence.*]—If a woman marry a drunkard, with full knowledge that he is a drunkard, she is not on that account to be held to take, without redress, the risk of anything that may happen to her as a result of his continued drunken habits.

In a case where a wife charges her husband with cruelty, and complains (*inter alia*) that he has made against her in the presence of other persons charges of præ-marital misconduct, which he stated to her he had discovered some time after the marriage, although documents may be admitted as tending to prove the *bona fides* of the husband in making the charges, yet neither oral evidence nor documents are admissible in proof of the facts alleged by the husband against the wife, unless he himself be called to state upon oath that he believed and acted upon the reports which reached him as to his wife's former conduct.

WALKER *v.* WALKER, (1898) 77 L. T. 715—[Barnes, J.

181. *Petitioner of Unsound Mind—Inmate of Lunatic Hospital—Access to Petitioner to obtain necessary Affidavit—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 41—*Rules and Regulations in Divorce and Matrimonial Causes*, 1865, *r.* 2.]—A married lady of unsound mind who was an inmate of a lunatic hospital sought a judicial separation. The hospital superintendent refused the managing clerk of her solicitors and a commissioner of oaths access to the lady for the purposes of obtaining the necessary affidavit in verification of the petition, pursuant to rule 2 of the Rules and Regulations in Divorce and Matrimonial Causes, 1865. The Commissioners in Lunacy indorsed the action and refusal of the superintendent. The Court, on motion,

HELD—that the lady and her advisers must be afforded the necessary facilities to enable the requirements of the Matrimonial Causes Act, 1857, s. 41, and the said rule 2 to be complied with, and to bring the case properly before the Court, and made an order against the Commissioners in Lunacy that they should authorise the access sought for.

IN RE PETITION FOR JUDICIAL SEPARATION, [EX PARTE BEECHAM, [1901] P. 65 ; 70 L. J. P. 20 ; 84 L. T. 63—Jeune, P.

182. *Petitioner Guilty of Desertion—Judicial Separation refused—Practice of Ecclesiastical Courts.*]—A husband petitioner was found guilty of desertion which conduced to the proved adultery of his wife. The Court, therefore, refused to grant him a decree *nisi*.

The petition being by leave amended so as to ask for a judicial separation :—

HELD—that the Court ought in its discretion to refuse to grant one.

The practice of the Ecclesiastical Courts with regard to desertion considered.

HODGSON *v.* HODGSON AND TURNER, [1905] P. [233 ; 74 L. J. P. 140 ; 53 W. R. 623 ; 93 L. T. 446 ; 21 T. L. R. 601—Barnes, P.

See also Nos. 83, 153, 183, 213.

(j) Jurisdiction.

183. *Judicial Separation — Private International Law — Domicile — Residence* — Locus delicti.]—If the parties are resident within the jurisdiction at the time of the beginning of the suit, the Court has jurisdiction to grant a wife a judicial separation on the ground of her husband's cruelty, although the matrimonial domicile is foreign, and although the acts of cruelty were committed in foreign countries.

If the Court grants a wife a judicial separation under such circumstances, it has also power to give her the custody of the children of the marriage.

ARMYTAGE *v.* ARMYTAGE, [1898] P. 178 ; 67 [L. J. (P. D. A.) 90 ; 78 L. T. 689 ; 14 T. L. R. 480—Barnes, J.

184. *Petition for Nullity of Marriage celebrated in India—Respondent domiciled and*

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resident in Ireland—Jurisdiction.]—A domiciled Irishman intermarried in Ireland with B., and afterwards, during B.'s lifetime, went through the ceremony of marriage, according to the rites of the Church of England, with C. at Kashmir, in India. C. presented a petition to have the marriage in India declared null and void, and the citation was served upon A. at his residence in Dublin. The petition contained no allegation relating to the domicil of the petitioner then resident in England. The respondent did not appear.

HELD—that the respondent's domicil and residence in India gave the Court jurisdiction, and (the facts having been proved) the marriage in India was accordingly declared null and void.

JOHNSON *v.* COOKE, [1898] 2 Ir. 130—[Madden, J.

185. *Rape*—20 & 21 Vict. *c.* 27—48 & 49 Vict. *c.* 69, *s.* 4—*Evidence.*]—A wife may obtain a divorce from her husband for rape, though he has only been prosecuted and convicted under 48 & 49 Vict. c. 69, s. 4, of an attempt to have unlawful carnal knowledge of a girl under the age of thirteen years.

The observations of a judge at the trial of a criminal action are not evidence against a respondent in a divorce suit.

COFFEY *v.* COFFEY, [1898] P. 169; 67 L. J. (P. [D. A.) 86; 78 L. T. 796—Barnes, J.

And see No. 125, *supra.*

186. *Nullity Suit—Matrimonial Residence.*]—Matrimonial residence, not domicil, is the test of jurisdiction in a nullity suit.

The petitioner, born in Wales, went through the ceremony of marriage with the respondent, whose domicil was in Ireland. They lived together in the Isle of Man and in England and Scotland. The respondent at the time of the marriage had a lawful wife living who had been married to him in Liverpool.

HELD—that the petitioner was entitled to a decree *nisi* of nullity.

ROBERTS *v.* BRENNAU, [1902] P. 143; 71 L. J. P. [74; 50 W. R. 414; 86 L. T. 599; 18 T. L. R. 467—Jeune, P.

187. *Unnatural Offence — Sodomy — Matrimonial Offence—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 27.]—Sodomy committed by a husband with his wife against her consent is a matrimonial offence within sect. 27 of the Matrimonial Causes Act, 1857.

C. *v.* C., (1905) 22 T. L. R. 26—Deane, J.

188. *Desertion—Separation Order by Justices—Two Years' Desertion before Order—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 Vict. *c.* 39), *ss.* 4, 5.]—A wife, having been deserted by her husband for more than two years, obtained from a Court of summary jurisdiction a separation order under the Summary Jurisdiction (Married Women) Act, 1895. She subsequently discovered that her husband had both before and after the separation order committed adultery. She then filed a petition for divorce.

HELD—that, as there had been desertion for two years and upwards at the time when the separation order was made, and as her husband had then committed adultery, the jurisdiction of the Court was complete, and that, as she was unaware of her husband's adultery at the time when she obtained the separation order, the latter was no bar to her setting up the desertion with his adultery as a ground for divorce.

LETT *v.* LETT, (1907) 23 T. L. R. 569—Buck-[nill, J.

189. *Judicial Separation—Parties resident in England but domiciled Abroad—Proceedings for Divorce in Foreign Country—Stay of Proceedings.*]—A wife brought a suit in this country against her husband for a judicial separation upon the ground of her husband's cruelty and adultery. The domicil of the parties was German, but their matrimonial residence was in England. The husband subsequently took proceedings in Germany for dissolution of marriage upon the ground of "wifely disobedience" on her part in refusing to dismiss her medical attendant; and he applied to stay the suit in this country pending the hearing of the German suit for divorce.

HELD—that the Court had jurisdiction to entertain the suit for judicial separation, and no reason had been shown for a stay.

VON ECKHARDSTEIN *v.* VON ECKHARDSTEIN, [(1907) 23 T. L. R. 539—Deane, J.

An appeal was withdrawn, 23 T. L. R. 593.

190. *Judicial Separation — Foreigners—Residence within Jurisdiction—Particulars—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *ss.* 16, 22.]—An action for judicial separation, on the ground of the adultery of her husband, is maintainable by an English lady whose husband is a German, the parties being domiciled abroad, but the matrimonial residence being in England.

The petitioner, having made a general charge of adultery against the respondent, was granted leave to deliver particulars of the charge, though the respondent did not ask for particulars.

E. *v.* E., (1907) 23 T. L. R. 364—Deane, J.

(k) Nullity of Marriage.

191. *Provision for Wife*—20 & 21 Vict. *c.* 85, *s.* 35.]—Where a petition is brought for a declaration that a marriage ceremony is null and void on the ground that the respondent had a husband living at the time of the ceremony, the Court cannot ordinarily make it a term of granting a decree that the petitioner shall make provision for the respondent.

Wilkins v. *Wilkins* ([1896] P. 108) explained.

A petitioner is entitled *ex debito justitiæ* to

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a declaration of nullity of marriage when the respondent's husband was alive at the time of the second marriage, and the Court has no discretion as to withholding relief.

Bateman *v.* Bateman (otherwise Harrison), [(1898) 78 L. T. 472—Barnes, J.

192. *Discretion as to Decree* nisi *or Decree Absolute — Bigamy — Alimony.*]—The principle on which every decree of nullity has been made a decree *nisi* in the first instance is that the Queen's Proctor may have an opportunity of intervening wherever there is any possible doubt as to the facts which have been brought before the Court. In some cases—bigamy—the alimony should cease at once and not be continued until decree absolute.

Childers *v.* Childers, (1899) 68 L. J. P. 90—[Jeune, P.

193. *Evidence of Identity.*]—In an undefended petition for nullity on the ground of impotence the identity of the respondent not appearing ought to be proved in open Court.

H. (otherwise G.) *v.* H., (1900) 69 L. J. P. 120 [— Barnes, J.

194. *Non-consummation — Inference from Refusal to submit to Examination.*]—In spite of the petitioner's repeated protests the respondent refused to have intercourse with his newly-married wife, and, in fact, the marriage was not consummated. The petitioner was examined, and found to be normal. The respondent refused to submit himself to examination.

Held—that the inference which entitled the petitioner to relief which she sought might be drawn, and she was entitled to a decree *nisi* with costs.

F. v. *P.* (falsely called *F.*) ((1896) 75 L. T. 122 —Jeune, P.) followed.

B. (otherwise H.) *v.* B., [1901] P. 39; 70 L. J. [P. 4—Barnes, J.

195. *Frigidity—Refusal to all Intercourse—Property settled — Expectancy — Variation of Marriage Settlement.*]—Where the respondent resisted all attempts at intercourse for a period of six months, the Court annulled the marriage and varied the marriage settlement, ordering the respondent to pay an annual sum to the petitioner.

E. *v.* E. (otherwise T.), (1902) 50 W. R. 607; [87 L. T. 119; 18 T. L. R. 643—Jeune, P.

196. *Husband's Suit — Non-consummation — Refusal of Wife to submit to Inspection—Positive Evidence of Incapacity.*] — Wilful refusal to consummate a marriage is not of itself sufficient to support a nullity suit, although in some cases the Court will infer incapacity from such refusal. In the particular case the Court inferred incapacity from statements made by the wife, coupled with her refusal to submit to medical inspection.

Previous authorities considered.

W. *v.* S. (or W.), [1905] P. 231; 74 L. J. P. 112; [93 L. T. 456—Barnes, P.

197. *Husband's Suit—Presumption of Incapacity—Delay in taking Proceedings—Explanation of.*]—On a husband's petition for nullity it appeared that the parties had been married for seventeen years, that the wife had refused to allow the marriage to be consummated, and now declined to submit to medical examination.

The husband excused the delay on the ground that while he held a responsible position in the Church legal proceedings would have caused a scandal in the diocese.

Held—that the delay was satisfactorily explained, and that the Court would presume the wife's incapacity.

S. *v.* B. (or S.), (1905) 21 T. L. R. 219—Barnes, J.

198. *Husband's Suit—Refusal of Wife to consummate Marriage—Delay.*]—The parties were married in 1887, and the wife refused to consummate the marriage. The husband, a clergyman, three months afterwards, in the honest belief and being so advised that he could not obtain relief from the Court as the marriage had taken place so recently, executed a separation deed. In 1905 he consulted other solicitors and filed a petition for nullity of marriage.

Held—that on proof of these facts a decree *nisi* should be granted.

M. *v.* M. (or H.), (1906) 22 T. L. R. 719—[Deane, J.

199. *Petition by Person detained in Lunatic Asylum under Order of Magistrate—Guardian* ad litem.]—The Court granted a decree *nisi* for a dissolution of marriage on the petition of a person detained in a lunatic asylum under a reception order made by a magistrate the petitioner appearing by his guardian *ad litem.*

Baker v. *Baker* ((1881) 6 P. D. 12; 49 L. J. P. 83 C. A.) followed.

Burrell *v.* Burrell and Blake, (1901) 17 [T. L. R. 41—Barnes, J.

200. *Non-consummation—Inference of "Practical Incapacity."*]—Although medical evidence disproves any actual and physical incapacity on the part of a wife, the Court may draw the inference of "practical" incapacity from the fact that her husband, though anxious to consummate the marriage, has been unable to induce her to consent to his wishes.

A. B. *v.* C. D., (1906) 8 F. 603.—Ct. of Sess.

201. *Petitioner's Previous Incontinence.*]—In a wife's suit for nullity on the ground of her husband's impotence it appeared that the wife, upon being medically examined, was found not to be *virgo intacta.* In her evidence she stated that she was seduced by another man before she

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married the respondent, and that that accounted for the medical report. The respondent did not appear to the suit, and when served with the petition said that he would not defend, as he must admit the truth of the allegations contained in the petition. The Court granted a decree *nisi*.

R. (or K.) *v.* R., (1907) 24 T. L. R. 65—Deane, J.

See also No. 234.

(1) Practice.

(*a*) *Appeals and New Trials.*

202. *Additional Evidence.*]—A new trial will not be granted on the ground of the discovery of fresh evidence, unless the proposed evidence is such that there is a reasonable probability that, if brought before the jury, a different verdict to that in the former trial would be given.

A petitioner asked for a re-hearing on the ground that since the hearing of his suit and the decision then given against him, additional evidence of a material character had been discovered.

HELD—that as the additional evidence seemed to be such as, in default of adequate explanation, would put the case in a different light, there ought to be a new trial.

Anderson v. *Titmas* ((1877) 36 L. T. 711) followed.

TAYLOR *v.* TAYLOR AND DARG, (1899) 68 L. J. P. [116; 81 L. T. 494—Div. Ct.

203. *Appeal to the House of Lords as to New Trial—Competency of Appeal—Supreme Court of Judicature Act*, 1881 (44 & 45 Vict. *c.* 68), *s.* 9.] —The appellant and the co-respondent gave notices of motion for a new trial of a petition for dissolution of marriage presented by the appellant against the respondent and co-respondent, and the Court of Appeal granted the application in both cases, and ordered a new trial of all the issues as to which evidence had been heard before the jury. The appellant did not obtain leave to appeal.

HELD—that an appeal against the judgment of the Court of Appeal lay to the House of Lords, as the question was not a mere question of interlocutory matter or a matter of practice, but it touched the dissolution of marriage.

BUTCHART *v.* BUTCHART, [1901] A. C. 266; 70 [L. J. P. 29; 84 L. T. 209—H. L. (E.).

204. *Application for Re-hearing—Cause tried without a Jury—To what Court—Divorce Rules*, *r.* 62.]—An application for the re-hearing of a suit for dissolution of marriage tried without a jury must be made to a Divisional Court.

Smith v. *Smith* ([1897] P. 293; 66 L. J. P. 151; 46 W. R. 24; 77 L. T. 206—C. A.) followed.

WATSON *v.* WATSON, (1903) 89 L. T. 78; 19 [T. L. R. 567—Jeune, P.

205. *Decree* nisi—*Application for New Trial by Co-respondent alone—Application granted—Case never set down—Effect as regards the Respondent.*]—After a decree *nisi* the co-respondent alone moved for a new trial and the Court of Appeal ordered "the verdict and judgment to be set aside and a new trial held." The petitioner did not set the case down again, and the co-respondent was accordingly, on his own application, dismissed from the suit. Nevertheless the petitioner asked to have the decree made absolute against the respondent.

HELD—that the order of the Court of Appeal had absolutely annulled the decree *nisi* as against the respondent also.

WORSLEY *v.* WORSLEY AND WORSLEY (1904) 20 [T. L. R. 171—Jeune, P.

See also No. 102.

(*b*) *Arrangement of Lists.*

206. *Wife's Petition — Return of Wife to Cohabitation pending Suit — Placing Case in Reserved List.*]—Since the petition of the wife for dissolution of marriage had been filed she had returned to cohabitation with her husband. Application was made on behalf of the wife when the case was called on that it might not be struck out for want of prosecution, and that the petition should not be dismissed until payment of the taxed costs.

HELD—that the proper practice was to put the case in the reserved list.

WARWICK *v.* WARWICK, (1901) 85 L. T. 173; 17 [T. L. R. 632—Jeune, P.

207. *Withdrawal of Claim for Damages — Notice to Opposite Parties—Transfer to Undefended List.*]—When no appearance has been entered by either the respondent or co-respondent, against whom damages are claimed, by leave of Court, and without notice to the respondent or co-respondent, the claim for damages may be withdrawn and the case transferred from the common jury to the undefended list. [But *see* Divorce Rule 36.]

CHAMBERLAIN *v.* CHAMBERLAIN, (1907) 51 Sol. [Jo. 357—Bucknill, J.

(*c*) *Contents of Petition.*

208. *Petition claiming Damages against Co-respondent—Specifying Sum.*]—If damages are claimed against a co-respondent, a specific sum must be claimed in the petition.

Spedding v. *Spedding and Smith* ((1862) 31 L. J. M. C. 96) followed.

PEGLER *v.* PEGLER AND RUSSELL, (1902) 85 [L. T. 649; 18 T. L. R. 13—Barnes, J.

209. *Husband's Petition—Statement of Domicil of Husband—No Statement as to Wife's Domicil—Divorce Rule 220 of 1905.*]—It is sufficient, under Divorce Rule 220 of 1905, to insert in a petition the domicil of the husband without stating that of the wife, unless the petitioner is

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asserting a domicil for the wife different from that of the husband.

In re the Petition of E. L. Clark for the Dissolution of his Marriage, (1906) 75 L. J. P. 7; 22 T. L. R. 158—Deane, J.

(d) Delay.

210. *Absence of Means.*]—A private in the Royal Artillery in 1876 heard that his wife, who had deserted him in 1874, was living with another man, but he did not know his name, and he had no money to make inquiries with. When invalided home in 1892 from India he made no inquiries about his wife nor did he write to her. Evidence was given that the respondent and co-respondent had been living together for twenty-three or twenty-four years. The case was undefended.

Held—that though the delay had been very great, there would be a decree *nisi*.

Edwards *v.* Edwards and Doncaster, [(1901) 17 T. L. R. 38—Jeune, P.

211. "*Unreasonable Delay*"—*Want of Means—Insanity of Respondent.*]—A divorce may be granted in the unavoidable absence, by reason of mental derangement, of one of the parties.

A woman was guilty of adultery in 1888. In 1889 she was sent by the magistrates to the workhouse, owing to her state of mind; and in 1890 she was removed to a lunatic asylum as a dangerous lunatic. There she remained ever since, a confirmed lunatic. The petitioner at the time she left him in 1888 was earning about £3 a week as a machinist, and he had two children to maintain. His debts amounted to about £20 and a quarter's rent. From his wife's state of health he thought that she might die. The official solicitor, as guardian *ad litem*, pleaded "unreasonable delay" in presenting and prosecuting the petition.

Held—that want of means did not stop the husband from taking proceedings; that the husband being told by his employer that he must find out the man with whom the respondent had committed adultery was not a valid excuse for the protracted delay; and that the petitioner was excused for the delay on the ground that he might well prefer to wait, in the hope that the hand of death might release her and him, rather than, by taking proceedings to have his marriage dissolved, cast upon his wife the stigma of adultery, and thus brand his daughters as the children of an adulteress.

Johnson *v.* Johnson, [1901] P. 193; 70 L. J. P. [44; 84 L. T. 725—Jeune, P.

212. *Petitioner's Misconduct — Husband's Petition — Husband having married again — No reasonable Grounds for believing Wife dead — Continuing to live with Second Wife after ascertaining First Wife to be alive — Discretion of Court — Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 31.]—A petitioner was married in 1865; in 1874, owing to his poverty, his wife left him, and afterwards refused to return to him. He was subsequently told that she was "dying." In 1875 he married again. In 1887 he discovered that his wife was alive and had also re-married. He still continued to live with his second "wife," and in 1903 filed his petition.

Held—that under the circumstances of the case the petition must be dismissed on the grounds of delay, and also on the grounds that the petitioner had not in the first instance made proper inquiries, and after learning the truth had lived for fourteen years in adultery.

Constantinidi v. *Constantinidi and Lance* ([1903] P. 246; 72 L. J. P. 82; 89 L. T. 340; 19 T. L. R. 699—Jeune, P., No. 165, *supra*) distinguished.

Pegg *v.* Pegg and Gowing, (1904) 20 T. L. R. [353—Barnes, J.

213. *Practice—Application for Decree to be made absolute—Delay in applying—Decree* nisi *—Amendment of Claim so as to ask for Judicial Separation.*]—A petitioner is entitled to a reasonable time to determine whether to apply for a decree *nisi* to be made absolute. The respondent is not necessarily entitled to have the petition dismissed because application for a decree absolute is not made directly the six months have expired.

A petitioner who has obtained a decree *nisi* may amend the claim by asking for a rescission of the decree, and a decree of judicial separation instead.

Parsons *v.* Parsons, [1907] P. 331; 76 L. J. P. [159; 23 T. L. R. 749—Bucknill, J.

(e) Divorce Bill.

214. *Domicil — Petitioner a Domiciled Irishman—English Decree* nisi*—Doubt as to operation in Ireland—Bill to remove Doubts.*]—Where there are doubts as to the operation in Ireland of an English divorce decree, the petitioner being domiciled in Ireland, the proper course is to obtain an Act confirming the decree and removing doubts.

Malone's Divorce Bill, [1905] A. C. 314— [H. L. (Ir.).

215. *Procedure—Copy of Judgment—Standing Orders of the House — Ord.* 177.]—On the hearing of a petition that a Bill of Divorce may be read a second time and sent to committee, a certified copy of any judgment affecting the matter given in the Irish Courts must be supplied by the registrar of such Court for evidence before the House.

Galway's Divorce Bill, (1907) 51 Sol. Jo. [306—H. L. (Ir.).

216. *Ireland — Decree* nisi *under English Divorce Acts—Doubt as to Validity of Decree—Domicil.*]—Where there are doubts as to the operation of a decree under the English Divorce Acts for the dissolution of the marriage of a domiciled Irishman, the proper course is to apply

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for an Act of Parliament confirming the decree and removing all doubts.

GRIMSHAW'S DIVORCE BILL, (1907) 51 Sol. Jo. [529—H. L. (Ir.).

See also Nos. 130, 135.

(*f*) *Evidence.*

217. *Husband's Petition—"Alleged Adulterer"—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 28.]—In a petition by the husband, charging various acts of adultery, between his wife and a named co-respondent, extending over the period when a child, of which the petitioner was not the father, must have been conceived by the wife, the registrar refused to allow the case to be set down until an application should have been made to the Court for leave to proceed without citing any person, other than the man named in the petition, as a co-respondent.

It appeared from the affidavits filed upon the motion that the wife, when her pregnancy was discovered by the petitioner, had made a verbal and written confession of adultery with a particular man, who was not the man named in the petition as a co-respondent, but the petitioner stated that he did not believe that the man so implicated by the wife was guilty of the adultery imputed to him.

HELD—that a person so implicated is entitled to an opportunity, if he choose to avail himself of it, to appear and defend his character; but

HELD, further, that as, in the present case, the Court was satisfied, upon the affidavits laid before it, that the person so implicated in the wife's confession did not desire to be made a co-respondent, and that there was no substantial risk of matters which the Court ought to know being left undisclosed by his remaining outside the suit, the application for leave to proceed without citing him should be acceded to.

EDWARDS *v.* EDWARDS AND WILSON, [1897] P. [316; 67 L. J. P. 1; 77 L. T. 406; 13 T. L. R. 592—Jeune, P.

218. *Statements to Third Persons.*]—A witness called to prove a husband's cruelty may be asked whether the wife made a complaint about the husband on a certain occasion.

BERRY *v.* BERRY, (1898) 78 L. T. 688—Jeune, P.

219. *Variation of Settlements—Motion upon Registrar's Report—Legitimacy of Child born in Wedlock—Motion adjourned—Petition to be presented to decide Question of Legitimacy.*]—In the course of an undefended suit for dissolution of marriage presented by the husband, it appeared that the respondent had made a written statement in the form of a letter to the petitioner as to the paternity of the only child, with the object of retaining its custody. Upon petition for variation of the marriage settlement, it was urged on behalf of the trustees of the settlement that the respondent's statement was inadmissible, and that so important a matter as that of the legitimacy of the child ought not to be dealt with upon motion. The Court thereupon adjourned the motion as to variation, and directed the official solicitor to present, on behalf of the child, a petition for declaration of legitimacy.

DOUGLAS *v.* DOUGLAS AND TREVOR, (1898) 78 [L. T. 88—Jeune, P.

220. *Acts of Familiarity prior to Petition—Acts of Adultery subsequent to Petition.*]—In an undefended suit of the husband for dissolution of marriage on the ground of his wife's adultery with the co-respondent, evidence to show that after the date of the petition the respondent and co-respondent were living together was admitted to show what inference the Court ought to draw from the acts of familiarity of which evidence had already been given, and which related to a period anterior to the filing of the petition.

WALES *v.* WALES, [1900] P. 63; 69 L. J. P. 34—[Barnes, J.

221. *Adultery — Official Document — Army Form Medical Sheet.*]—To prove that the respondent, a soldier in the army, had committed adultery, an army form medical sheet under rule 208 of the Royal Army Medical Service Rules, showing that the respondent had been admitted to hospital suffering from a certain illness, was put in evidence.

HELD—that this, being an official document properly produced, was evidence of adultery.

GLEEN *v.* GLEEN, (1901) 17 T. L. R. 62—[Jeune, P.

222. *Commission to take Evidence Abroad—Petition filed but not served—Costs.*]—On a motion *ex parte* by petitioner (wife) for a commission to take the evidence of witnesses in Toronto, Canada, who were about to leave that city, the petition having been filed only that morning, and not served on the husband:—

HELD—that if the wife had means to defray the necessary expense the order might be made, subject to any questions of admissibility of the evidence thereafter.

VALLENTINE *v.* VALLENTINE, [1901] P. 283; [70 L. J. P. 89; 85 L. T. 171; 17 T. L. R. 564—Jeune, P.

223. *Evidence of Misconduct—Questions put to Respondent on serving Petition—Practice disapproved by Court.*]—The Court disapproves strongly of a person serving papers interrogating the party served in order to obtain admissions of misconduct.

HALLAM *v.* HALLAM, (1904) 20 T. L. R. 34—[Bucknill, J.

224. *Suppression of Material Facts—Intervention of King's Proctor—Facts which would have been excused by the Court—Refusal of Decree.*]—A wife, petitioner in a divorce suit, concealed the fact that she had herself committed adultery. Such adultery was due to her

Matrimonial Causes in the High Court—*Continued.*

husband's duress; and the Court would in its discretion have granted her a decree notwithstanding it.

The King's Proctor intervened on the ground of suppression of material facts.

HELD—that though, had the facts been disclosed, the Court would in the first instance have overlooked the misconduct, yet, as they had been suppressed, a decree absolute must be refused.

ROCHE *v.* ROCHE, [1905] P. 142; 72 L. J. P. 50; [92 L. T. 668; 21 T. L. R. 332—Deane, J.

225. *Evidence — Question as to Adultery — Evidence Amendment Act*, 1869 (32 & 33 Vict. *c.* 68), *s.* 3.]—A suit for variation of settlements, instituted after decree absolute for a divorce, is not a "proceeding instituted in consequence of adultery" within the meaning of sect. 3 of the Evidence Amendment Act, 1869. Therefore, when in such a suit an issue is directed as to the paternity of a child, a witness cannot refuse to answer a question as to his adultery with the child's mother.

It is not now sufficient ground for refusing to answer such a question to say that an answer might subject the witness to ecclesiastical censure.

Dictum of Bowen, L.J., in *Redfern* v. *Redfern* ([1891] P. 139; 60 L. J. P. 9; 55 J. P. 37; 39 W. R. 212; 64 L. T. 68—C. A.) not followed.

EVANS *v.* EVANS AND BLYTH, [1904] P. 378; [73 L. J. P. 114; 20 T. L. R. 612; 91 L. T. 600—Barnes, J.

And see No. 286.

226. *Uncorroborated Evidence of Petitioner—Discretion of Court.*]—Although as a rule the Court does not act upon the uncorroborated evidence of a petitioner, there is no rule of law which prohibits it from so doing: it will do so if satisfied that the story put forward is a true one, and that there is no collusion.

CURTIS *v.* CURTIS, (1905) 21 T. L. R. 676—[Deane, J.

227. *Separation Order on Ground of Cruelty—Conviction admitted as Corroborative Evidence on Wife's Petition — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 Vict. *c.* 39), *ss.* 4, 5.]—A husband was convicted before a stipendiary magistrate of persistent cruelty to his wife, and a separation and maintenance order was made against him under sect. 5 of the Summary Jurisdiction (Married Women) Act, 1895. The wife subsequently petitioned for a divorce upon the ground of her husband's adultery and cruelty. As corroboration of the wife's evidence as to the cruelty she tendered the depositions of the witnesses who gave evidence before the magistrate, and who had left the country and could not be found, and alternatively tendered the conviction itself.

The Court refused to admit the depositions of the witnesses, but admitted the conviction as corroborative evidence, being satisfied in the particular case that the husband had been guilty of cruelty, and that the witnesses called before the magistrate had properly satisfied that Court that the charge of cruelty within the Act of 1895 had been established.

JUDD *v.* JUDD, [1907] P. 241: 76 L. J. P. 118; [23 T. L. R. 538—Deane, J.

228. *Confession of Misconduct—No Corroboration—Whether sufficient.*]—There is no hard and fast rule that the Court in a divorce suit will not act upon an uncorroborated confession of misconduct. It will do so if the surrounding circumstances satisfy it that the confession is a true one.

GETTY *v.* GETTY, [1907] P. 334; 76 L. J. P. [158—Bucknill, J.

229. *Proof of Foreign Marriage.*]—In a nullity suit it was proved that the marriage, a foreign one, was valid, assuming that a certain prior divorce decree affecting one of the parties was valid. In a subsequent divorce suit between the same parties:—

HELD—that expert evidence must nevertheless be called to prove the validity of the marriage in question.

BATER *v.* BATER AND OTHERS, [1907] P. 333—[Bucknill, J.

230. *Identification by Photograph.*]—Under special circumstances the Divorce Court will act upon identification by photograph only.

DAWSON *v.* DAWSON AND ANOTHER, (1907) 23 [T. L. R. 716—Bucknill, J.

231. *Commission—Commission before Service of Citation and Petition.*]—The Court allowed a commission to issue, before service of the citation and petition for divorce, to examine witnesses at a place abroad, where the respondent was, upon the ground that a great saving of expense would be thereby effected.

GRIBBON *v.* GRIBBON, (1907) 24 T. L. R. 160—[Deane, J.

232. *Privilege—King's Proctor's Intervention—Suppression of Material Facts—Alleged Advice of Solicitors—Rescission of Decree* nisi.]—The plea of privilege cannot be relied upon to keep back material facts from the Court in a divorce suit; nor, if a client has attacked the character of her solicitors, will privilege prevent them from vindicating it.

LAMBART *v.* LAMBART, (1907) 51 Sol. Jo. 345—[Barnes, P.

233. *Oral Evidence supplementing Affidavit—Agreement to dispense with Oral Evidence.*]—The Court has power to supplement affidavit evidence by oral evidence, notwithstanding an agreement of the parties before the registrar to dispense with oral evidence, and although the report of the registrar is not being appealed against.

B. *v.* B., (1907) 51 Sol. Jo. 430—Bucknill, J.

Matrimonial Causes in the High Court—*Continued.*

234. *Cross-examination—No Plea of Want of Sincerity — Evidence Further Amendment Act*, 1869 (32 & 33 Vict. *c.* 68), *s.* 3—*Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 43.]—An action was brought for nullity of marriage on the ground of impotence, and there was a cross-action for dissolution of marriage on the ground of the petitioner's adultery. In the first action the respondent proposed to cross-examine the petitioner as to her alleged improper intimacy with the person named as co-respondent in the second action in order to show want of sincerity on the part of the petitioner.

HELD—that the cross-examination could not be allowed.

M. v. *D.* ((1885) 10 P. D. 175) not followed.

The respondent thereupon tendered evidence for the purpose of establishing the alleged intimacy, so as (1) to show want of sincerity, and (2) to rebut the presumption as to the petitioner's physical condition arising from the medical report.

HELD—that the evidence was not admissible upon the ground that there was no plea upon the record of want of sincerity or incapacity.

S. (otherwise G.) *v.* S., [1907] P. 224; 76 L. J. P. [118; 23 T. L. R. 460—Deane, J.

See also Nos. 71, 179, 185, 202.

(g) Hearing.

235. *Right to begin Petition for Restitution—Answer alleging Adultery*—Onus Probandi.]—Where a wife petitions for a decree of restitution of conjugal rights, and the husband in his answer denies that he has no just cause for separating and living apart from his wife, and alleges that the separation was brought about by his wife's adultery, the *onus* of proof lies on the husband, and his counsel should begin.

Cherry v. *Cherry* ((1858) 1 Sw. & Tr. 319) followed.

SMITH *v.* SMITH, [1900] P. 66; 69 L. J. P. 44—[Jeune, P.

236. *Act on Petition alleging Foreign Domicil—Answer to Act—Power to order Trial by Jury—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *ss.* 28, 36—*Divorce Rules*, *r.* 61.]—A suitor is entitled under sect. 28 of the Matrimonial Causes Act, 1857, to have any disputed question of fact tried by a jury; and Divorce Rule 61 does not exclude this right, when an Act of Petition has been filed alleging a foreign domicil, and objecting to the jurisdiction of the English Court.

LOWENFELD *v.* LOWENFELD (CORBETT inter-[vening), [1903] P. 177; 72 L. J. P. 57; 89 L. T. 146; 19 T. L. R. 542—C. A.

237. *Hearing* in camerâ.]—Though it is only in nullity suits that a hearing *in camerâ* is authorised by express enactment, yet a Divorce Court, like the old Ecclesiastical Court, and indeed all Courts of the realm, has an inherent power to try *in camerâ* any case, when it is reasonably clear that justice cannot be done by a public hearing—*e.g.*, where the presence of a mixed audience renders a real examination of the facts almost impossible.

DRUCE *v.* DRUCE AND GIBBS, [1903] P. 144; 72 [L. J. P. 51; 88 L. T. 573; 19 T. L. R. 387—Jeune, P.

238. *King's Proctor—Intervention—No Answer filed — Duty to prove Facts.*]—The petitioner having obtained a decree *nisi* for a divorce, the King's Proctor intervened and filed a plea alleging that the petitioner had committed adultery. The petitioner's solicitors wrote to the King's Proctor that their client denied the allegations in the plea, but that she had not the means to contest the matter.

HELD—that the King's Proctor need not prove the allegations in the plea, but might proceed by motion.

CROWDEN *v.* CROWDEN, (1906) 23 T. L. R. 143—[Deane, J.

(h) Interlocutory Proceedings.

239. *Unknown Adulterer—Wife's Statement—Alleged Adulterer named by Wife — No other source of Information—Motion for leave to Proceed without citing any Co-respondent — Motion adjourned — Inquiries ordered to be made from the Wife.*]—A wife, in answer to inquiries by her husband touching the paternity of a child with which she was pregnant, and of which he could not be the father, gave the name of a man, and made certain statements which she said were within the petitioner's knowledge, but of which he declared he knew nothing; neither did he know of the existence of such a man.

After petition filed, and upon motion by the husband (petitioner) for leave to proceed without citing any person as co-respondent :—

The Court directed the petitioner's solicitor to write to the respondent with a view to having a personal interview with and obtaining an explanation from her, and refused to make an order in the petitioner's favour until this had been done and the result made known to the Court.

GROSE *v.* GROSE, (1898) 78 L. T. 89—Jeune, P.

240. *Dismissal of Petition—Summons in Chambers.*]—An application to dismiss a petition for dissolution can now be made by summons in chambers and that is the course that ought to be adopted in every such case instead of a motion.

SLATER *v.* SLATER AND BOLDERSON, (1900) [69 L. J. P. 48—Barnes, J.

241. *Death of Co-respondent pending Suit—Motion to strike out his Name.*]—A co-respondent upon whom a petition had been served and who had been examined and cross-examined in open court in view of his departure for the seat of war in South Africa died there of enteric fever.

HELD—that the right course was a motion by

Matrimonial Causes in the High Court—*Continued.*

the petitioner (husband) to strike out the name of the co-respondent from the proceedings.

WALPOLE *v.* WALPOLE, [1901] P. 86; 70 [L. J. P. 23; 84 L. T. 63; 17 T. L. R. 143—Barnes, J.

242. *Particulars—Abuse in presence of Servants—Names of such Servants.*]—Where a wife alleged acts of cruelty by the husband, consisting in the use of abusive language to her in the presence of the servants, and thereby holding her up to contumely and contempt, the Court ordered the wife to give particulars of the names of the servants in whose presence the alleged abusive language was used.

BISHOP *v.* BISHOP, [1901] P. 325; 70 L. J. P. [93; 85 L. T. 173; 17 T. L. R. 616—Jeune, P.

243. *Particulars of Adultery.*]—The allegation in the petition by the husband for dissolution of marriage was that from the month of April, 1901, down to the month of February, 1902, the respondent was visited almost daily by the co-respondent and committed adultery with him. Particulars were ordered on this paragraph. The particulars furnished simply said in effect that the respondent and co-respondent were constantly meeting during that time, and were in the boudoir and bedroom together.

HELD—that there was not a sufficient compliance with the order; and that the petitioner must give the best particulars which he could extract from the different witnesses upon whom he relied to prove his case.

HARTOPP *v.* HARTOPP AND EARL COWLEY, [(1902) 71 L. J. P. 78; 87 L. T. 188—C. A.

244. *Examination as to Means—Decree absolute—Order for Examination of Husband as to Means—Refusal to attend—Conduct Money.*]—A divorce decree having been made absolute upon the wife's petition, an order was made for the husband to attend before the registrar for examination as to his means for the purposes of assessing permanent alimony. He refused to attend.

HELD—that, as no conduct money had been paid to him, an order of committal could not be made against him for contempt in not attending.

TOWNEND *v.* TOWNEND, (1905) 21 T. L. R. 657; [93 L. T. 680—Barnes, P.

245. *Interrogatories — Wife's Petition on Ground of Cruelty and Adultery—Interrogatory directed to both—Evidence Further Amendment Act*, 1869 (32 & 33 Vict. *c.* 68), *s.* 3.]—A wife in her petition for divorce on the ground of her husband's cruelty and adultery alleged in paragraph 4, as an act of cruelty, the wilful communication to her of a venereal disease, and in paragraph 7 she alleged an act of adultery with a woman unknown at the same date whereby he had contracted the disease. The wife proposed to interrogate the respondent as to whether he was not suffering from venereal disease at the time in question, and whether a doctor did not attend him for it, contending that the interrogatories went solely to the charge of cruelty alleged in paragraph 4.

HELD—that the interrogatories were not admissible.

E. *v.* E., (1907) 24 T. L. R. 78—Deane, J.

246. *Production of Books—Order—Non-compliance—Motion to Attach—Conduct Money.*]—Where a respondent was ordered to produce books relating to his income at his place of business for inspection by the petitioner's solicitor, on motion to attach for non-compliance with the order :—

HELD—that he was not entitled to conduct money to appear on the hearing of the motion.

JEFFRIES *v.* JEFFRIES, (1907) 51 Sol. Jo. 572—[Bucknill, J.

See also Nos. 190, 203, 222, 231.

(i) Intervention of Third Party.

247. *Wife's Petition—Counter-charge of Adultery without claiming Cross-relief—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 28—*Matrimonial Causes Act*, 1866 (29 & 30 Vict. *c.* 32), *s.* 2.]—The application by a person, who has been charged with adultery by the respondent in his answer, not claiming cross-relief, for leave to intervene refused. Such leave can be granted only where the answer contains a claim for cross-relief.

Wheeler v. *Wheeler and Rhodes* ((1889) 14 P. D. 154; 58 L. J. P. 65; 61 L. T. 306) considered.

HARROP *v.* HARROP, [1899] P. 61; 68 L. J. P. [58; 80 L. T. 171; 15 T. L. R. 144—Barnes, J.

248. *Wife's Petition—Counter-charge of Adultery and Claim that Petition be Dismissed—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 28—*Matrimonial Causes Act*, 1866 (29 & 30 Vict. *c.* 32), *s.* 2.]—If, on the presentation of a petition for divorce, a respondent merely puts in an answer to the petition asking that the petition shall be dismissed and no further relief, the intervention of a third party, whose name has been mentioned in the answer, is not permissible. He can only intervene if the answer claims such further relief as would admit of the answer being treated as a cross-petition.

Harrop v. *Harrop* ([1899] P. 61; 68 L. J. P. 58; 80 L. T. 171; 15 T. L. R. 144, *supra*) followed.

LOWE *v.* LOWE, [1899] P. 204; 68 L. J. P. 60; [47 W. R. 553; 80 L. T. 575; 15 T. L. R. 360—C. A.

249. *Decree* nisi — *Co-respondent showing Cause against making Decree absolute—Matrimonial Causes Act*, 1860 (23 & 24 Vict. *c.* 144),

Matrimonial Causes in the High Court—*Continued.*

s. 7.]—A co-respondent entered an appearance but did not defend the suit. On the motion to make absolute the decree *nisi* the co-respondent asked for leave to show cause why the decree *nisi* should not be made absolute upon certain specified grounds.

HELD—that the co-respondent was not entitled to intervene as a member of the public; and that the decree must be made absolute, with costs.

HARRIES *v.* HARRIES AND GREGORY, (1902) [86 L. T. 262; 18 T. L. R. 219—Barnes, J.

(*j*) *Notice, Service and Stay of Proceedings.*

250. *Practice—Stay of Proceedings—Matrimonial Suits between same Parties in England and Scotland—Motion to restrain Scotch Proceedings—Order.*]—The wife instituted proceedings in England, claiming a judicial separation on the grounds of the husband's alleged cruelty, desertion, and adultery. The husband appeared under protest, and filed an act on petition, disputing the jurisdiction. Negotiations were afterwards entered into for a separation to be effected by deed, and after these had been pending for some time the husband commenced proceedings in the Scotch Court, praying for a dissolution of marriage on the ground of alleged malicious desertion for a period of four years.

The Court, upon the application of the wife, granted an injunction restraining the husband from prosecuting the proceedings in Scotland until the act on petition should be heard and determined in this Court, or until further order.

CHRISTIAN *v.* CHRISTIAN, (1898) 67 L. J. P. 18; [78 L. T. 86—Jeune, P.

251. *Substituted Service of Petition and Citation.*]—An affidavit by the petitioner of his ignorance of the address of the parties to be served should be filed with applications for substituted service.

MARTIN *v.* MARTIN (No. 1), (1898) 78 L. T. 170 [—Barnes, J.

252. *Substituted Service.*]—Though the fact that the respondent's whereabouts cannot be discovered may be due to the petitioner's delay in bringing the petition, substituted service of the petition and citation may be allowed.

JENSON *v.* JENSON, (1898) 78 L. T. 764—Jeune, P.

253. *Permanent Maintenance — Petition for — Substituted Service — Petitioner's Affidavit dispensed with.*]—The wife obtained a decree *nisi* dissolving her marriage with respondent. She then filed a petition for permanent maintenance, and applied that substituted service of the petition on the respondent's solicitor might be allowed. She had no personal knowledge of any of the facts connected with the service of the petition.

HELD—that an affidavit by two clerks of the petitioner's solicitor showing the impossibility of serving the respondent was sufficient, and there need be no affidavit by the petitioner.

SCHRAML *v.* SCHRAML, (1899) 68 L. J. P. 47; 80 [L. T. 328—Jeune, P.

254. *Unknown Co-respondent—Assumed Name—Amendment—Substituted Service.*]—A husband petitioned for divorce on the ground of his wife's adultery with a man unknown to him, but who was alleged to have lived with the wife at an hotel as Mr. and Mrs. E. L. G. The petitioner, who was abroad, moved for leave to proceed without making a co-respondent or for substituted service.

HELD—that the petition must be amended and adultery against E. L. G. charged in the ordinary way. And the co-respondent might be served by advertisement.

NICOLAS *v.* NICOLAS, [1899] 68 L. J. P. 66; 80 [L. T. 422—Jeune, P.

255. *Respondent of Unsound Mind not so found—No Appearance—Notice to Official Solicitor—R. S. C., Ord.* 13, *r.* 1.]—Where the respondent, the husband in a suit for dissolution, was a person of unsound mind not so found by inquisition, and the suit was *in formâ pauperis*, the Court, before making the decree, required notice of the proceedings to be formally given to the official solicitor.

GILES *v.* GILES, [1900] P. 17; 69 L. J. P. 26; [48 W. R. 288; 81 L. T. 823—Barnes, J.

256. *Service of Citation and Petition Abroad—Substituted Service—Registered Letter.*]—The Court allowed substituted service of a citation and petition on the co-respondent by enclosing them in registered letters addressed to his mother and uncle abroad, as there seemed to be a difficulty about service through the foreign tribunal.

STUMPEL *v.* STUMPEL AND ZEPPEL, (1901) 70 [L. J. P. 6; 17 T. L. R. 17—Jeune, P.

258. *Service of Citations and Petition in Lisbon — Letters of Request — Service by Registered Letters.*]—Leave was given to serve copies of the citations and petition upon the mother of the respondent and on the sister-in-law of the co-respondent by registered letters addressed to them respectively in Lisbon; and also by registered letters addressed to the respondent and co-respondent at addresses in Lisbon, after letters of request from England to Portugal to serve such documents had been refused by the President.

WRAY *v.* WRAY, [1901] P. 132; 70 L. J. P. 32; [84 L. T. 64; 17 T. L. R. 242—Barnes, J.

259. *Variation of Settlement — Service of Petition — Husband a Bankrupt — Notice to Official Receiver — One Trustee a Bankrupt and Address unknown.*]—A wife, having divorced her husband, desired to move for a variation of her settlement.

Matrimonial Causes in the High Court—*Continued.*

Her husband and one trustee were uncertificated bankrupts, and their addresses unknown. The other two trustees had been served with the petition.

HELD—that service on the husband and the one trustee might be dispensed with, notice of the present motion having been given to the official receiver as trustee of the husband's estate.

GORDON *v.* GORDON, [1905] P. 97; 74 L. J. P. [39; 92 L. T. 476—Barnes, P.

See also Nos. 139, 189, 206, 262, 263, 264, and as to making decree absolute, Nos. 152, 213.

XII. PROTECTION ORDER.

260. *Contract prior to* 1883—*Power of Appointment—Creditor's right to prove against Appointed Funds—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *ss.* 21, 25, 26—*Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *s.* 4.]—A married woman having obtained a protection order under the Matrimonial Causes Act, 1857, s. 21, by deed dated in 1880 covenanted to pay certain moneys.

Under a settlement dated in 1894 she acquired a general testamentary power of appointment over certain funds, which power she exercised, and died in 1896.

HELD—that the married woman was, by virtue of sects. 21 & 26 of the Matrimonial Causes Act, 1857, capable of contracting as a *feme sole*, and consequently the assignee of the covenant must be allowed to prove against her estate, which consisted solely of the appointed funds.

Re Roper, *Roper* v. *Doncaster* (39 Ch. Div. 482) distinguished.

Decision of Kekewich, J., (77 L. T. 564; 46 W. R. 220) affirmed.

RE HUGHES, BRANDON *v.* HUGHES, [1898] 1 [Ch. 529; 57 L. J. (Ch.) 279; 78 L. T. 432; 46 W. R. 502—C. A.

XIII. RESTITUTION OF CONJUGAL RIGHTS.

261. *Practice—Counter-claim or Cross-petition—Judicial Separation* (36 & 37 Vict. *c.* 66, *s.* 24, *sub-s.* 3).]—A wife petitioned for a judicial separation on the ground of the respondent's cruelty. The respondent, in his answer, denied the cruelty, and claimed a decree for restitution of conjugal rights.

HELD—that the respondent's proper course would have been to file a cross-petition, and that the relief prayed for could not be granted on a mere counter-claim in the answer not verified by affidavit.

WINGFIELD *v.* WINGFIELD, (1898) 78 L. T. 568; [Barnes, J.

262. *Service of Order out of Jurisdiction—Matrimonial Causes Act*, 1884 (47 & 48 Vict. *c* 68), *s.* 5.]—When a respondent is domiciled within the jurisdiction, an order for restitution of conjugal rights may be properly served on him at a time when he is not, in fact, within the jurisdiction of the Court.

DICKS *v.* DICKS, [1899] P. 275; 68 L. J. P. 118; [48 W. R. 302; 81 L. T. 462; 15 T. L. R. 482 —Barnes, J.

263. *Practice—Substituted Service of Petition in Scotland—Deed of Separation—Non-appearance of Husband.*]—Substituted service of a wife's petition for restitution of conjugal rights effected in Scotland, the husband being a domiciled Englishman, was held good. The husband and wife executed an agreement by which she undertook not to trouble or molest him so long as he continued to pay her an allowance. The husband and wife lived separate. She subsequently sued for restitution of conjugal rights. The husband did not appear.

HELD—that, as the husband had not appeared and pleaded the agreement, the Court would grant a decree of restitution.

HARDIE *v.* HARDIE, (1901) 70 L. J. P. 29; 84 [L. T. 64; 17 T. L. R. 190—Barnes, J.

264. *Practice—Service of Citation and Petition—Service out of the Jurisdiction—Decree.*]—In cases of restitution of conjugal rights, where the respondent is served with the citation and petition at a place which, although out of the jurisdiction, is one from which he can reasonably get back to his wife within the time limited in the decree, it is reasonable to hold that it is good service.

In any further proceedings the petitioner may take, she will have to satisfy the Court that the respondent has been served with the decree for restitution of conjugal rights at a place from which he could reasonably have got back to her within the time limited in the decree.

BATEMAN *v.* BATEMAN, [1901] P. 136; 70 L. J. P. [29; 84 L. T. 331—Barnes, J.

265. *Written Demand for Cohabitation and Restitution of Conjugal Rights—Form—Rules and Regulations in Divorce and Matrimonial Causes, r.* 175.]—In cases of restitution of conjugal rights it is not reasonable to expect that a woman should write a preliminary letter to her husband, in compliance with rule 175 of the Divorce and Matrimonial Rules and Regulations, of an affectionate character. It is sufficient if it is shown that a clear request has been made to the husband, that it has been received by him, and that he has failed to comply with it.

ELLIOTT *v.* ELLIOTT, (1902) 85 L. T. 648— [Jeune, P.

266. *Defence — Drunken Habits of Wife — Habitual Drunkard — Counter-petition.*]—In a suit by a wife for restitution of conjugal rights it was proved, in answer to the suit, that the wife had for a considerable period been addicted to drink, that at one time she was in a condition bordering on *delirium tremens*, that the disease was progressive, and that she was at times

Restitution of Conjugal Rights—*Continued.*

dangerous to herself and possibly to her children.

HELD, upon the evidence, that the husband had proved that he had just cause for withdrawing from cohabitation and refusing to return to his wife; that the petition should be dismissed and no order made for the wife's costs, as there was no reasonable ground for instituting the suit; but that the facts did not entitle the husband to a decree of judicial separation.

BEER *v.* BEER, (1906) 54 W. R. 564; 94 L. T. [704; 22 T. L. R. 338 –Barnes, P.

See also Nos. 70, 80, 81, *supra*.

XIV. VARIATION OF SETTLEMENTS.

267. Where under a marriage settlement a wife has power to resettle settled property in the event of surviving her husband and marrying again, and, having been divorced, has married the co-respondent during her husband's lifetime, the Court may make an order preventing any re-settlement on any husband married, or children born, during the husband's lifetime.

Noel v. *Noel* (10 P. D. 179) commented on, but followed.

The Court will not make payment to a father, for maintenance of a child, conditional on the latter residing with the father and being under his control, on the ground that after sixteen the child may wish to reside with the divorced wife.

Payment to a child of an annual sum after attaining majority, to which he is not entitled under the settlement, will not be refused on the ground that he may receive larger benefits from the wife.

DAY *v.* DAY AND ERSKINE, (1898) 78 L. T. 358 [—Jeune, P.

268. The fact that, by reason of dissolution of a marriage in consequence of a wife's misconduct, an annuity provided by the husband will not be payable to the wife, and will be lost to the family, is a detriment to the children, and a ground for compensating them out of the wife's property brought into settlement.

NEWALL *v.* NEWALL, (1898) 78 L. T. 203— [Jeune, P.

269. *Ultimate Limitation to Next of Kin.*]—Where under a marriage settlement there is a limitation of the wife's settled property in the event of failure of issue upon such trusts as she should by will or codicil appoint, and in default of appointment to her absolutely if she survive the husband, but if she die in his lifetime upon trust for her next of kin, the Court may, if she obtain a decree *nisi* without issue born, order the settled property to be reconveyed to her freed from the trusts of the settlement.

WYNNE *v.* WYNNE (No. 2), (1898) 78 L. T. 796 — [Jeune P.

* *And see* No. 275, *infra*.

270. *Income of Funds—Extinguishing Power of Appointment—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 45—*Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 5.]—The guiding principle running through the cases is: where the breaking up of the family life has been caused by the fault of the respondent, the wife, the Court, exercising its powers under the 5th section of the Matrimonial Causes Act, 1859, ought to place the petitioner and the children in a position as nearly as circumstances will permit the same, as if the family life had not been broken up.

Where the trust funds are settled, as is usual, upon the parents successively, or upon one of them for life, with remainder to the children, the Court, while it might extinguish the whole or part of the guilty parent's life interest and his or her power of appointment, if any, amongst the children, would not interfere to deprive the children of those interests to which they are entitled under the settlement.

Where the children become entitled under a marriage settlement to the fund on attaining twenty-one, or, if daughters, on marrying, subject, however, to the respondent's life interest, and to the power of appointment by the respondent, so that if the respondent should exercise that power, to the extent to which she does so, the benefit to be derived by the children from the fund is postponed till after their father's death; that is to say, the children's interests vary according as the power is exercised or not. If the family life had continued, it is most natural to expect, where he has no interest in his wife's money conferred by the settlement, except so far as she might give him a benefit by the exercise of the power in question, that if she died before him she should leave a will exercising the power in his favour.

HELD—that on the wife's divorce, she being guilty, the settlement must be varied by extinguishing all the wife's power of appointment, and half the income, as long as the respondent lived, must be given to the husband, and a portion of it further secured to him after her death.

HARTOPP *v.* HARTOPP, [1899] P. 65; 68 L. J. P. [33; 80 L. T. 297; 15 T. L. R. 168—Barnes, J.

271. *Income of Guilty Wife — Reversionary Interest of Guilty Wife—Allowance for Husband and Children — Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *ss.* 32, 45.]—The very first thing to do in ascertaining what settlement is to be made—whether under sect. 45 of the Divorce Act, 1857, or any other—when dealing with income, is to see not what the trustees receive in respect of the share of the person ordered to settle, but what the person ordered to settle receives from the trustees after keeping down those charges which are out of his or her power to get rid of.

The Court has jurisdiction to order a settlement of the guilty wife's reversionary interest, even although it is limited to income and does not extend to the capital sums. When a woman by her own fault has broken up a family of which she was a part, the Court must endeavour to

Variation of Settlements —*Continued.*

put the husband and the children, as far as money goes, in the same position as they would have been if she had not broken it up. The allowance for a child may be paid after he has attained twenty-one.

March v. *March* ((1867) L. R. 1 P. & M. 440) and *Noel* v. *Noel* ((1884) 10 P. D. 179; 54 L. J. P. 73; 33 W. R. 552) applied.

SAVARY *v.* SAVARY, (1899) 79 L. T. 607—C. A.

272. *Husband's Petition — Decree granted in spite of his Adultery — Retrospective Order — Wife's "protected" Life Interest — Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 5.]—The Court, in exercising its discretion under sect. 5 of the Matrimonial Causes Act, 1859, as to the variation of settlements after a final decree of divorce, will take into consideration (*inter alia*) the conduct of both parties and will act in the interests of public morality.

A husband obtained a decree, although after his wife had left him he had frequently committed adultery, the Court being of opinion that his conduct had not conduced to her adultery, but that her conduct had led to his. He thereupon applied for variation of their marriage settlements.

HELD by the Court of Appeal, who took a graver view of his conduct than the judge below had done—that any order varying the settlement in his favour ought to be refused except one extinguishing the wife's interest in moneys settled by him.

The Court, in varying settlements, cannot exercise its jurisdiction retrospectively, nor can it deal with a wife's "protected life interest."

March v. *March and Another* ((1867) L. R. 1 P. & M. 440) applied.

Decision of Jeune, P. (92 L. T. 473; 21 T. L. R. 107) reversed.

CONSTANTINIDI *v.* CONSTANTINIDI, [1905] [P. 253; 74 L. J. P. 122; 54 W. R. 121; 21 T. L. R. 651; 93 L. T. 651—C. A.

And see No. 165, *supra.*

273. *Wife's Property given back to her freed from all Trusts—Re-marriage of Wife.*]—The Court has power to give back to the wife, freed from all trusts, the property which she brought into settlement on her marriage when she has obtained a decree dissolving such marriage and has re-married, and also all after-acquired property which was given to her absolutely.

MERTON *v.* MERTON, (1900) 83 L. T. 223—[Barnes, J.

274. *Extinguishment of Respondent's Life Interest—Acceleration of Children's Interest — Power to appoint to future Husband and his Children—Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 5.]—By an ante-nuptial settlement property was settled on the wife for life, and after her death for the husband for life, and after the death or other determination of his life interest in trust for the children, as they or the survivor of them should appoint. It was also provided that if the wife should marry again she should have power to appoint the income of £5,000 to her future husband after her decease, and subject thereto the capital and income thereof in trust for the issue of such future marriage as she should appoint. The husband and wife were divorced by reason of his cruelty and adultery. She now asked that her former husband's interest in the settlement should be extinguished, and that her power to appoint the £5,000 in favour of any future husband and children might be exercised, though her former husband was alive.

HELD—that the former husband's interests might be treated as abolished, as if he were dead, which would enable the wife to make the appointment of £5,000 upon a future marriage, more especially as the children of the first marriage would thus get a very substantial benefit in the shape of an acceleration of their interests, owing to the former husband's interest being struck out.

WHITTON *v.* WHITTON, [1901] P. 348; 71 L. J. [Ch. 10; 85 L. T. 646—Jeune, P.

275. *Husband's Property—Extinguishment of Respondent's Interest—Life Interest of Petitioner to be operative—Refusal to vest Property entirely in Petitioner.*]—The petitioner (husband) obtained a decree absolute for a divorce in 1900. There was no issue of the marriage. By an ante-nuptial settlement certain property was brought into settlement by the petitioner, who took the first life interest therein "until he should become bankrupt, or should assign, charge, or otherwise dispose of the same, or attempt" so to do, or "until he should do some act, or some other event should occur, whereby the income, if payable to himself, would become vested in some other person or persons," or until his death, whichever should first happen. The respondent was to take the second life interest during her widowhood. There was an ultimate trust in favour of the next of kin of the petitioner, but to take effect only after the decease of the respondent if she should have married again and again become a widow. In 1899 the petitioner had given an undertaking, embodied in a Chancery order, to the effect that he would apply forthwith to vary the trusts so as to vest the remaining settled property in himself absolutely, and give a certain charge on his interest in that property in favour of certain trustees. The petitioner after the divorce contracted a second marriage. Upon a motion by the petitioner to confirm the registrar's report upon a petition to vary the marriage settlement:—

HELD—that the interests of the respondent must be extinguished; and, subject to the engagement which the petitioner had entered into in the Chancery Division, the petitioner's life interest would become operative; that the result of the order would be that during the petitioner's life there would be a resulting trust of the income which would be subject to the charge; and that the Court could not go so far

Variation of Settlements—*Continued.*

as to direct that the property remaining in the settlement was to vest entirely in the petitioner.

Meredyth v. *Meredyth and Leigh* ([1895] P. 92; 64 J. P. 54; 43 W. R. 304; 72 L. T. 898; 11 R. 651—Jeune, P.), and *Wynne* v. *Wynne* ((1898) 78 L. T. 796—Jeune, P., *see* No. 269, *supra*) distinguished.

WALPOLE *v.* WALPOLE, [1901] P. 196; 70 [L. J. P. 49; 84 L. T. 727—Jeune, P.

276. *Nullity*—"*Property settled*"—*Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 Vict. *c.* 19), *s.* 3.]—The Court has jurisdiction to make an order with reference to the application of settled property under sect. 5 of the Matrimonial Causes Act, 1859, as amended by sect. 3 of the Matrimonial Causes Act, 1878, in a case in which there has been a decree of nullity of marriage on the ground of impotence.

The Court has power in such a case not only to make orders with reference to the application of the property settled amongst the beneficiaries contemplated by the settlement, but also for application of the property settled in favour of persons outside the settlement and under conditions outside the settlement. In other words, the Court must read in the settlement child or children as meaning a child or children who are not issue of a marriage, and who are, therefore, illegitimate, and must read marriage as including a connection which is no marriage at all, being a voidable marriage which has been avoided.

A settlement which began with a recital of an intended marriage witnessed that, in consideration of the intended marriage, the intended husband, E. G. W., covenanted with trustees that he would, during the joint lives of himself and G. J. D., his intended wife, pay them a yearly sum of £200 by quarterly payments, and that the trustees should pay the said £200 to G. J. D., without power of anticipation. The marriage took place, and was annulled on the ground of the husband's impotence.

HELD—that this covenant could not be enforced after a decree of nullity without an order under sect. 5 of the Matrimonial Causes Act, 1859, and that the Court should make the order for the application for the benefit of G. J. D. of the yearly sum of £200.

By the same settlement a jointure rent-charge was limited and appointed to G. J. D. and a term of 1,000 years to secure it, but the jointure and term were not to commence till after the death of E. G. W.

HELD—that the Court by the exercise of its power, under sect. 5 of the Matrimonial Causes Act, 1859, could not vary the settlement by ignoring the condition as to commencement, and that this applied also to a power to raise £20,000 contained in the settlement which could not be raised during the lifetime of E. G. W. without his consent, which had not been given.

Decision of Barnes, J. ([1900] P. 130; 69 L. J. P. 65; 48 W. R. 524; 82 L. T. 469; 16 T. L. R. 220) reversed.

DORMER *v.* WARD, [1901] P. 20; 69 L. J. P. 144; [49 W. R. 149; 83 L. T. 556; 17 T. L. R. 12—C. A.

277. *Nullity—Absolute Assignment—Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 5.]—An absolute assignment made by a husband to his wife during the marriage is not a "settlement" within sect. 5 of the Matrimonial Causes Act, 1859, and after the dissolution of the marriage on the ground of nullity the Court has no power to vary it.

Chalmers v. *Chalmers* ((1893) 1 R. 504; 68 L. T. 28—Jeune, P.) approved.

HUBBARD *v.* HUBBARD, [1901] P. 157; 70 [L. J. P. 34; 84 L. T. 441—C. A.

278. *Nullity—Wife's Petition—Interest of Each Party in the Funds of the Other Extinguished—Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 5.]—By an ante-nuptial settlement, the wife's funds were held in trust for her for life for her separate use without power of anticipation, and then for the husband for his life, and then in default of any issue, over. The husband's trust funds were held in trust for the husband for life, and then for the wife for life for her separate use without power of anticipation, and then, in default of children, for the husband absolutely. The wife obtained a decree for nullity of marriage on the ground of the husband's incapacity. She petitioned for variation of settlements.

HELD—that the interest of each party should be extinguished in the funds of the other, and that the husband's funds should be released and transferred back to him by the trustees; and the wife's funds would be resettled on her with her father's sanction, and remain vested in the trustees under the settlement; and that the husband must pay the costs of the trustees, as they were bound to be present.

ATTWOOD (otherwise POMEROY) *v.* ATTWOOD, [(1902) 71 L. J. P. 129; 18 T. L. R. 833; [1903] P. 7—Barnes, J.

279. *Husband's Property—Husband's Interest Extinguished—Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 5.]—After a divorce on the wife's petition the Court extinguished the husband's life interest in the property included in the marriage settlement, the income of which amounted to £45 a year, and the whole of which had been brought into settlement by him. There was one child of the marriage, who had not attained a vested interest.

HELD—that this was a proper exercise of the discretion of the Court in the interests of the wife and child.

KAYE *v.* KAYE, (1902) 50 W. R. 499; 86 L. T. [638—C. A.

280. *Husband's Property—Petition by Guilty Party—Jurisdiction to Entertain.*]—By a post-nuptial settlement the husband assigned certain

Variation of Settlements—*Continued.*

property to trustees upon trust out of the income therefrom to pay to the wife during her life for her separate use without power of anticipation an annuity of £2,000 to abate proportionately in certain events. The wife was out of the said annuity to bear and pay the expenses of the joint establishment of husband and wife. The marriage was dissolved at the suit of the wife by reason of the cruelty and adultery of the husband. The husband petitioned the Court to vary the settlement. The wife had no separate estate. The petitioner's income was £4,700 per annum.

HELD—that assuming the facts alleged in the petition to be accurate, and assuming that the Court had jurisdiction to deal with the settlement at the instance of the guilty party, the case was not one in which the Court ought to make any order varying the settlement, because if a husband chooses to break up the joint matrimonial establishment by departing from it, the Court ought not to reduce the wife's allowance on that ground.

WOOTTON-ISAACSON *v.* WOOTTON-ISAACSON, [1902] P. 146 ; 71 L. J. P. 80 ; 87 L. T. 147 : 18 T. L. R. 581—Barnes, J.

281. *Policy on Husband's Life—Policy Payable at Fixed Date to Husband if alive, and if not to Wife—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 45—*Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 5.]—A wife had certain rights under a policy which her husband had taken out on his life in 1891. On April 25th, 1900, the husband obtained a decree *nisi* for the dissolution of his marriage, which was made absolute on November 5th, 1900, by reason of his wife's adultery.

HELD—that the wife ought to be compelled to settle her interest in the policy for the benefit of the husband and his children.

STEDALL *v.* STEDALL, (1902) 50 W. R. 320 ; 86 [L. T. 125 ; 18 T. L. R. 254—Jeune, P.

282. *Wife's Property—Share Vested in Son who Died Intestate—Guilty Husband's Derivative Interest as Next of Kin Extinguished—Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 5.]—A wife upon her marriage settled her property upon herself for life, and after her death upon her husband for life, with remainder to the children of the marriage. There was one child of the marriage, a son, who attained twenty-one and obtained a vested interest in the property. The wife then obtained a decree *nisi* for a dissolution of the marriage, and before the decree was made absolute the son died intestate and unmarried. After the decree *nisi* had been made absolute she applied for an order extinguishing the husband's interest in the property, as, the son having died intestate, the husband had become entitled to the son's interest in the property.

HELD—that the Court had jurisdiction under sect. 5 of the Matrimonial Causes Act, 1859, to order that the life interest of the respondent, the husband, and all the rights, powers, and interests of the respondent, including any beneficial derivative interest of the respondent as next of kin of his son, in, concerning, or over the whole or any part of the capital and income of the petitioner's settled funds should be extinguished and vested in the petitioner, but without prejudice to the rights of any person deriving title from the son, whether they were mortgagees or assignees, or creditors, or any other persons except the respondent.

Crisp v. *Crisp* ((1872) L. R. 2 P. & M. 426 ; 42 L. J. Mat. 13 ; 21 W. R. 79 ; 27 L. T. (N.S.) 428) discussed.

Decision of Barnes, J. ([1902] P. 78 ; 71 L. J. P. 40 ; 65 J. P. 823 ; 50 W. R. 138 ; 86 L. T. 121 ; 18 T. L. R. 73) affirmed and order varied.

BLOOD *v.* BLOOD, [1902] P. 190 ; 71 L. J. P. 97 ; [50 W. R. 547 ; 86 L. T. 641 : 18 T. L. R. 588—C. A.

283. *Error of Court in Drawing up Order—Order Settled and Passed—Appeal against Order Pending—Order nevertheless Rectified.*]—After judgment in a nullity suit, an attempt was made to agree the order necessary to give effect to the judgment : the attempt being unsuccessful, the order was drawn up in common form ; the respondent entered an appeal, and then applied to have the order drawn up "so as to read in accordance with the orders actually made."

HELD—that there had been a mistake on the part of the Court and registrar, and that the order could be rectified.

E. *v.* E. (otherwise T.), [1903] P. 88 ; 72 L. J. P. [44 ; 88 L. T. 570—Jeune, P.

284. *Petition for—Effect as a* lis pendens—*Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 5.]—A petition for the variation of settlements cannot be heard until after decree absolute ; but if filed, it operates as a *lis pendens*, and nothing done after decree absolute, but before the hearing, can affect the power of the Court to vary the settlements.

CONSTANTINIDI *v.* CONSTANTINIDI AND LANCE, [1904] P. 306 ; 73 L. J. P. 91 ; 91 L. T. 273 ; 20 T. L. R. 573—C. A.

285. *Life Interest of Guilty Wife—Provision for Adult Daughters—Matrimonial Causes Acts*, 1857 (20 & 21 Vict. *c.* 85), *s.* 45, *and* 1859 (22 & 23 Vict. *c.* 61).]—A husband, who had obtained a divorce from his wife, had a large fortune of his own not settled. There were two settlements :—the R. settlement of £2,800 per annum, of which (subject to one prior life interest) the wife had £1,000 for pin money and the husband £1,800, the wife having an ultimate power of appointment among the children (two daughters aged 17 and 21) ; and the B. settlement of £4,900, of which (subject to two prior life interests) half went to the husband and half to the wife : there were also settled heirlooms.

The settlements, &c., were varied as follows :—

(1.) Extinguish the wife's interest in her husband's property as if she were dead.

Variation of Settlements—*Continued.*

(2.) Extinguish her powers of appointment to children of the marriage under the settlements, and empower the trustees to themselves appoint new trustees if necessary.

(3.) Suspend during the husband's life her power under the settlements to appoint to a future husband or children.

(4.) Vest the heirlooms in trustees for the husband and children.

(5.) Provide a sufficient present income for the daughters in the manner indicated by the Court's judgment.

BEAUCHAMP *v.* BEAUCHAMP AND WATT, [(1904) 20 T. L. R. 273—C. A.

286. *Child born after Decree* Nisi—*Issue directed to determine Legitimacy.*]—Upon a petition to vary a marriage settlement after decree absolute for a divorce, the Court directed an issue in order to determine the paternity of a child born after the decree *nisi*, which the husband (the petitioner) alleged to be illegitimate.

In re Chaplin ((1867) L. R. 1 P. & M. 328; 36 L. J. P. 49; 16 L. T. 154) and *Douglas* v. *Douglas* ((1898) 78 L. T. 88 — Jeune, P., No. 219, *supra*) discussed.

EVANS *v.* EVANS AND BLYTH, [1904] P. 274; [73 L. J. P. 87; 91 L. T. 356; 20 T. L. R. 516—Barnes, J.

And see No. 225, *supra.*

287. *No Issue of Marriage—Re-conveyance of Trust Property to Innocent Settlor—Interests of Unborn Nephews and Nieces — Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 5.]—Upon A.'s marriage she settled property bringing in £240 per annum, the ultimate trust in default of issue being for her brothers and sisters and the children of any of them who might be dead.

A. divorced her husband, who had an income of £150 a year. None of her brothers and sisters were yet married, and they were all willing for the interests of themselves and their possible issue to be extinguished. Unless this was done, A. could make no provision for any child she might have by a future husband.

HELD—that all interests under the settlement other than A.'s should be extinguished, and the trust property re-conveyed to her.

MORRISSEY *v.* MORRISSEY, [1905] P. 90: 74 [L. J. P. 11; 92 L. T. 476—Jeune, P.

288. *Power to appoint Part of Settled Fund on Petitioner's Second Marriage—Interests of Children—Matrimonial Causes Act*, 1859 (22 & 23 Vict. *c.* 61), *s.* 5.] —A marriage settlement gave to the husband, if he should survive his wife and if there should be but one child of the marriage, power to appoint by deed or will two-thirds of the capital of the fund which he brought into settlement in favour of a future wife and the issue of a second marriage. There was one child of the marriage. A decree absolute for dissolution having been obtained, the husband, who was the petitioner, applied to have the settlement varied by allowing him at once to settle two-thirds of his fund in favour of a second wife and her issue, as though his divorced wife was dead.

HELD—that the Court had jurisdiction to make the order; but that, in the interest of the child, which had primarily to be considered, it would only allow, during the divorced wife's life, the power of appointment to be exercised as to one-third of the fund.

Whitton v. *Whitton* ([1901] P. 348; 71 L. J. P. 10; 85 L. T. 646—Jeune, P., No. 274, *supra*) followed.

HODGSON-ROBERTS *v.* HODGSON-ROBERTS AND [WHITAKER, [1906] P. 142; 75 L. J. P. 48; 94 L. T. 621; 22 T. L. R. 395—Barnes, P.

See also 195, 219, 225.

XV. SUMMARY PROCEEDINGS IN MATRIMONIAL CAUSES.

(a) Cruelty and Drunkenness.

289. *Persistent Cruelty.*]—*Semble*, that a number of acts of cruelty committed on one day may amount to persistent cruelty.

BROAD *v.* BROAD, (1898) 78 L. T. 687—Div. Ct.

290. *Summary Jurisdiction—Conviction for Persistent Cruelty—Form of Order.*]—An order made under the Summary Jurisdiction (Married Women) Act, 1895, should not omit to recite that the defendant was convicted of the complaint, as that is the very essence of the order.

BULLIVANT *v.* BULLIVANT, (1902) 18 T. L. R. [317—Barnes, J.

291. "*Habitual Drunkard*"—*Habitual intemperate drinking—What constitutes—Licensing Act*, 1902 (2 Edw. 7, *c.* 28), *s.* 5 (1)—*Habitual Drunkards Act*, 1879 (42 & 43 Vict. *c.* 19), *s.* 3 (3) (*b*).]—The word "habitual" is not explained or defined in the Habitual Drunkards Act, 1879, and it is in each case a question of fact whether drunkenness is only occasional or is habitual within the meaning of that Act.

ROBSON *v.* ROBSON, (1904) 68 J. P. 416—Div. Ct.

(b) Desertion.

292. *Appeal from Magistrates—Form of Order — Ord.* lix., *rr.* 4A *and* 7 — *Jurisdiction.*] — B. and his wife resided at W. On various occasions the wife left B. and went to her father at P. For some time husband and wife lived apart, and the husband gave the wife an allowance, but no definite agreement for separation was arrived at. The wife took out a summons at W. against B. for desertion under sect. 4 of the Summary Jurisdiction (Married Women) Act, 1895. The summons was dismissed. The wife subsequently returned to the husband's house, and the husband after several days' absence informed her that he was giving up the house and she must find a home for herself. The wife's furniture was removed from the house on May 14th. The wife went to P., and took out a similar summons there against B.

Summary Proceedings in Matrimonial Causes— *Continued.*

HELD—that the magistrates were justified in deciding that the facts constituted desertion by B.

HELD, also, that desertion being a continuing offence and the wife having been driven to P. by B.'s acts, the magistrates at P. had jurisdiction to make an order against B.

The order of the magistrates contained no finding that B. had been guilty of desertion.

HELD, further, that, though the order was irregular, the Court had power to make a fresh order under Ord. lix., rr. 4A and 7, and that a fresh order ought to be made in the terms of the order appealed against.

BROWN *v.* BROWN, (1898) 62 J. P. 711; 79 L. T. [102—Div. Ct.

293. *Maintenance—Wilful neglect to maintain Wife—Causing Wife to leave and live apart.*]—Husband and wife had been living apart for many years, when the husband returned and resumed cohabitation with his wife at his wife's house. The wife then went to her husband's house, but her husband refused her admission.

HELD—that the husband caused his wife to leave and live apart from him within the meaning of sect. 4 of the Summary Jurisdiction (Married Women) Act, 1895.

SNAPE *v.* SNAPE, (1900) 64 J. P. 793; 17 T. L. R. [19—Div. Ct.

294. *Summary Jurisdiction—Copies of Notes of Evidence and Decision—Duty of Justices' Clerk.*]—On an appeal to the Probate, Divorce and Admiralty Division of the High Court of Justice from an order of justices under the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the justices' clerk to supply to the Court, first, two copies of the notes of the evidence; secondly, the decision of the justices; and thirdly, the reasons of the justices for their decision.

Desertion is a continuing offence, and a Court of summary jurisdiction acting for any place in which the deserted wife is residing for the time being, has jurisdiction under the Act to make a separation order.

COBB *v.* COBB, [1900] P. 145; 69 L. J. P. 52; [64 J. P. 106, 200; 82 L. T. 626—Div. Ct.

And see Nos. 320, 321 *infra.*

295. *Compelling Wife to leave the House—Intention to break off Matrimonial Relations—Costs.*]—To constitute desertion it is not necessary that the husband should actually have turned his wife out of doors; it is sufficient if, by his conduct, he has compelled her to leave the house, the question being whether it was the husband's intention to break off matrimonial relations.

Where a husband and wife quarrelled, and the husband said, "Go where you like, do what you like," and the wife took him at his word, and when he asked her to return home she refused to do so:—

HELD—that the husband was not guilty of desertion.

CHARTER *v.* CHARTER, (1901) 84 L. T. 272; 17 [T. L. R. 327—Jeune, P.

296. *Meaning of—Reasonable Ground for refusing to cohabit—No actual Adultery—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *ss.* 27, 31.]—The word "desertion" in sect. 4 of the Summary Jurisdiction (Married Women) Act, 1895, has the same meaning as in the Matrimonial Causes Act, 1857, *i.e.*, it does not mean refusal to cohabit *simpliciter*, but refusal to cohabit without reasonable cause.

Therefore, where, on an application by a wife for a separation order on the ground of desertion, it was admitted that she had not committed adultery:—

HELD, nevertheless, that the husband was entitled to cross-examine her to show that her conduct justified him in refusing to cohabit.

FROWD *v.* FROWD, [1904] P. 177; 73 L. J. P. 60; [68 J. P. 436; 90 L. T. 175—Div. Ct.

297. *Desertion and Adultery of Husband.*]—A summary separation order under the Act of 1895 cannot alter or abridge the jurisdiction of the High Court under the Matrimonial Causes Act. Therefore sect. 5 (a) of the Act of 1895 is to be read with the qualification that no order made under it can oust the jurisdiction of the Divorce Court, and for the purposes of a divorce petition desertion may continue while a separation order is in force.

SMITH *v.* SMITH, [1905] P. 249; 74 L. J. P. 113; [93 L. T. 457; 54 W. R. 220—Deane, J.

Note.—Not followed in *Dodd* v. *Dodd*, [1906] P. 189, *infra.*

298. *Summary Separation Order—Effect of as preventing continuance of Desertion—Order obtained within two years of Desertion a Bar to Divorce on ground of Adultery and Desertion—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *ss.* 27, 31.]—The Summary Jurisdiction (Married Women) Act, 1895, has not altered the provisions of the Matrimonial Causes Act, 1857, as to the grounds for granting decrees of divorce.

A non-cohabitation or separation order under the Act of 1895 has the effect of preventing a continuance of legal "desertion," even if there has been such desertion prior to its date.

Therefore a deserted wife who obtains such an order within two years of the first desertion is thereby debarred from subsequently obtaining a divorce on the ground of desertion and adultery.

Justices should not grant such orders where the wife's safety does not require it, and where a maintenance order is sufficient.

Smith v. *Smith* ([1905] P. 249; 74 L. J. P. 113; 93 L. T. 457—Deane, J., *supra*) and *Levy* v. *Levy* (21 T. L. R. 157—Jeune, P.) not followed.

DODD *v.* DODD, [1906] P. 189; 75 L. J. P. 49; [70 J. P. 163; 54 W. R. 541; 94 L. T. 709; 22 T. L. R. 484—Barnes, P.

See also 300, 308, 309.

Summary Proceedings in Matrimonial Causes— *Continued.*

(c) Evidence.

299. *Practice—Affidavit—Fresh Evidence.*]—Except in very rare instances, no fresh evidence will be received by the Divisional Court on the hearing of appeals from orders made under the Summary Jurisdiction Act, 1895. The note to be taken by the clerk to the justices on the hearing of summonses under the Act, and which is to be furnished to either party, or the solicitor for either party, on application, will be accepted by the Divisional Court, on the hearing of appeals, as a *primâ facie* statement of the facts; but if the note is defective, an affidavit will be received in order to supplement the statement of what took place in the Court below, but no fresh facts, which were not tendered in evidence before the justices, should be introduced into the affidavit.

SNAPE *v.* SNAPE, (1898) 62 J. P. 153—Div. Ct.

300. *Variation of Order—"Fresh Evidence"—Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 Vict. *c.* 39), *s.* 7.]—Sect. 7 of the Summary Jurisdiction (Married Women) Act, 1895, enacts that the "Court of summary jurisdiction . . . may, on the application of a married woman or her husband, and upon cause being shown upon fresh evidence to the satisfaction of the Court at any time, alter, vary, or discharge such order, &c."

HELD—that "fresh evidence" meant evidence which had not come to the party's knowledge wishing to call it at the time of the trial, or evidence which he could not then have called; but not evidence which could have been called and was not.

JOHNSON *v.* JOHNSON, [1900] P. 19; 69 L. J. P. [13; 64 J. P. 72; 81 L. T. 791; 16 T. L. R. 26 —Div. Ct.

301. *Desertion — Husband's refusal to take Wife back — Evidence of antecedent Circumstances.*]—A wife called at her husband's house, accompanied by a policeman, and asked to be taken back. The husband refused to take her back. The wife then took out a summons against her husband for desertion. At the hearing of the summons the husband admitted the wife's demand to be taken back, and his refusal; but sought to give in evidence circumstances antecedent to the day of his refusal. The justices refused to go into such evidence, and held that such refusal was enough to prove desertion.

HELD—that such evidence was clearly material and ought to have been admitted; that the refusal of the husband to take back his wife on one particular day was not in itself enough to constitute desertion.

WASSELL *v.* WASSELL, (1899) 68 L. J. P. 127; [81 L. T. 496—Div. Ct.

302. *Desertion — Maintenance — Husband's Means.*]—On an application by a wife for maintenance under the Summary Jurisdiction (Married Women) Act, 1895, after desertion, it being shown that a relative of the husband had undertaken to provide £1 a week for the wife, the justices ordered the husband to pay that sum weekly for maintenance.

HELD (affirming the decision of the justices)—that there was evidence upon which the justices might make such order, and if the husband was unable to pay, he might show cause upon fresh evidence before the justices to have the order varied or discharged.

WALTON *v.* WALTON, (1900) 64 J. P. 264— [Jeune. P.

303. Res Judicata—*Fresh Evidence.*]—A wife took out a summons against her husband for neglecting to support her, and he subsequently returned to live with her until she gave birth to a child, the paternity of which the husband denied. She then took out another summons charging her husband with neglecting to maintain her, and thereby causing her to leave and live apart from him. That second summons was dismissed, and she thereupon took out a third summons charging persistent cruelty, wilful neglect, and desertion. This summons was also dismissed. She thereupon took out a fourth summons identical in terms with the second summons. The magistrate convicted on the fourth summons.

HELD—that the conviction was right.

FLETCHER *v.* FLETCHER, (1901) 64 J. P. 807— [Div. Ct.

304. *"Fresh Evidence"—Powers in relation to Rescission of Orders — Time within which Applications to rescind Orders must be made —Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 Vict. *c.* 39), *s.* 7.]—"Fresh evidence," within the meaning of sect. 7 of the Summary Jurisdiction (Married Women) Act, 1895, means practically the same sort of evidence as that upon which a new trial would, in the ordinary course, be granted; it may be evidence relating to something which has happened since the former hearing or trial, or it may be evidence which has come to the knowledge of the party applying since the hearing or trial, and which could not by any reasonable means have come to his knowledge before that time.

The six months' limit mentioned in sect. 11 of the Summary Jurisdiction Act, 1848, has no reference to an application to discharge an order, but refers to a complaint.

Johnson v. *Johnson* ([1900] P. 19; 69 L. J. P. 13; 64 J. P. 72; 81 L. T. 791—Div. Ct., No. 300, *supra*) approved and followed.

WEIGHTMAN *v.* WEIGHTMAN, (1906) 70 J. P. [120; 94 L. T. 621; 22 T. L. R. 362—Div. Ct.

305. *"Fresh Evidence."*] — In 1887 the appellant was deserted by her husband, who went to New Zealand. Believing him dead, in 1895 she went through the ceremony of marriage with the respondent. In March, 1906, the appellant obtained against the respondent a separation order under the Summary Jurisdiction (Married Women) Act, 1895. At this date the respondent had written to New Zealand for a

Summary Proceedings in Matrimonial Causes— *Continued.*

certificate of the death of the husband, but the same had not been received. In May, 1906, the respondent, having in the meanwhile received the certificate in question, applied to discharge the order on the ground that the husband of the appellant was alive at the time of the ceremony of marriage in 1895. At this hearing hearsay evidence was given in support of the contention of the respondent, and evidence was received of a statement by the appellant to the effect that her husband was alive at the time of the ceremony in 1895, and a certificate of his death was forthcoming, but no evidence of identification. At an adjourned hearing of the application by the respondent on July 11th, 1906, the stipendiary magistrate discharged the separation order. On appeal on the grounds, *inter alia*, that there was no "fresh evidence" within the meaning of the Act before the stipendiary magistrate, and that there was no evidence of anything that had occurred since the order :—

HELD—that the certificate was, in this case, "fresh evidence," as it could not have been previously obtained, and the respondent had been in fact ignorant of its existence, and that the stipendiary magistrate had sufficient evidence before him to justify the discharge of the separation order.

Johnson v. *Johnson* ([1900] P. 19 ; 69 L. J. P. 13 ; 64 J. P. 72 ; 81 L. T. 791—Div. Ct., No. 300, *supra*) distinguished.

GROVES *v.* GROVES, (1907) 71 J. P. 167—[Div. Ct.

(d) Jurisdiction.

306. *Common Assault by Husband.*]—A husband was found guilty of a common assault upon his wife, and was bound over to come up for judgment when called upon. On an application under sect. 4 of the Summary Jurisdiction (Married Women) Act, 1895, asking the judge to grant the wife a separation order and to say that she should no longer be compelled to live with her husband :—

HELD—that the section did not apply to such a case.

REG. *v.* CORRIGAN, (1898) 62 J. P. 522—[Wright, J.

307. *Husband convicted upon Indictment of an Assault—Throwing Corrosive Fluid.*]—Where a husband was convicted at assizes upon indictment of throwing a corrosive fluid on his wife with intent to burn, and sentenced to a term of imprisonment exceeding two months, an order, on the application of the wife, was made by the judge presiding at the trial under sects. 4, 5, of the Summary Jurisdiction (Married Women) Act, 1895, that she be no longer bound to cohabit with her husband.

REG. *v.* KNOWLES, (1901) 65 J. P. 26—Ridley, J., [Manchester Assizes.

308. *Withdrawal of Summons—Effect of—Fresh Summons on the same Ground cannot be issued—Objection as to Time not taken in Court below—Costs.*]—The withdrawal of a summons under the Summary Jurisdiction (Married Women) Act, 1895, can only take place by leave of the justices or magistrate. If that leave is given and the summons is withdrawn that amounts to a consent by the Court ; and that involves the effect that the complaint upon which the summons was founded necessarily falls to the ground. The Court having once given its consent to the withdrawal, is not competent to revive it again by issuing a fresh summons on the same ground.

Where the husband did not take the point in the Court below as to the complaint being out of time, but took it and succeeded on appeal, the wife had her costs on the appeal.

PICKAVANCE *v.* PICKAVANCE, [1901] P. 60 ; 70 [L. J. P. 14 ; 84 L. T. 62—Div. Ct.

309. *Desertion — Jurisdiction — Condonation—Effect of.*]—Condonation of an offence within the meaning of the Summary Jurisdiction (Married Women) Act, 1895, extinguishes the cause of complaint.

A wife took out a summons complaining of desertion ; the summons was adjourned, and in the interval the parties resumed cohabitation.

HELD—that the cause of offence was blotted out, and that the justices had nothing to adjudicate on.

WILLIAMS *v.* WILLIAMS, [1904] P. 145 ; 73 [L. J. P. 31 ; 68 J. P. 188 ; 90 L. T. 174 ; 23 T. L. R. 213—Div. Ct.

310. *Desertion—Petition for Divorce Pending in the High Court.*]—Where proceedings are pending in the Divorce Division of the High Court between husband and wife, justices ought not to entertain any application by the wife against her husband under the Summary Jurisdiction (Married Women) Act, 1895. In October, 1906, a husband filed a petition for divorce, and an order was made for a weekly payment of alimony to the wife *pendente lite*. The weekly payments were made down to January 4th, 1907. On February 19th, 1907, an order was made by the President that the petitioner should pay the respondent her taxed costs, and should deposit £20 in Court as security for the wife's costs, and the usual order was made staying the suit until the order was complied with. On April 15th, 1907, a summons was taken out by the wife under sect. 4 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground that the husband had deserted her. The justices made an order, dated April 22nd, for separation and maintenance, and recited in the reasons they gave for their decision that "the husband not going on with his proceedings in the High Court, that Court, by the registrar, ordered a stay of proceedings therein."

HELD—that, as the divorce suit was still pending, there could be no desertion, and the justices had no jurisdiction to make the order.

CRAXTON *v.* CRAXTON, (1907) 71 J. P. 399 ; 23 [T. L. R. 527—Div. Ct.

See also Nos. 73, 76, *supra*.

Summary Proceedings in Matrimonial Causes—*Continued.*

(e) Maintenance.

311. *Guiding Principles — Proportion—One-third of Husband's Nett Income.*]—Courts of Summary Jurisdiction as to the proportion they should allot for the support of complainants who obtain separation orders under the Summary Jurisdiction (Married Women) Act, 1895, should be guided by the principles which, though not applied with absolute rigidity in the Probate Division, are nevertheless generally recognised and accepted there as a practical guide in cases of judicial separation, the rule being that where there are no children of the marriage or where, if there are children, the wife has not to support them, she, if she has no means of her own, shall be allotted one-third of the husband's nett income, or, if she has means apart from her husband, then her income is to be made one-third of the joint incomes.

COBB *v.* COBB, [1900] P. 294; 69 L. J. P. 125; [83 L. T. 716—Div. Ct.

312. *Joint Income—Voluntary Allowance to Wife.*]—In assessing a sum for maintenance to be paid to a wife under sect. 5 of the Summary Jurisdiction (Married Women) Act, 1895, a voluntary allowance paid to the wife should be taken into account.

Bonsor v. *Bonsor* ([1897] P. 77; 66 L. J. P. 35; 45 W. R. 304; 76 L. T. 168; 13 T. L. R. 184—Jeune, J.) followed.

NOTT *v.* NOTT, [1901] P. 241; 70 L. J. P. 94; [65 J. P. 378; 84 L. T. 573; 17 T. L. R. 525 —Div. Ct.

313. *Desertion—Wilful Neglect to provide Reasonable Maintenance—Causing Wife to leave and Live Apart—Agreement to Live Separate—Bankruptcy of Husband—Limit of time for Proceedings—Summary Jurisdiction Act*, 1848 (11 & 12 Vict. *c.* 43).]—A husband and wife lived together for twenty-two years and in 1895 separated. Some agreement was then come to between them under which the husband agreed to pay his wife a weekly allowance of 10*s.* The allowance was not paid regularly, and in 1901 the arrears amounted to about £100. In August, 1901, a receiving order was made against the husband on his own petition. He was summoned under sect. 4 of the Summary Jurisdiction (Married Women) Act, 1895, for having wilfully neglected to provide reasonable maintenance for his wife, whereby he had caused her to leave and live separately and apart from him. The magistrates ordered him to pay 7*s.* 6*d.* a week for her maintenance.

HELD—that there was no evidence at all of the husband's neglect to maintain his wife; that the wife distinctly stated before the magistrates that she left her husband because he was unfaithful and neglected her; and that the complaint was out of time as not having been made within the six months required by the Summary Jurisdiction Act, 1848, s. 11.

Ellis v. *Ellis* ([1896] P. 251; 65 L. J. P. 124; 60 J. P. 823; 45 W. R. 144; 75 L. T. 390—Jeune, P.) followed.

ROWLANDS *v.* ROWLANDS, (1902) 86 L. T. 125; [18 T. L. R. 291—Div. Ct.

314. *Step-children—Husband's Liability to Maintain.*]—Although it may be a question how far the husband may be liable to maintain his step-children, it is clear that there is a measure of liability for their support attaching to him by virtue of the Poor Law. A husband may be ordered under sect. 4 of the Summary Jurisdiction (Married Women) Act, 1895, to make his wife an allowance for the support of his step-children.

HILL *v.* HILL, [1902] P. 140; 71 L. J. P. 81; [66 J. P. 344; 50 W. R. 400; 86 L. T. 597; 18 T. L. R. 393—Div. Ct.

315. *One-Third of Joint Incomes.*]—In allotting maintenance on making an order under the Summary Jurisdiction (Married Women) Act, 1895, the justices should follow the principles on which the Court acted when awarding alimony, viz., one-third of the joint incomes. The order should recite the conviction on the face of it.

WILCOX *v.* WILCOX, (1902) 66 J. P. 166; 18 [T. L. R. 237—P. Div. Ct.

316. *Subsequent Adultery of Wife—Right of Husband to have Order for Payments Discharged—Conduct of Husband Conducing to Adultery.*]—A husband who has been ordered under the Summary Jurisdiction (Married Women) Act, 1895, to make weekly payments to his wife is entitled as of right to have such order discharged upon proof before a Court of Summary Jurisdiction that his wife has committed adultery. The fact that his conduct has conduced thereto does not prejudice his right; and, if the Court find the adultery to be proved, the husband's liability for future payments is at an end, even though the order is not formally discharged.

RUTHER *v.* RUTHER, [1903] 2 K. B. 270; 72 [L. J. K. B. 826; 67 J. P. 359—Div. Ct.

And see No. 319, *infra.*

(f) Practice: Appeals, Notes, Costs.

317. *Deposition of Evidence before the Magistrates, and Magistrates' Reasons for Decision—Appeal.*]—For the purposes of appeals under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), full notes of the evidence of witnesses before the magistrates ought to be taken and copies furnished to the Court.

The magistrates ought to furnish the Court with the reasons for their decision.

ROBINSON *v.* ROBINSON, [1898] P. 153; 67 [L. J. P. 77; 78 L. T. 392; 14 T. L. R. 385—Div. Ct.

318. *Copies of Notes of Evidence—Costs.*]—On an appeal to the Probate, Divorce and Admiralty Division of the High Court of Justice, from an

Summary Proceedings in Matrimonial Causes— *Continued.*

order of justices under the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of appellant to supply to the Court two copies of the notes of the evidence taken by the justices' clerk, the cost of which will be allowed on taxation.

WALTON *v.* WALTON, [1900] P. 147; 69 L. J. P. [54; 48 W. R. 622; 82 L. T. 627—Div. Ct.

319. *Appeal by Special Case—Payments in Arrear.*]—Where a married woman complains that payments due to her under a separation order (made under the Act of 1895) are in arrear, an appeal from the magistrate's decision upon such complaint lies to the King's Bench Division by special case, and not to the Probate, Divorce and Admiralty Division, under sect. 11 of the Act.

Manders v. *Manders* ([1897] 1 Q. B. 474; 66 L. J. Q. B. 296; 61 J. P. 105; 45 W. R. 287—Div. Ct.) distinguished.

RUTHER *v.* RUTHER, [1903] 2 K. B. 270; 72 [L. J. K. B. 826; 67 J. P. 359; 52 W. R. 154 —Div. Ct.

And see No. 316, *supra.*

320. *Appeal—Notes of Proceedings in Court below—Duties of Magistrates' and Justices' Clerks—Right of either Party to a Copy of Clerk's Notes on Application—Method adopted for compelling Clerk to supply Copy of his Notes.*]—Upon the hearing of every summons under the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the clerk to the magistrate or justices to make a complete and adequate note, not only of the evidence and of the decision arrived at, but also of the reasons for arriving at the decision, and to furnish a copy of the note upon proper application to either party. In a case where copies were refused, the Court directed the registrar to communicate with the justices' clerk requiring him to state the reasons of his refusal and ordering him forthwith to supply two copies of his notes for the use of the judges of the Divisional Court.

Cobb v. *Cobb* ([1900] P. 145; 69 L. J. P. 52; 64 J. P. 200; 82 L. T. 626—Div. Ct., No. 294, *supra*) followed.

BARKER *v.* BARKER, (1905) 74 L. J. P. 74; 69 [J. P. 82, 192; 21 T. L. R. 253—Div. Ct.

321. *Justices' Clerk—Duty to take Notes.*]—It is the duty of justices' clerks to take a full note of the proceedings in the Court below in any case arising out of the Summary Jurisdiction (Married Women) Act, 1895, and of the justices to state the reasons for arriving at their decision. The Court will decline to hear any appeal under the Act when it is not supplied with such notes and reasons. If an imperfect note is taken, such note cannot be supplemented or amplified by affidavit evidence.

Cobb v. *Cobb* ([1900] P. 145; 69 L. J. P. 52; 64 J. P. 200; 82 L. T. 626—Div. Ct., No. 294, *supra*), and *Barker* v. *Barker* ((1905) 74 L. J. P. 74; 69 J. P. 82, 192; 21 T. L. R. 253—Div. Ct., *supra*) approved.

WENHAM v. WENHAM, (1906) 95 L. T. 548— [Div. Ct.

322. *Appeal Costs to be Paid by Wife.*]—Where a husband successfully appealed from an order of justices for payment of a weekly sum on desertion, the wife, who did not appear, being shown to have separate estate, was condemned in costs, without notice of the application.

DAVIES *v.* DAVIES, (1907) 51 Sol. Jo. 412— Div. Ct.

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ILLEGAL ARREST AND IMPRISONMENT.

See CRIMINAL LAW; TRESPASS.

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I. TAXABLE INCOME.

(a) In General.

1. *American Domicile and Business—Lessee of Scotch Shooting—Annual Residence for Two Months—Residing in the United Kingdom—Income Tax Acts*, 1842 (5 & 6 Vict. *c.* 35), *s.* 39, *and* 1853 (16 & 17 Vict. *c.* 34), *s.* 2, *Sched. P.*]—An American barrister, ordinarily resident and practising in New York, had for some years a lease of a shooting and furnished lodge in Scotland. The lodge was ready for his use at any time, and he spent two months there every year; his own house was also always kept open for his use.

HELD—that he was a person "residing in the United Kingdom" and was liable for income tax, and did not fall within the exemption of a person so residing "for some temporary purpose only and not with any view or intent of establishing his residence therein."

INLAND REVENUE *v.* CADWALADER, (1905) 7 F. [146—Ct. of Sess.

2. *Annuity—Annual Payments, each consisting partly of Repaid Capital, and partly of Interest on Capital still Outstanding—Income Tax Acts*, 1842 (5 & 6 Vict. *c.* 35), *s.* 102, *and* 1853 (16 & 17 Vict. *c.* 34), *s.* 2, *Scheds. C and D.*]—The Great Indian Peninsula Railway Company was formed in 1849, and it received a guarantee of financial assistance from the East India Company upon the terms, amongst others, that after fifty years the East India Company might buy the whole interest of the railway company; that the East India Company, if it became liable to pay for the purchase of the railway, might, instead of paying a gross sum of money, declare by notice its option to pay an annuity to be reckoned from the time when the gross amount would be payable, and to continue for the residue of the term of ninety-nine years for which the land on which the railway was constructed was granted by the East India Company to the railway company, interest being calculated for that purpose at a rate to be ascertained by the governor or deputy governor of the Bank of England for the time being. The fifty years having elapsed in 1899, the Secretary of State for India, who succeeded the East India Company, gave notice to purchase, and then gave notice that he would pay an annuity as provided by the contract. The rate of interest was ascertained from the Bank of England at £2 17*s.* per cent. Thereupon, the gross sum arrived at being about £34,859,217, the annuity was ascertained to be £1,268,508, payable half-yearly. Under the Act of Parliament carrying out the Secretary of State's notice, an arrangement was made that the annuity to be paid to the Great Indian Peninsula Railway Company should be paid to certain annuity trustees, who were to establish two classes of annuitants—class A., who would have their annuity in full, and would have nothing when it came to an end, and class B., who would suffer a deduction in respect of a sinking fund, and would have their share of that sinking fund when the annuity came to an end. The Secretary of State had made the half-yearly payments to the annuity trustees, but had deducted therefrom income tax in respect of the whole amount thereof. No point arose as to the difference between "A." and "B." annuitants.

HELD—that each half-yearly payment consisted partly of a payment on account of capital, and partly of interest on capital remaining unpaid; and that tax was only payable on such last-mentioned part. Nature of an "annuity" discussed.

Decision of Phillimore, J. ([1902] 2 K. B. 413; 71 L. J. K. B. 727; 87 L. T. 396; 18 T. L. R. 662) reversed.

SCOBLE *v.* SECRETARY OF STATE IN COUNCIL [FOR INDIA, [1903] 1 K. B. 494; 72 L. J. K. B. 215; 67 J. P. 106; 51 W. R. 580; 88 L. T. 144; 19 T. L. R. 244—C. A.; affirmed [1903] A. C. 299; 72 L. J. K. B. 617; 51 W. R. 675; 89 L. T. 1; 19 T. L. R. 550—H. L. (E.).

3. *Annuity—Purchase of Railway Company—Payment of Purchase Price by Annuity—Part to be treated as Capital and Free from Tax—Income Tax Acts*, 1842 (5 & 6 Vict. *c.* 35), *s.* 102, *and* 1853 (16 & 17 Vict. *c.* 34), *s.* 21, *Scheds. C, D.*]—The annuities paid by the Indian Government to the shareholders of the East Indian Railway as the purchase price of their undertaking are to be treated as representing in part capital paid off, and in part interest on capital not yet paid off; and income tax is only payable on the latter portion.

Taxable Income—*Continued.*

There is a distinction between the simple case where a person sacrifices his capital to purchase an annuity, and cases where there is an antecedent debt due to him, the amount of which is ascertained or must be ascertained for the purpose of arranging its repayment by annual instalments.

The statement in the special Act as to the proportions of capital and income respectively is not conclusive: the method by which such proportions are to be determined considered.

Scoble v. *Secretary of State for India* ([1903] A. C. 299; 72 L. J. K. B. 617; 51 W. R. 675; 89 L. T. 1; 19 T. L. R. 550—H. L., *supra*) examined and followed.

Decision of Jelf, J. (92 L. T. 495; 21 T. L. R. 3) affirmed in part.

East Indian Ry. Co. *v.* Secretary of State [for India, [1905] 2 K. B. 413; 74 L. J. K. B. 779; 54 W. R. 4; 93 L. T. 220; 21 T. L. R. 606—C. A.

4. *Assignment for Benefit of Creditors — Trustee Carrying on Part of Business at a Profit—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100, *Sched. D.*]—C. & C. carried on business as worsted spinners, and part of the business was that, as they generated a great deal more steam power than they wanted for their own business, they supplied steam power at a profit to other persons carrying on similar businesses. They failed in business, and an arrangement was come to by which the appellant was empowered by the creditors to take the business as trustee for them, and he had power, as trustee, to carry on the debtors' business. The trustee, under the deed of assignment, realised C. & C.'s assets, except the lease under which the steam power was supplied, and paid dividends to the creditors. The trustee got power to make, and made, a further lease, which resulted in the letting out of the steam power generated on the premises in his possession to people for more than it cost.

Held—that the trustee must pay income tax under Sched. D, although he had abandoned the carrying on of the business, except the supplying of steam power.

Armitage *v.* Moore, [1900] 2 Q. B. 363; 69 [L. J. Q. B. 614; 82 L. T. 619—Div. Ct.

5. *Cemetery—Money received for Graves—Admitting Note of Case—Amendment of Special Case — Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 60, *Sched. A, No.* 3, *r.* 3.]—A cemetery company received from purchasers of grave spaces or lairs, in lieu of annual payment, a lump sum for keeping the lairs in order, and gave receipts in the following form: "Received from —— the sum of ——, being the amount agreed to be accepted by the directors —— for keeping in order and dressing lair No. —— in said cemetery, from time to time, during each year in all time coming."

Held—that the sums so received were assessable for income tax under Sched. A. No. 3, r. 3, of the Income Tax Act, 1842, as being part of the annual profits of the company. The Court allowed a note to be put in by the parties setting forth additional facts without ordering the case stated by the Income Tax Commissioners under the Taxes Management Act, 1880, s. 59, to be formally amended.

Paisley Cemetery Co., Ld. *v.* Reith (Sur- [veyor of Taxes), (1899) 63 J. P. 806; 25 R. 1080; 35 S. L. R. 947—Ct. of Exch. (Sc.).

6. *Clergyman—Chaplain's Stipend—"Without any Deduction or Abatement for Taxes"—Special Public Act* (10 Geo. 4, *c.* 15)—*Contract of Appointment—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 146, *Sched. E, r.* 6.]—In 1884, L. was appointed chaplain of a charitable institution, the donors and subscribers of which were incorporated by a special Act of Parliament passed in 1829. By that Act the wardens of the institution were directed to pay the chaplain for the time being a yearly salary of not less than £300, nor more than £500, "without any deduction or abatement for taxes or otherwise howsoever." L.'s appointment was made under the provisions of the Act, and his salary was fixed at £500 per annum.

Held—that the determination of the amount of the salary was a contract between the chaplain and the persons appointing him; that, notwithstanding the clause in the special Act, the wardens were bound by the sixth rule of Sched. E of the Income Tax Act, 1842, to deduct and pay the tax on the salary, and that the chaplain was not entitled to his salary in full without recouping the wardens the amount so paid.

Re Liverpool School for Indigent Blind, [Lund *v.* The Same, [1898] 2 Ch. 669; 62 J. P. 728; 67 L. J. Ch. 680; 79 L. T. 69; 47 W. R. 7—Byrne, J.

7. *Clergyman—"Salary, Perquisite, or Profit" Accruing by Reason of an Office—Voluntary Grant from Queen Victoria Clergy Sustentation Fund—Income Tax Acts*, 1842 (5 & 6 Vict. *c.* 35), *s.* 146; 1853 (16 & 17 Vict. *c.* 34), *s.* 2, *Sched. E.*]—An incumbent of a parish received from the Norwich Diocesan Branch of the Queen Victoria Sustentation Fund a grant each year for three years. The object of the diocesan branch was to make grants to poor beneficed clergymen, so as to raise the income of all beneficed clergymen to £200 a year. The onus rested on each incumbent to decide whether his circumstances were such as to justify him in applying for a grant. The branch decided whether the grant should be made, and it did not follow that the grant, when once made, would be renewed in the following year.

Held—that the grant was "perquisite or profit" accruing to the incumbent by reason of his office within sect. 146, Sched. E, r. 1, of the Income Tax Act, 1842, and was therefore chargeable as income tax.

Decision of Div. Ct. ([1901] 2 K. B. 761; 70 L. J. K. B. 725; 65 J. P. 376; 84 L. T. 661; 17 T. L. R. 488) reversed.

Herbert *v.* McQuade, [1902] 2 K. B. 631; 71 [L. J. K. B. 884; 66 J. P. 692; 87 L. T. 349; 18 T. L. R. 728—C. A.

Taxable Income—*Continued.*

8. *Clergyman—Minister of Chapel—Profits Accruing by reason of Office—Grant from Ministers' Stipend Augmentation Fund—Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *s.* 2, *Sched.*]*D.*]—A minister of a chapel received a grant of £50 from a fund called the Ministers' Stipend Augmentation Fund. This fund was vested in trustees and managed by a committee of management, and annual grants were made from the fund towards the augmentation of the stipends of the ministers of such congregations as the committee might from time to time select. No grants were made for more than a year, and the committee had to pay particular regard to the state and condition of the congregations and to their ability to make adequate provision for their minister, and in making grants the committee took into consideration the applicant's private income as well as that received from the congregation, his age, his training, and the length and value of his services. A grant ceased with the death or resignation of the recipient, and any portion unpaid at that time was not paid at all; but his successor could apply for a grant, when his application would be separately considered.

HELD—that the grant was made by way of augmentation of the stipend of the minister and not as a personal gift, and that, therefore, the applicant was assessable to income tax under sect. 2, Sched. D, of the Income Tax Act, 1853, in respect of the sum granted.

Decision of Phillimore, J. (92 L. T. 383; 21 T. L. R. 428) reversed.

POYNTING *v.* FAULKNER, (1905) 93 L. T. 367; [21 T. L. R. 560—C. A.

9. *Clergyman—Profits accruing by reason of Office—Church Collections—Income Tax Acts*, 1842 (5 & 6 Vict. *c.* 35), *s.* 2, *Sched. E, and* 1853 (16 & 17 Vict. *c.* 34), *s.* 136, *Sched. E, rr.* 1, 4.] —A collection was made in a church of the Church of England on each Sunday, and before the collection was made it was announced to the congregation that a portion of the collection would be paid to the incumbent. The incumbent was a poor man. Upon the question whether the incumbent was assessable to income tax in respect of that portion of the collections which was paid to him, the Income Tax Commissioners found that the money was given to the incumbent as incumbent, but that it would not have been given to him if he had not been poor.

HELD—that the money was given to the incumbent because he was a poor person, and not as additional remuneration, and was therefore personal to him, that it did not accrue to him by virtue of his office as incumbent, and that therefore he was not assessable to income tax in respect thereof.

TURTON *v.* COOPER, (1905) 92 L. T. 863; 21 [T. L. R. 546—Channell, J.

10. *Clergyman—Easter Offerings—"Perquisites or Profits Accruing by reason of his Office"—Income Tax Acts*, 1842 (5 & 6 Vict. *c.* 35), *s.* 146, *rr.* 1, 4, *and* 1853 (16 & 17 Vict. *c.* 34), *s.* 2, *Sched. E.*]—The bishop of a diocese sent a letter to the churchwardens of the parishes in his diocese recommending to their favourable notice the practice of making free-will offerings at Easter to the parochial clergy, who were seldom sufficiently endowed, and stating that it was admitted that the clergy as a body were miserably underpaid, and great hardships were often suffered by those who possessed little or no private means; and that in those circumstances it became the duty as well as the privilege of the laity to do what they could to rectify or mitigate hardships by free-will personal gifts; and the letter concluded by a request that the Easter Sunday collection should be devoted to the personal use of the incumbent as a personal, non-official, free-will gift. The churchwardens of a parish accordingly devoted the Easter Sunday collection, augmented by the gifts of those who were unable to be present, to the use of the incumbent.

HELD—that the incumbent was liable to pay income tax thereon.

Decision of Bray, J. ([1907] 1 K. B. 336; 76 L. J. K. B. 243; 95 L. T. 800; 23 T. L. R. 161) reversed.

COOPER *v.* BLAKISTON, [1907] 2 K. B. 688; 76 [L. J. K. B. 1041; 97 L. T. 531; 23 T. L. R. 663—C. A.

10a. *Corporate Body—Duty on Income or Profits—Exemptions—Property legally appropriated and applied for Promotion of Education, Literature, Science or the Fine Arts—Customs and Inland Revenue Act*, 1885 (48 & 49 Vict. *c.* 51), *s.* 11, *sub-s.* (3).]—By sect. 11 of the Customs and Inland Revenue Act, 1885, duty is imposed upon the annual value, income or profits of all real and personal property belonging to, or vested in, any body corporate or unincorporate, subject to exemption from duty in the case of "property which, or the income or profits whereof, shall be legally appropriated and applied . . . for the promotion of education, literature, science or the fine arts."

The Royal College of Surgeons was a body corporate, with two main objects, namely, the promotion of the science of surgery, and the promotion and encouragement of the practice of surgery, including examinations to qualify for such practice. The property of the college consisted, among other things, of general offices, an examination hall, and a library; but there had been no appropriation of this property by conveyance, declaration of trust, or otherwise, to the first-named of the above objects as distinguished from the second. The fees received in respect of the examinations constituted a large part of the income of the college. The college had no school of instruction or training for persons seeking admission to the college. The above property having been assessed to the annual duty imposed by sect. 11 of the Customs and Inland Revenue Act, 1885:—

HELD—that as the college had two main objects, only such of its property as was legally appropriated and applied to the first-named object, as distinguished from the second, was exempt from duty within sect. 11, sub-sect. 3, of

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the Act, and that as none of the property in question was legally appropriated thereto, the exemption did not apply.

The words "legally appropriated" mean appropriated so as to create a legal obligation upon the part of the administrators of the property to apply it in a particular manner.

Judgment of Div. Ct. (67 L. J. Q. B. 705 ; 62 J. P. 421 ; 46 W. R. 538 ; 79 L. T. 89 ; 14 T. L. R. 378) affirmed.

In re Royal College of Surgeons, [1899] 1 [Q. B. 871 ; 68 L. J. Q. B. 613 ; 47 W. R. 452 ; 80 L. T. 611 ; 15 T. L. R. 317—C. A.

11. *Courts of Justice—County and Municipal Buildings—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *Sched. A.*]—The general rule is that Courts used for the administration of justice, whether criminal or civil, and buildings used for purposes incidental to the preservation of order and the punishment of crime, form parts of the Government establishment for the administration of justice, and that consequently they cannot be subjected to assessment for income tax, unless they are specially mentioned in the Act as being liable to such assessment. All these buildings are provided and maintained for purposes of the Government, which are, according to the theory of the constitution, administered by the sovereign. But county and municipal buildings which do not fall under that description are liable to assessment for income tax.

Where a county hall is built and is used primarily and usually for the performance of county business, and only exceptionally and accidentally for the purposes of a Court of justice, it cannot be regarded as part of the King's establishment for the administration of justice, and for similar reasons, rooms occupied by the town-clerk and procurator-fiscal cannot be regarded as forming parts of that establishment.

Brown (Surveyor of Taxes) *v.* Smith, (1902) [4 F. 31—Exch. (Sc.).

12. *Exemption—"Almshouse"—"House provided for the Reception or Relief of Poor Persons"—Home for Poor Ladies—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 61, No. 6, *clause* 2.]—A house founded for ladies in reduced circumstances, who had an income not less than £25 and not exceeding £55 a year, where each lady was provided with a room free of charge, *held* to be an "almshouse" within the meaning of the Income Tax Act, 1842, s. 61, No. 6, clause 2, so as to come within the exemptions from income tax.

The Trustees of the Mary Clarke Home [*v.* Anderson, [1904] 2 K. B. 645 ; 73 L. J. K. B. 806 ; 91 L. T. 457 ; 20 T. L. R. 626—Channell, J.

13. *Exemption—Limited Company — Income not exceeding £160 — Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *ss.* 163, 192—*Finance Act*, 1894 (57 & 58 Vict. *c.* 30), *s.* 34.]—A limited company registered under the Companies Acts is not exempt from payment of income tax by reason of its total income not exceeding £160 a year.

Mylam *v.* The Market Harborough Adver- [tiser Co., Ld., [1905] 1 K. B. 708 ; 74 L. J. K. B. 205 ; 53 W. R. 478 ; 92 L. T. 94 ; 21 T. L. R. 201—Phillimore, J.

14. *Exemption — Unincorporated Society — Political Association — Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *ss.* 40, 163, 192.]—An unincorporated society (*e.g.*, a political association) whose aggregate income is less than £160 per annum is not on that account entitled to exemption from income tax under sect. 163 of the Income Tax Act, 1842.

Decision of Court of Session (7 F. 119) reversed.

Curtis *v.* Old Monkland Conservative [Association, [1906] A. C. 86 ; 75 L. J. P. C. 31 ; 94 L. T. 7 ; 22 T. L. R. 177—H. L. (Sc.).

15. *Interest on Colonial Investments—Sums sent by Insurance Society for Investment in Colony — Monies remitted back from Colony—Whether repaid Principal or Interest — Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100, *Sched. D, Case* 4.]—An insurance society had between 1885 and 1890 sent out to Australia for investment large sums of money, amounting at the end of 1898 to one-and-a-half millions. Until 1893 the interest on these investments was retained in Australia and invested. The question now arose whether £200,000 sent over from Australia in 1898 was to be treated as repaid principal, or as taxable income.

The society endeavoured to earmark various sums as being repayments of specific loans, but the whole of the society's monies in Australia (except one sum of £5,000) had been mixed in one banking account, and the Court of Session held that the £200,000 must be regarded as income and liable to taxation. The society appealed.

Held—that the question was one of fact, and had been rightly decided. The onus was on the society, and they could not discharge themselves of it by merely calling these sums repaid capital : further, the fact of large remittances being made in two consecutive years was (unless explained) suggestive of their being income, and so also was the fact that, in spite of such remittances, there was £300,000 now invested in Australia in excess of the total amount sent over from England in 1885—1890.

Judgment of the First Division of the Court of Session ((1901) 3 F. 874) affirmed.

Scottish Provident Association v. Allan, [1903] A. C. 129 ; 72 L. J. P. C. 70 ; 67 J. P. 341 ; 88 L. T. 478 ; 19 T. L. R. 432—H. L. (Sc.).

16. *Land Company—Buying and Selling Land —Method of Ascertaining Profits.*]—A company, whose business consisted in buying and selling land and rights in land, bought a piece of vacant ground for £898, and after erecting houses upon it burdened each house with a feu duty ; the feu duties in all amounting to £114 per annum. The company then sold the feu duties for £3,135,

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but retained the land and houses. The Inland Revenue claimed income tax on the difference between £898 and £3,135 as profit earned by the company.

HELD—that the claim could not be sustained. for the price of £3,135 was partly due to the erection of houses by the company.

FURTADO *v.* CARDONALD FEUING Co., [1907] [S. C. 36—Ct. of Sess.

17. *Life Assurance Company—Mutual Insurance—Annual Profits and Gains—Accumulation—Participating Policies—Return of Premiums as "rebate or discount"—Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *Sched. D.*]—A life assurance company by its charter limited the interest payable to the holders of its capital stock to 7 per cent., and the earnings and receipts of the company over and above this fixed dividend, and the losses and expenses on the year's trading were to be accumulated. The insurance business of the company was expressed to be conducted upon the mutual plan, and every five years each policy-holder was to be credited with a share of the accumulated surplus, to be applied by him either in the purchase of an additional amount of insurance payable at his death, or, at his option, to the purchase of an annuity in reduction of his future premiums. The amount of the surplus funds to be so divided at these quinquennial distributions was to be entirely a matter for the discretion of the directors of the company.

HELD—that the accumulated funds of the company were not the property of the policy-holders, and that the returns from surplus did not pass to them by the constitution of the company, but were payments made them arising out of the "profits" earned by the company, and the money so to be divided had rightly been assessed to income tax under Sched. D.

Last v. *London Assurance Corporation* ((1885) 10 App. Cas. 438; 55 L. J. Q. B. 92; 50 J. P. 116; 34 W. R. 233; 53 L. T. 634) and *New York Life Insurance Co.* v. *Styles* ((1889) 14 App. Cas. 381; 59 L. J. Q. B. 291; 61 L. T. 201) considered.

Decision of Div. Ct. ([1899] 2 Q. B. 439; 68 L. J. Q. B. 772; 47 W. R. 556; 80 L. T. 728; 15 T. L. R. 376) affirmed.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE [UNITED STATES *v.* BISHOP, [1900] 1 Q B. 177; 69 L. J. Q. B. 252; 48 W. R. 341; 81 L. T. 693; 16 T. L. R. 74—C. A.

18. *Sewer—"Hereditament Capable of Actual Occupation"—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 60, *Sched. A* (*Nos.* 1 *and* 3).]—A sewer was vested in and under the control of a sewerage board for a united drainage district as the local sanitary authority for the purposes of such sewer. The sewer, which was about seventeen and a quarter miles in length, was constructed partly underground, partly on the surface, and partly in an artificial embankment; and no change was made by reason of its construction in the assessment under Sched. A of the Income Tax Act, 1842, of the owners or occupiers of the lands over, through, or under which the sewer was constructed. The sewerage board derived no profit from the sewer.

HELD—that the sewer was a hereditament capable of actual occupation, of which the sewerage board was in occupation, and that the board was assessable to income tax under the Income Tax Act, 1842, s. 60, Sched. A (No. 1), upon the annual value of the sewer.

Sched. A (No. 3) applies to the properties therein specified when such properties are used as trading concerns for the purpose of earning profits; and a sewer vested in a public authority and out of which no profit can be made is assessable under No. 1 and not under No. 3.

Decisions of Walton, J. ([1906] 1 K. B. 294; 75 L. J. K. B. 202; 70 J. P. 240; 94 L. T. 20; 54 W. R. 440; 22 T. L. R. 213; 4 L. G. R. 241) and C. A. ([1907] 1 K. B. 490; 76 L. J. K. B. 282; 71 J. P. 76; 96 L. T. 282; 23 T. L. R. 105; 5 L. G. R. 189) affirmed.

YSTRADYFODWG AND PONTYPRIDD MAIN [SEWERAGE BOARD *v.* BENSTED, [1907] A. C. 264; 76 L. J. K. B. 876; 71 J. P. 425; 97 L. T. 141; 23 T. L. R. 621; 5 L. G. R. 865 —H. L. (E.).

19. *Railway—Interest guaranteed by South African Republic—Line taken by British Government — Payment of Arrears — Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *Sched. D.*]—On November 2nd, 1895, the South African Republic granted to S. a concession for the construction of a railway, and guaranteed to a company, which was formed to take over the railway, interest at 4 per cent. on its share capital.

On October 11th, 1899, war having broken out, the line was seized and worked by the British military authorities until the end of the war.

On February 18th. 1902, the British Government gave notice to expropriate the railway under the terms of the concession.

They recognised the validity of the concession, and admitted liability to pay all arrears of interest. They paid £97,506 16*s.* 11*d.* as "guaranteed interest on share capital at 4 per cent. per annum from January 1st, 1889, to November 14th, 1903," in addition to the other payments on the expropriation.

HELD—that the Crown was entitled to income tax on the sum of £97,506 16*s.* 11*d.*

PRETORIA-PIETERSBURG RY. CO., LD. *v.* EL- [WOOD, (1906) 95 L. T. 468—Walton, J.

20. *Schoolmaster's Salary—Increase of Salary retained to form Provident Fund—Master entitled on Retiring to part of Accumulations in any event, to part only Contingently—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 146, *Sched. E*, *r.* 1.]—The governors of a public school formed a masters' provident fund by the following scheme:—They granted to each master (a) a certain percentage of his salary as an increase thereof, and (b) a similar percentage as a further increase.

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Both these percentages were retained by the governors and accumulated at compound interest.

A master was compelled to join the scheme, and on retiring was entitled in any event to his "a" percentages and accretions thereto, and upon certain contingencies to his "b" percentages and accretions.

HELD—that both "a" and "b" percentages must be regarded as income, and were liable to income tax.

Hudson v. *Gribble* ([1903] 1 K. B. 517; 72 L. J. K. B. 242; 67 J. P. 85; 50 W. R. 457; 88 L. T. 186; 19 T. L. R. 260—C. A., No. 59, *infra*) followed.

SMYTH *v.* STRETTON, (1904) 90 L. T. 756; 20 [T. L. R. 443; 53 W. R. 288—Channell, J.

21. *Share of Profits of a Business placed to Credit of Employees—Contingent and Defeasible Interest.*]—By a deed of arrangement the owner of a business provided that from and after his death certain of his employees should have a "prospective interest" in the profits and in the business itself "if acquired by them." It was provided—first, that the provisions in favour of the selected employees should not become vested interests until the whole of the grantor's capital had been paid out; secondly, that it should not be competent for any employee to sell or dispose of his interest; thirdly, that the whole net profits of the business, after paying interest on the grantor's capital, rent, and depreciation, should be divided amongst the selected employees, and that 10 per cent. thereof should be paid to them in cash, but that the remaining profits should not be drawn out by them, but merely credited to their accounts until the whole of the grantor's capital had been paid out; fourthly, that upon payment of the grantor's capital and a sum fixed as the price of the factory, and of the amount at the credit of deceased, bankrupt, or retired employees, the grantor's testamentary trustees should convey the business and the factory to the surviving employees; and fifthly, that the employees should at any time be entitled to purchase the business for the sum at the grantor's credit. The business was to be carried on by the employees, but the grantor's testamentary trustees were given power to appoint managers, &c., to dismiss any of the selected employees for misconduct, and, if the business could not be carried on at a profit, to wind it up.

HELD—that the share of the 90 per cent. of profits placed to the credit of one of the selected employees in the books of the business under the provisions of the deed was not to be reckoned as part of his income for the purposes of the Income Tax Acts.

Hudson v. *Gribble* ([1903] 1 K. B. 517; 72 L. J. K. B. 242; 67 J. P. 85; 50 W. R. 457; 88 L. T. 186; 19 T. L. R. 260—C. A., No. 59, *infra*) and *Smyth* v. *Stretton* ((1904) 90 L. T. 756; 20 T. L. R. 443—Channell, J., *supra*) distinguished.

WALKER *v.* REITT, (1906) 8 F. 381—Ct. of [Sess.

22. *Waterworks of Local Authority—Sale of Water — Profits of Trading — Application of Profits to Sinking Fund.*]—A local authority, in the exercise of their statutory powers, entered into contracts to supply with water certain parishes being districts outside the area of the local authority.

HELD—that income tax was payable in respect of the surplus over annual expenditure of the sums received by the local authority; and that income tax was payable in respect of the portions of that surplus which were appropriated to the sinking fund provided for the redemption of capital debt.

Mersey Docks and Harbour Board v. *Lucas* ((1883) 8 App. Cas. 891; 53 L. J. Q. B. 4; 48 J. P. 212; 49 L. T. 781; 32 W. R. 34—H. L. (E.)) followed.

HARRIS *v.* IRVINE CORPORATION, (1901) 2 F. [1080; 65 J. P. 661.

22a. *Unincorporate Body—Real Property—"Annual Value. Income or Profits"—Principle of Assessment—Gate-money—Customs and Inland Revenue Act*, 1885 (48 & 49 Vict. *c.* 51), *s.* 11.]—The Surrey County Cricket Club, an unincorporated body, were the lessees of Kennington Oval at a rent of £750 per annum, the lessees paying all rents and taxes. Certain parts of the property comprised in the lease were underlet by the club. The rest of the ground was in hand and in the possession of the club. The club had also certain investments of stocks, the income of which appeared in the revenue account. The only other receipts of the club were, first the subscriptions and entrance fees paid by members of the club, and secondly, gate-moneys and other payments received from the public for viewing the cricket and other matches played from time to time on the ground. Except as hereinbefore stated the club had no property real or personal. The club paid income tax under Sched. D in the usual way.

HELD—that it would be unfair to tax the income twice over—once under Sched. D, and again under sect. 11 of the Customs and Inland Revenue Act, 1885; and that the annual value of the real property should be charged in accordance with an assessment under Sched. A of the Income Tax Act, 1853, subject to a reduction of some kind under the words at the close of sect. 11, *e.g.*, 10 per cent.

IN RE SURREY COUNTY CRICKET CLUB, [1901] [2 K. B. 400; 70 L. J. K. B. 823; 65 J. P. 488; 85 L. T. 213; 17 T. L. R. 494; 50 W. R. 173—Div. Ct.

(b) Profits earned Abroad.

23. *Business carried on partly in Great Britain and partly in the United States of America—Jurisdiction of General Commissioners for District — Prohibition — Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *ss.* 106, 108, 111—117.]—The K. Co. carried on a business and had their head and seat and directing power in this country within the jurisdiction of the General Commissioners of Taxes for Clerkenwell, and was undoubtedly liable to be assessed to income

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tax under Sched. D in this country, and a question arose between the K. Co. and the Commissioners as to the amount of trade upon which the company was liable to pay income tax, the company asserting that they were not liable to pay income tax upon the profits of the Rochester business in New York, U.S.A. The Commissioners asserted that the Rochester trade was carried on by the K. Co. in this country under such circumstances as to make the profits of the Rochester trade assessable to the income tax in this country and as profits of the K. Co.

HELD—that the Commissioners had jurisdiction so to determine and were right, and if they were wrong it was a matter for appeal as provided by the Taxes Management Act, 1880, and not prohibition.

REX *v.* GENERAL COMMISSIONERS OF TAXES [FOR CLERKENWELL, [1901] 2 K. B. 879 ; 70 L. J. K. B. 1010 ; 65 J. P. 724 ; 85 L. T. 503 ; 17 T. L. R. 744—C. A.

24. *Company—Foreign Registration and Office—Control in England—Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *Sched. D.*]—A shipping company was registered in New Zealand and had its registered office there. Its head office in London directed the whole business of the company in all countries.

HELD—that the company was rightly assessed to income tax.

Decision of Bray, J ((1907) 96 L. T. 50 ; 23 T. L. R. 213) affirmed.

NEW ZEALAND SHIPPING CO., LD. *v.* STEPHENS, [1907] 24 T. L. R. 172—C. A.

25. *English Limited Company carrying on a Business Abroad—Profits and Gains in Part remitted to England—Assessment of Income Tax on all Profits and Gains, whether remitted to England or not—Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *s.* 2, *Sched. D.*] — An English company formed under the Companies Acts and registered in London had power by its memorandum of association to acquire the whole or part of the capital stock of an American incorporated association, then carrying on a brewing business in the State of Missouri, in the United States, and to allow the legal estate and interest in any business or property acquired by the company to be vested in and carried on by any American company upon trust for, and as agents or nominees of, the English company. The English company acquired the whole of the share capital of the American association except fourteen shares (directors' qualification shares). The brewing operations were carried on in the State of Missouri exclusively, and under the immediate management of the directors of the American association, and the breweries and other property were vested in that association, and the officers and employees were appointed by the American directors. At the end of each financial year copies of the balance-sheet and profit and loss account of the American association were sent to the English company, and after considering them, the directors of that company informed the American association as to what dividend they thought ought to be declared, and the American association habitually declared a dividend at the rate mentioned. In the reports and accounts of the English company the breweries, business and profits were treated as being the property and under the control of the English company, and the directors of the American association were referred to as "the board of management in St. Louis." The accounts of the breweries were audited annually by an English accountant sent for the purpose by the English company. The amount of the dividend on the shares held by the English company was transmitted to England for distribution amongst the shareholders.

HELD—that the brewing business was in substance the business of the English company, and that they were liable to be assessed to income tax under sect. 2, Sched. D, of the Income Tax Act, 1853, in respect of the annual profits or gains arising from that business.

ST. LOUIS BREWERIES, LD. *v.* APTHORPE (SURVEYOR OF TAXES), (1899) 63 J. P. 135 ; 47 W. R. 334 ; 79 L. T. 551 : 15 T. L. R. 112—Div. Ct.

26. *English Limited Company carrying on Business Abroad—Profits and Gains in Part remitted to England — Control of Business in England — Assessment of Income Tax on all Profits and Gains, whether remitted to England or not—Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *s.* 2, *Sched. D.*]—(a) If a business is wholly carried on in this country, the whole of the profits must be assessed to the income tax of this country.

(b) If a business is carried on partly in this country and partly abroad, the whole of the profits, whether made here or abroad, must be assessed to the income tax of this country.

(c) If a business is wholly carried on abroad, the profits received in this country must alone be assessed to the income tax of this country.

Whether a business is carried on partly here and partly abroad is a question of fact.

The Court can only look at the facts in the case stated under sect. 59, sub-sect. 1, of the Taxes Management Act, 1880, and will not refer to anything outside the case.

From the statements in the case it appeared that an English company registered under the Companies Acts owned all the property of an American company except the real property, and the American company was kept alive on account of the laws of the State of Illinois as to real property. All the shares except three in the American company were transferred to the English company. The trade was carried on in Illinois, and all the profits were earned in America ; but the English company had the power to manage the business at Chicago, and the directors delegated that power to the directors of the American company in Chicago. A portion of the profits was transmitted to England.

HELD—that the English company carried on business partly here and partly in Chicago. An important fact to consider was that the ultimate tribunal of control was in England.

San Paulo (Brazilian) Ry. Co. v. *Carter* ([1896] A. C. 31 ; 65 L. J. Q. B. 161 ; 60 J. P.

Taxable Income—*Continued.*

84; 44 W. R. 336; 73 L. T. 538—H. L. (E.)) followed.

APTHORPE *v.* PETER SCHOENHOFEN BREWING [CO., LD., (1899) 80 L. T. 395; 15 T. L. R. 245 —C. A.

27. *English Company holding 98 per cent. of the Shares of a Foreign Company—Control and Management—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100, *Sched. D, Case* 1.]—On November 15th, 1898, the English company of Kodak, Ld., was registered under the Companies Acts for the purpose (*inter alia*) of acquiring not less than 95 per cent. of the shares of the American Eastman Kodak Company. Kodak, Ld., acquired 98 per cent. of the total number of shares of the Eastman Kodak Company. There were, however, and always had been, thirty additional shareholders holding 818 shares of the Eastman Kodak Company, who were independent of Kodak, Ld. Some of these shares were held by the seven directors or trustees as qualifying shares. The American company were manufacturers and vendors, and the English company were buyers, but the English company had never controlled, or interfered in, the management of the American company, nor attempted to do so.

HELD—that the English company had no right of control over the profits of the American company, but were simply shareholders; that there was no relation of principal and agent, or master and servant existing between the companies, and that the English company could not be assessed under the first case of Sched. D on the full amount of the profits of the American company.

Decision of Phillimore, J. ([1902] 2 K. B. 450; 71 L. J. K. B. 791; 67 J. P. 26; 51 W. R. 75; 18 T. L. R. 686) affirmed.

KODAK, LD. *v.* CLARK, [1903] 1 K. B. 505; 72 [L. J. K. B. 369; 67 J. P. 213; 51 W. R. 459; 88 L. T. 155; 19 T. L. R. 243—C. A.

28. *Insurance Company—Branch Business Abroad—Dividends from Securities out of the United Kingdom—Constructive Receipt in the United Kingdom of such Dividends—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100.]—A life assurance society having its head office and directors in the United Kingdom carried on business in the East Indies by means of branches with agents and committees of management. The monies received at the branches in the East Indies included interest and dividends arising from securities in her Majesty's dominions outside the United Kingdom and were used, as far as required, in liquidation of payments at the branches, any balance being retained for use as required or dealt with by the directors in London. An equivalent for the amount of such dividends, if not retained abroad, would have to be sent from time to time to the East Indies by the directors from the United Kingdom for the discharge of the obligations of the society's business in India. The accounts of the society were made up yearly, and from the aggregate results of the entire business the directors determined what amount of profits should be divided between the share and policy holders.

HELD—that the interest and dividends from the securities in the East Indies were constructively received by the society in the United Kingdom, and as such were assessable under the Income Tax Act, 1842, Sched. D, Case 4.

UNIVERSAL LIFE ASSURANCE SOCIETY *v.* [BISHOP, (1899) 68 L. J. Q. B. 962; 64 J. P. 5; 81 L. T. 422—Div. Ct.

But see Gresham Life Assurance Society v. Bishop, infra.

29. *Insurance Company—Branch Business Abroad—Interest and Dividends from Securities out of the United Kingdom—Receipt in United Kingdom of such Interest and Dividends—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100, *Sched. D, Case* 4—*Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *s.* 2, *Sched. D, s.* 5.]—The appellants carried on the business of a life assurance society with head offices and directors in London. They had funds invested in foreign countries, and the interest and dividends on such securities were either re-invested in such countries or remitted direct to other foreign countries for investment there. The appellants also carried on business in foreign countries by local agents, but the business was one indivisible business. The interest and dividends from securities in such foreign countries were invested in such countries or applied for establishment expenses in such countries, or remitted direct to other foreign countries for investment. If such interest and dividends had not been retained in such foreign countries, or remitted from one foreign country to another, the appellants would have been obliged to send out money from the United Kingdom to their agencies to meet the establishment charges. Such interest and dividends were included as money received by the appellants in the revenue accounts, upon which the surplus of profits was ascertained. The accounts were made out at the head office in London.

HELD—that such interest and dividends were not received in account in the United Kingdom, and were not liable to be assessed to income tax under the Income Tax Act, 1842, s. 100, Sched. D, Case 4.

Decision of C. A. ([1901] 1 K. B. 153; 70 L. J. K. B. 298; 65 J. P. 4; 83 L. T. 654; 17 T. L. R. 75) reversed.

GRESHAM LIFE ASSURANCE SOCIETY *v.* [BISHOP, [1902] A. C. 287; 71 L. J. K. B. 618; 66 J. P. 755; 50 W. R. 593; 86 L. T. 693; 18 T. L. R. 626—H. L. (E.).

30. *Non-residents—Carrying on Business in United Kingdom — Resident Agent — Taxable through him for Profits—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *ss.* 41, 44.]—J. P. S. are provision manufacturers in U.S.A., and S. and H. are commission agents in L., in the United Kingdom, and at irregular intervals and in varying quantities J. P. S. consign to S. and H. goods for sale on commission.

Taxable Income—*Continued.*

There is no agreement between them, but consignment notes are sent with each lot of goods showing the amount drawn against each lot, and bills of lading with the drafts attached are sent by mail.

S. and H. take up the drafts and realise the goods.

The risk of profit or loss on each transaction rests with J. P. S.

S. and H. fix the prices of the goods, invoice the goods in their own name, receive the proceeds of the sales, and assume responsibility of payment by the purchasers. They from time to time send statements to J. P. S. showing their receipts and debiting the account with their commission. They remit to or draw upon J. P. S. for the credit or debit balance as the case may be.

HELD — that income tax payable on the profits of these transactions as the business was carried on by J. P. S. in the United Kingdom, where they were non-resident. Therefore S. and H. were rightly assessed as their agents.

WATSON *v.* SANDIE, [1898] 1 Q. B. 326 ; 67 L. J. [Q. B. 319 ; 77 L. T. 528 ; 14 T. L. R. 124 ; 46 W. R. 202—Div. Ct.

31. *Interest earned Abroad — Constructive Remittance—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100. *Sched. D, Case* 4.]—A proprietary insurance company which derived interest from its foreign and Colonial investments, did not remit the interest home but retained it in the countries where it was earned, and invested it or otherwise applied it there. The interest was entered in the company's accounts and taken into account in estimating the amount of profit to be divided by way of bonus, dividend or otherwise.

HELD (Lord Young dissenting)—that it was not constructively received in this country so as to be chargeable with duty under Case 4 of Sched. D of the Income Tax Act, 1842.

Forbes v. *Scottish Provident Institution* ((1895) 23 R. 322) followed.

Scottish Mortgage Co. of New Mexico v. *Inland Revenue* ((1886) 14 R. 98, distinguished.

Gresham Life Assurance Society v. *Bishop* ([1901] 1 Q. B. 153 ; 70 L. J. Q. B. 298 ; 65 J. P. 4 ; 83 L. T. 654 ; 17 T. L. R. 75—C. A., *see* No. 29, *supra*) disapproved.

STANDARD LIFE ASSURANCE CO. *v.* ALLAN, [(1901) 3 F. 805.

32. "*Residing in United Kingdom*"—*Company registered Abroad—Head Office and Directors' Meetings in London—Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *s.* 2, *Sched. D.*]—A company registered abroad, but having its head office in London where directors' meetings are held and the business controlled, is assessable to income tax as "a person residing in the United Kingdom."

A company was registered in South Africa for the purpose of purchasing and prospecting lands with mining possibilities in South Africa, and of forming companies to work the same, and making markets in and realising the shares of those companies on the stock markets of various cities in Europe, including London. The general meetings of the company were held in South Africa. The meetings of the directors, some of whom were resident in England and some abroad, were held in London, though the articles of association gave power to hold the meetings at various cities abroad, and the control of the business proceeded from the board in London.

HELD—that the fact of the registration of the company in South Africa did not prevent it being resident in the United Kingdom ; that the company was resident in the United Kingdom ; and that therefore it was assessable to income tax under sect. 2, Sched. D, para. 1, of the Income Tax Act, 1853, upon the whole of the profits of its business.

GOERTZ & CO. *v.* BELL, [1904] 2 K. B. 136 ; 73 [L. J. K. B. 448 ; 53 W. R. 64 ; 90 L. T. 675 ; 20 T. L. R. 348—Channell, J.

33. "*Residing in the United Kingdom*"—*Income Tax Acts*, 1842 (5 & 6 Vict. *c.* 35), *s.* 39, *and* 1853 (16 & 17 Vict. *c.* 34), *s.* 2.]—An English merchant carried on business, and usually resided, in Madras. His wife and children lived in a house in England belonging to her ; and in most years he spent several months with them there. During the twelve months ending April 5, 1903, he was, however, never in England.

HELD—that he could not be said to be a person "residing in the United Kingdom" and was not liable to be assessed for income tax.

TURNBULL *v.* INLAND REVENUE, (1905) 7 F. 1 [—Ct. of Sess.

34. "*Residing in the United Kingdom*"—*Company registered Abroad — Head Office Abroad — Directing Power in the United Kingdom — Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *s.* 2, *Sched. D.*]—A diamond mining company was registered and had its head office abroad. The general meetings of the shareholders were held abroad where the mine was situate, but a certain number of the directors were obliged to reside in London, and meetings of the directors took place both in London and abroad. The contracts for the sale of the diamonds and for controlling the price in the market were made in London.

HELD, upon the facts—that the direction and control of the policy and important operations of the company were exercised in London, and that, therefore, the company was resident in the United Kingdom within the meaning of sect. 2, Sched. D, of the Income Tax Act, 1853, and was assessable to income tax upon the whole of its profits.

Decision of C. A. ([1905] 2 K. B. 612 ; 74 L. J. K. B. 934 ; 54 W. R. 9 ; 93 L. T. 63 ; 21 T. L. R. 578) affirmed.

DE BEERS CONSOLIDATED MINES, LD. *v.* HOWE, [1906] A. C. 455 ; 75 L. J. K. B. 858 ; 95 L. T. 221 ; 22 T. L. R. 756 ; 13 Mans. 394 —H. L.

Taxable Income—*Continued.*

35. "*Residing in the United Kingdom*"—*Company registered in England—Company owning all the Shares in Foreign Company—Profits in Foreign Company—Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *Sched. D.*]—An English company, registered under the Companies Acts, held all the shares in a German company which was registered as a joint stock company in Germany with limited liability. The members of the board of management of the German company were also directors of the English company, and the members of the board of supervision were nominees of the English company. Out of the profits of the German company for the year in question, a sum of £15,000 was, in accordance with the requirements of German law, transferred to the patents depreciation fund before dividing the profits. The Income Tax Commissioners came to the conclusion that the English company controlled the German company from England, and that the entire business of the German company was carried on by, and was the business of, the English company, and that the £15,000 were profits of the English company assessable to income tax.

HELD—that, as the two companies were distinct entities, the fact that the English company owned all the shares in the German company did not make the German company a mere *alias* or a trustee or agent for the English company; that the profits of the German company were not the profits of the English company, and that therefore the English company were not assessable to income tax in respect of the £15,000.

THE GRAMOPHONE AND TYPEWRITER, LD. *v.* [STANLEY, [1906] 2 K. B. 856; 75 L. J. K. B. 1031; 95 L. T. 461: 22 T. L. R. 818—Walton, J.

II. ASSESSMENT AND COLLECTION.

(a) In General.

See BANKRUPTCY, No. 165.

36. *Appeal—Further Statement—No Question of Law arising—Appeal dismissed.*]—When an appeal from the Divisional Court, who held that the Income Tax Commissioners were right, came on for hearing and had been partly argued, the Court sent the case back to the Commissioners for a further statement. Upon the further statement being made by the Commissioners, it was admitted that no question of law arose.

HELD—that, there being no question of law, the appeal must be dismissed.

PENINSULAR AND ORIENTAL STEAM NAVIGA- [TION CO. *v.* LESLIE, (1900) 82 L. T. 137—C. A.

37. *Loss in any Trade, &c.—Adjustment—Certiorari to question Decision of Commissioners—Customs and Inland Revenue Act*, 1890 (53 Vict. *c.* 8), *s.* 23.]—If Commissioners of Income Tax when purporting to act under sect. 23 of the Customs and Inland Revenue Act, 1890, consider a wrong question, their decision may be reviewed on *certiorari*: *sems* if they in fact consider the right question, but decide it erroneously.

Under that section the Commissioners ought to consider the person's total income from all sources, and then whether he has sustained a loss in any trade, &c.; if he has done so he may be entitled to some adjustment in respect of the tax already paid on, *e.g.*, investments.

R. *v.* COMMISSIONERS OF INCOME TAX, (1904) [91 L. T. 94—Div. Ct.

38. "*New Business*"—*Company Owners of One Ship for Three Years—Owners of Part of another Ship for Eight Months—Whether they can be combined in One Assessment—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100, *Sched. D*, 2, 3.]—During the years 1898, 1899, and 1900 a steamship company owned the whole of *The Brookside*, and during the last eight months of 1900 fifty-nine sixty-fourths of *The Glen Dochart*. The surveyor of taxes contended that, as *The Glen Dochart* was not the sole property of the company, and was a concern carried on by two or more persons jointly, it must be treated as a separate concern and assessed separately. On the other hand, the company contended that the proper way to arrive at the correct assessment was to add together the three years' profit of the one vessel, and the eight months' profit of the other, and divide the result by three.

HELD—that *The Glen Dochart* must be separately assessed.

Attorney-General v. *Borrodaile* ((1814) 1 Price, 148) followed.

FARRELL *v.* THE SUNDERLAND STEAMSHIP CO., [LD., (1903) 67 J. P. 209; 88 L. T. 741; 9 Asp. M. C. 416—Ridley, J.

39. *New Business—Purchase of small Bank by larger Bank—*"*Succession*"*—Enlargement of old Business—Proper Mode of Assessment—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100, *Sched. D, Case* 1, *r.* 1; *Cases* 1 & 2, *r.* 4.]—The National Provincial Bank purchased the whole business of the County of Stafford Bank, whose only office was at W., as from December 31st, 1899; and from that date the business was carried on at the cost, and for the profit, of the purchasers till March 5th, 1900, when the old bank closed its doors, re-opening next day as the W. branch of the National Provincial Bank. The accounts of this branch were merged in the general accounts of the bank, and profits made by it could not be determined: but the profits made by the County of Stafford Bank, 1896, 1897, 1898, were known, and the appellant claimed that an assessment, based on averages of these figures, should be made on the National Provincial Bank for the first three years of their trading.

HELD—that there had been a succession by the National Provincial Bank to the business of the old bank within the meaning of the fourth rule, and that an additional assessment should be made.

Decision of Ridley, J. ([1903] 2 K. B. 249; 72 L. J. K. B. 590; 67 J. P. 329; 88 L. T. 840; 19 T. L. R. 532) reversed.

BELL *v.* NATIONAL PROVINCIAL BANK OF ENG- [LAND, [1904] 1 K. B. 149; 73 L. J. K. B. 142; 68 J. P. 107; 52 W. R. 406; 90 L. T. 2; 20 T. L. R. 97—C. A.

Assessment and Collection—*Continued.*

40. *Non-payment—Distress for Non-payment by former Occupier—Owner not in Possession—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 70—*Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *s.* 35.] —On April 22nd, 1897, a lease was granted to the plaintiff of premises, beginning December 25th, 1896, for sixty years at £65 a year rent. The rent was to be paid quarterly, the first payment being payable on September 29th, 1897. He did not take possession until April, 1897, and for several years before he entered the premises had been unoccupied. An assessment for income tax of £9 3*s.* 4*d.* was made for the year April, 1896, to April, 1897. In August and again in September, 1897, demands were made for payment, and as the plaintiff refused to pay, on November 17th a distraint was put in.

The present action was then commenced against the defendant, a duly appointed collector for the purpose of the Income Tax Acts, for wrongful distress.

HELD—that this was a lawful entry, and that no action would lie, as it was covered by sect. 70 of the Income Tax Act of 1892.

READING *v.* CHEW, (1898) 78 L. T. 681; 14 [T. L. R. 468—Bruce, J.

And see MISREPRESENTATION AND FRAUD, No. 23.

41. *Non-payment — Distress — Authority of Collectors to Levy — Expiration of Year for which Tax is Payable—Taxes Management Act*, 1880 (43 & 44 Vict. *c.* 19).]—On May 25th, 1899, various sums were due and unpaid from the plaintiff for income tax, house duty, and land tax for the year ending April 5th, 1899. The defendants, who were duly appointed collectors for the period from April, 1898, to April, 1899, levied a distress on the plaintiff's premises for such unpaid sums. At the time when the distress was levied, no day had been appointed under sect. 100 of the Taxes Management Act, 1880, to receive the monies collected, and no schedule of arrears had been delivered under sect. 103.

HELD—that the warrant given by the Commissioners in Form 5 of Sched. 2 of the Taxes Management Act, 1880, gave the defendants power to distrain without limit as to time for duties payable for the year ending April 5th, 1899. Collectors appointed under sect. 73 (1) of the Act do not become *functi officio* on April 5th, but are appointed to collect the taxes for the year ending April 5th. Until a day has been appointed by the Board under sect. 100 of the Act to receive the monies received by the collectors, and the money collected has been paid over, and a schedule of arrears delivered under sect. 103, the collectors' authority to collect has not terminated.

ELLIOTT *v.* YATES, [1900] 2 Q. B. 370; 69 [L. J. Q. B. 820; 64 J. P. 564; 48 W. R. 610; 82 L. T. 812; 16 T. L. R. 473—C. A.

42. *Penalties — Abatement and Exemption — Penalty for Untrue Declaration — Income Tax Act*, 1842 (5 & 6 Vict. *s.* 35), *s.* 166.]—Upon the true construction of sect. 166 of the Income Tax Act, 1842, a person who in making a claim for exemption "untruly declares" his income is liable to the prescribed penalty of £20 and treble duty, although his claim for exemption was not allowed; and the amount of income on which such treble duty is to be calculated is his whole income, including that part on which duty has already been paid.

Per Lord Kinnear, an "untrue" declaration means one which is not merely inaccurate, but false and untruthful.

LORD ADVOCATE *v.* M'LAREN, (1906) 7 F. 984— [Ct. of Sess.

43. *Practice — Case stated by the Commissioners of Income Tax—Note of Fresh Facts—Taxes Management Act*, 1880 (43 & 44 Vict. *c.* 19). *s.* 59.]—Upon the hearing of a case stated by the Commissioners of Income Tax under the Taxes Management Act, 1880, the Court allowed a note to be put in by the parties containing further facts, without pronouncing any formal order.

THE PAISLEY CEMETERY CO., LD. *v.* KEITH, [(1898) 25 R. 1080; 35 Sc. L. R. 947—Ct. of Sess.

44. *Practice — Administration of Insolvent Estate — Proof by creditor — Calculation of Interest and Income Tax—Practice.*]—A question having arisen as to the incidence of income tax on a claim by a creditor, Kekewich, J., referred the matter for consideration to the Masters, who stated that in such an administration creditors are admitted to prove for the amount of their debt with interest (less income tax) on debts carrying interest to the date of the judgment or order for administration. The interest, less tax, and any costs allowed are added to the principal, and the dividend is calculated on the total debt thus found due. Income tax so deducted is not accounted for to the Revenue, because, until the principal sum is paid, it is considered that no income tax is in fact payable.

IN RE GREEN, BALL *v.* ELLIS, [1904] W. N. 116 [L. T. Jo. 523; 117 L. T. Jo. 60; 39 L. J. N. C. 172—Kekewich, J.

45. *Repayment — Appeal on Case stated — Taxes Management Act*, 1880 (43 & 44 Vict. *c.* 19), *s.* 59.]—A claim for repayment of income tax cannot be made by way of appeal on a case stated under sect. 59 of the Taxes Management Act, 1880.

BRUCE *v.* BURTON, (1901) 65 J. P. 440; 85 [L. T. 227—Div. Ct.

46. *Successor — New Business — Average of Three Years' Profits—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *Sched. D, Cases* 1, 2, *rr.* 1, 4.] —In 1878 a tramways company was incorporated by a private Act to work horse trams. In 1885 an omnibus company was incorporated under the Companies Acts. In 1888 these two companies amalgamated, and a company (hereinafter called the "United Company") incorporated under the Companies Acts, acquired the undertakings of the tramways and omnibus

Assessment and Collection- *Continued.*

company. In 1901 the district council purchased the tramways undertaking of the united company in exercise of the powers conferred on them by the Tramways Act, 1870, and then largely extended the system and worked the trams by electricity instead of by mechanical power.

HELD—that the district council were successors to the united company in carrying on the tramways within the meaning of r. 4 applying to Cases 1 and 2 of Sched. D in sect. 100 of the Income Tax Act, 1842.

A person can be a successor to one of two separate businesses carried on by another, but not to a part of one business.

STOCKHAM *v.* WALLASEY URBAN DISTRICT [COUNCIL, (1907) 71 J. P. 244; 95 L. T. 834; 5 L. G. R. 200—Bray, J.

47. "*Trade*"—*Religious Society—Profits of Trade going to meet Deficiency in other Work—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100, *Sched. D, s.* 101.]—The respondent association had for its object the improvement of the spiritual, mental, social, and physical condition of young men. The expenses of the association were defrayed by the subscriptions of the members and the public, by the fees of those attending the classes, and by the profits, if any, of the various departments of the work of the association. The association had at Exeter Hall educational classes, a gymnasium, and a publication department, which were carried on at a loss, the fees charged being less than the expenses, and having to be supplemented by voluntary subscriptions. They also had at Exeter Hall a restaurant, which was open to the public, and which was carried on on the usual commercial principles. Should there be a loss on the restaurant in any year, such a loss would be made good out of the subscriptions, but the restaurant would be carried on irrespective of any profit being derived therefrom. For the year 1899—1900 the profits from the restaurant were £703.

HELD—that the restaurant was carried on as a "trade" within the meaning of sect. 100, Sched. D, of the Income Tax Act, 1842, and that the losses on the other branches of the work could not be deducted from the profits of the restaurant for the purposes of assessment to the income tax.

GROVE *v.* YOUNG MEN'S CHRISTIAN ASSOCIA- [TION, (1903) 67 J. P. 279; 88 L. T. 696; 19 T. L. R. 491—Ridley, J.

48. "*True and Correct Statement*" *within Property and Income Tax Act*, 1842, *ss.* 52, 55—*Time within which Information must be laid—Taxes Management Act*, 1880—*Inland Revenue Regulation Act*, 1890.]—By sect. 52 of the Property and Income Tax Act, 1842, every person chargeable under that Act must when required prepare and deliver "a true and correct statement in writing" containing the amount of his profits or gains. By sect. 55 of the same Act it is enacted that if any person, who ought by the Act to deliver any list, declaration "or statement as aforesaid," refuse or neglect to do so, proceedings may be taken against him.

HELD—that the words "any statement as aforesaid" mean the "true and correct" statement mentioned in sect. 52, and that a penalty is incurred under sect. 55 both for failing to deliver any statement at all or for delivering one that is not true and correct. It is not necessary in a prosecution in the High Court under sect. 55 that proceedings should first have been taken before the Commissioners. By sect. 21 (4) of the Taxes Management Act, 1880 (43 & 44 Vict. *c.* 19), it is provided that in default of prosecution within the space of twelve months from the time of any penalty being incurred, no penalty or forfeiture shall thereafter be recoverable in any other manner.

HELD, also, that the words "in any other manner" mean in any other manner than before the High Court.

HELD, further, that sub-sect. 4 has been impliedly repealed by the Inland Revenue Regulation Act, 1890, which provides that proceedings may be commenced within two years after the penalty has been incurred.

THE LORD ADVOCATE *v.* SAWERS, (1898) 25 R. [242; 35 Sc. L. R. 190—Ct. of Sess.

49. *Underwriters*—"*Names*"—*Annual Statements of Account—Statements for Income Tax Purposes—Duty of Underwriters to Furnish—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *ss.* 42, 51.]—A firm of underwriters, doing insurance business on behalf of "names" and accounting to such "names" annually for the profits of the year, must deliver to the Income Tax Act authorities a list of their "names" showing the profit due to each of them.

LORD ADVOCATE *v.* GIBB, (1906) 8 F. 887—Ct. [of Sess.

(b) Deductions.

50. *Annual Premium on Life Policy—Money advanced by Insurance Company to pay Part of Premium—Amount advanced debited against Policy Holder—Premium "paid by" him—Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *s.* 54.]—By a policy of life assurance half of the annual premium during each of the first seven years was, if the assured so desired, to be advanced by the insurance company and to be a first charge on the policy. The insurance company did advance half the annual premium, the mode in which this was done being that the assured paid half the premium in cash, and was credited in the renewal premium register with the full amount of the premium, separately entered in two sums, the sum actually paid by him in cash, and the sum advanced by the company, against which latter sum the words "on credit" were placed; in the loan register of the insurance company he was debited with the half of the premium advanced by the company. No advance in cash was made to the assured by the company.

HELD—that the part of the premium advanced by the insurance company was not "paid by"

Assessment and Collection—*Continued.*

the assured within the meaning of sect. 54 of the Income Tax Act, 1853, and that he was not entitled to deduct the amount thereof from his assessment to income tax.

Decision of C. A. ([1903] 1 K. B. 514 ; 72 L. J. K. B. 230 ; 67 J. P. 89 ; 51 W. R. 489 ; 88 L. T. 134 ; 19 T. L. R. 261) affirmed.

HUNTER *v.* THE KING, [1904] A. C. 161 ; 73 [L. J. K. B. 381 ; 52 W. R. 593 ; 90 L. T. 325 ; 20 T. L. R. 370—H. L. (E.).

51. *Damages for Personal Injuries — Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100, *Sched. D, Cases* 1 *and* 2, *r.* 1.]—The appellants, who were brewers, were the owners of a licensed house, the business of which they carried on by a manager acting for them. A customer was injured by the falling of a chimney of the house during a gale, and he recovered damages and costs in an action against the appellants on the ground of negligence.

HELD—that in estimating the balance of the profits or gains of the trade the appellants were not entitled to deduct the amount of the damages and costs ; such expenses were not incidental to their trade, and were not incurred by them in earning profits.

Decision of C. A. ([1905] 2 K. B. 350 ; 74 L. J. K. B. 702 ; 53 W. R. 625 ; 21 T. L. R. 550) affirmed.

STRONG & CO., LD. *v.* WOODFIELD, [1906] A. C. [448 ; 75 L. J. K. B. 864 ; 95 L. T. 241 ; 22 T. L. R. 754—H. L. (E.).

52. *Cost of Removal to New Premises—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100, *Sched. D, Case* 1.]—A company engaged in buying and selling granite transferred its business to a larger yard, and incurred expense in moving stones and cranes to the new yard and in re-erecting the cranes there.

HELD—that such expenses could not be deducted in arriving at the company's annual profits.

GRANITE SUPPLY ASSOCIATION, LD. *v.* INLAND [REVENUE, (1906) 8 F. 55—Ct. of Sess.

53. *Exhaustion of Nitrate Ground—Income Tax Acts*, 1842 (5 & 6 Vict. *c.* 35), *s.* 103, *Sched. D, Case* 1, *rr.* 1, 3, *and* 1853 (16 & 17 Vict. *c.* 34), *s.* 2, *Sched. D.*]—A company registered in England purchased nitrate grounds abroad, which contained large quantities of "caliche," the raw material from which nitrate is produced. When all the caliche was exhausted the land and works would be practically valueless. In assessing the profits of the company to income tax under Sched. D of the Income Tax Acts the company claimed to make a deduction in respect of the exhaustion of the caliche deposits.

HELD—that the caliche represented capital of the company, and no reduction was allowable.

Decision of C. A. ([1905] 1 K. B. 184 ; 74 L. J. K. B. 219 ; 53 W. R. 257 ; 92 L. T. 184 ; 21 T. L. R. 134) affirmed.

ALIANZA CO., LD. *v.* BELL, [1906] A. C. 18 ; 75 [L. J. K. B. 44 ; 54 W. R. 413 ; 93 L. T. 705 ; 22 T. L. R. 94—H. L. (E.).

54. *Brewer—Expenses of applying for new Licences for Public-houses—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100, *Sched. D.*]—The expenses incurred by brewers in order to increase their trade, in connection with applications made by them for new and additional licences for houses owned and leased by them, and also for houses not owned by them, including payments made to owners of public-houses for the surrender of licences in order to enable the brewers to obtain a new licence, cannot be deducted from the profits made by the brewers, and are assessable to income tax under Sched. D of the Income Tax Act, 1842.

SOUTHWELL *v.* SAVILL BROTHERS, LD., [1901] [2 K. B. 349 ; 70 L. J. K. B. 815 ; 65 J. P. 649 ; 49 W. R. 682 ; 85 L. T. 167 ; 17 T. L. R. 513—Div. Ct.

55. *Brewers — Expenses of repairing Tied Houses—Deduction from Profits of Brewery—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100 *—Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *s.* 2.]—A firm of brewers, in order to increase the sale of their beer, &c., and so to increase their profits, bought public-houses, which they let to tenants who covenanted to buy all beer, &c., from the brewers.

Their profits were materially increased by the sale of beer, &c., to the tenants of these "tied" houses. They expended a large sum of money upon the repairs of these "tied" houses, and they claimed to deduct a part of that sum in estimating the balance of profits and gains of their trade for the purpose of the income tax.

HELD (affirming the judgment of the Queen's Bench Division)—that the brewers were not entitled so to deduct any part of the sum expended upon repairs of the "tied" houses.

BRICKWOOD & CO., LD. *v.* REYNOLDS, [1898] 1 [Q. B. 95 ; 62 J. P. 51 ; 67 L. J. Q. B. 26 ; 77 L. T. 456 ; 14 T. L. R. 45 ; 46 W. R. 130—C. A.

56. *Depreciation of Ships—Power to take into account Allowances in former Years—Hulks—"Plant"—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100, *Sched. D., Case* 1, *r.* 3—*Customs and Inland Revenue Act*, 1878 (41 & 42 Vict. *c.* 15), *s.* 12.]—Under sect. 12 of the Customs and Inland Revenue Act, 1878, in assessing the profits and gains of a shipowner's business, deduction should be made for depreciation in the value of the ships caused by wear and tear during the year of assessment, irrespective of the deductions allowed in former years. Therefore, though in former years deductions for the diminished value of the ships owing to wear and tear had been allowed amounting in all to 96 per cent. of their original value, and though their breaking-up value amounted to more than the remaining 4 per cent. of their original value: —

HELD—that the owners were entitled to a

Assessment and Collection *Continued.*

deduction in respect of the diminished value of the ships by reason of their wear and tear during the year of assessment.

A hulk used as a warehouse, having been formerly a sailing ship but having been dismantled, is "plant" within the meaning of sect. 12 of the Customs and Inland Revenue Act, 1878.

JOHN HALL, JUNR. & CO. *v.* RICKMAN, [1906] 1 [K. B. 311 ; 75 L. J. K. B. 178 ; 54 W. R. 380 ; 94 L. T. 224 ; 22 T. L. R. 131—Walton, J.

57. *Insurance Company — Unexpired Risks, No Allowance for.*]—In ascertaining for income tax purposes the annual profits of a company carrying on the business of fire, sickness, accident and guarantee insurance, no deduction is allowable in respect of estimated losses on risks which have not "run off" at the end of the year in question.

National Insurance Co. v. *Inland Revenue* ((1889) 16 R. 461, 474—Ct. of Sess.) followed.

GENERAL ACCIDENT ASSURANCE CORPORATION, [LD. *v.* MCGOWAN, (1907) S. C. 1004—Ct. of Sess.

58. *Public Officer—Salary—Contribution to Superannuation Fund—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 146—*Poor Law Officers Superannuation Act*, 1896 (59 & 60 Vict. *c.* 50), *s.* 12.]—An officer or servant in the employ of poor law guardians is entitled by sect. 146 of the Income Tax Act, 1842, to deduct from the amount of his salary on which income tax is payable the amount deducted from his salary for the purpose of the superannuation fund under the powers conferred by the Poor Law Officers' Superannuation Act, 1896.

BEAUMONT *v.* BOWERS, [1900] 2 Q. B. 204 ; 69 [L. J. Q. B. 600 ; 64 J. P. 552 ; 48 W. R. 557 ; 83 L. T. 126 ; 16 T. L. R. 376—Div. Ct.

59. *Salary—Contributions to a "Thrift Fund" —Non-compulsory Participation in Scheme— "Sums payable or chargeable on the Same by Virtue of any Act of Parliament"—"Really and* bonâ fide *paid, and borne by the Party to be charged"—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 147—*Manchester Corporation Act*, 1891 (54 & 55 Vict. *c.* cevii.).]—The Manchester Corporation Act, 1891, empowered the corporation to establish a fund for the encouragement of thrift amongst its officers and servants, and for providing a sum of money which, in the event of the retirement or death of any person in the service of the corporation who had contributed to the fund, should be available for himself or his representatives—such fund to be called the "thrift fund"—and to prepare and approve by resolution a scheme for the establishment of such fund. The scheme passed by the corporation provided that persons who were in their employ previous to the passing of the Act might, on their applying in writing, be admitted to the benefits of the fund, and, having been admitted, they could not, while in the service of the corporation, withdraw from the fund ; and that persons entering their employ after the passing of the Act must contribute to the fund. The contributions to the fund were to be deducted from the salaries.

HELD—that the contributions were payable, or chargeable, upon the servants' salaries, not "by virtue of any Act of Parliament," but by the men's voluntary act in entering the corporation's employ, or joining the fund ; also that the contributions were not "really and *bona fide* paid and borne" by the men, because under the scheme they were virtually invested for the ultimate benefit of the individual who contributed them, and therefore such contributions could not be deducted under rule 1 of sect. 146 of the Income Tax Act, 1842.

Beaumont v. *Bowers* ([1902] 2 Q. B. 204 ; 6 L. J. Q. B. 600 ; 64 J. P. 552 ; 48 W. R. 557 ; 83 L. T. 126 ; 16 T. L. R. 376—Div. Ct., *supra*) disapproved.

Decision of Phillimore, J. ([1902] 2 K. B. 298 ; 71 L. J. K. B. 744 ; 66 J. P. 680 ; 50 W. R. 685 ; 87 L. T. 115 ; 18 T. L. R. 680) varied.

HUDSON *r.* GRIBBLE, BELL *r.* GRIBBLE, [1903] [1 K. B. 517 ; 72 L. J. K. B. 242 ; 67 J. P. 85 ; 50 W. R. 457 ; 88 L. T. 186 ; 19 T. L. R. 260 ; 1 L. G. R. 292—C. A.

60. *Shipowner—Partly insuring Vessel— Forming Insurance Fund out of Profits—Loss of Vessel.*]—A shipping company partially insured one of its vessels, and took part of the risk upon itself, transferring annually from revenue to an "insurance fund" a sum equal to the premium that an underwriter would have required. No deduction for income tax purposes was allowed from annual profits in respect of the sum so transferred, upon the loss of the ship in question.

HELD—that, in estimating its annual profits, the company could not deduct the amount taken from the insurance fund to meet the loss, for the loss was a loss of capital.

INLAND REVENUE *v.* WESTERN STEAMSHIP [CO., LD., (1907) S. C. 1005—Ct. of Sess.

61. *Wear and Tear of Machinery "during the Year"—Customs and Inland Revenue Act*, 1878 (41 & 42 Vict. *c.* 15), *s.* 12.]—The amendment introduced by the Customs and Inland Revenue Act, 1878, s. 12, with respect to the deduction to be made for depreciation, is to the effect that the Commissioners in assessing the profits of any trade shall "allow such deduction as they think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern."

HELD—that for the purpose of arriving at the balance of the profits an average of three years is to be taken ; but in order to arrive at the sum which is to be allowed by way of deduction from those profits in respect of depreciation, the wear and tear during the year in progress when the assessment is made only is to be taken into consideration.

CUNARD STEAMSHIP CO. *v.* COULSON, [1899] [1 Q. B. 865 ; 68 L. J. Q. B. 554 ; 80 L. T. 326 ; 15 T. L. R. 285—Div. Ct.

Assessment and Collection—*Continued.*

62. *Wear and Tear of Steamship—Customs and Inland Revenue Act*, 1878 (41 & 42 Vict. *c.* 15), *ss.* 12.]—Whether the deduction allowed by the Commissioners of Income Tax in respect of the diminished value of ships by reason of wear and tear is just and reasonable is a question of fact in each case.

British India Steam Navigation Co., Ld. [*r.* Leslie, (1901) 17 T. L. R 104—Div. Ct.

III. DEDUCTION OF TAX FROM RENT OR ANNUAL PAYMENTS.

63. *Alimony — Whether to be paid free of Income Tax—Income Tax Acts*, 1842 (5 & 6 Vict. *c.* 35), *ss.* 102, 103, *and* 1853 (16 & 17 Vict. *c.* 34), *s.* 40.]—A divorce suit was compromised by a deed of separation, and by a supplemental deed the husband agreed to pay to the wife £450 per annum, being the amount fixed by an arbitrator to whom the question was referred in accordance with the terms of the deed of separation.

Held—that the husband might deduct income tax from the annuity.

Decision of Kekewich, J. ([1906] 1 Ch. 768; 75 L. J. Ch. 415; 54 W. R. 448; 94 L. T. 537), affirmed.

In re Barry's Trusts, Barry *r.* Smart, [1906] 2 Ch. 358; 75 L. J. Ch. 676; 54 W. R. 621; 95 L. T. 165—C. A.

64. *Annuity—Purchase of Property—Lump Sum and Annual Payments—Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *s.* 40.]—The plaintiff was the owner of the reversion of a leasehold interest in certain premises, part of which were let to the defendants. The net rent accruing to the plaintiff, after payment of rent to the superior landlord, was £1,625 per annum. The plaintiff agreed with the defendant to sell him the reversion in consideration of the sum of £1,000 and the execution of a deed whereby the defendant covenanted to pay to the plaintiff £1,625 per annum to the end of the term. The defendant deducted income tax from the annual sum of £1,625 under sect. 40 of the Income Tax Act, 1853, and the plaintiff disputed his right to do so.

Held—that the annual sum was not paid as an instalment of capital, but as an annuity, and that therefore the defendant was authorised to deduct income tax from it.

Chadwick *v.* The Pearl Life Assurance [Co., Ld., [1905] 2 K. B. 507; 74 L. J. K. B. 671; 54 W. R. 78; 93 L. T. 25; 21 T. L. R. 456—Walton, J.

65. *Annuity—"Clear of all Deductions"—Right of Party making Payment to deduct Tax—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *ss.* 102, 103.]—By an agreement for separation between husband and wife the husband undertook to make his wife, during their joint lives, an annual allowance payable quarterly in advance "clear of all deductions," and to secure the annuity on his estates.

Held—that the agreement came within sects. 102 and 103 of the Income Tax Act, 1842, and that the husband was entitled and bound to make, and the wife was bound to allow, a deduction of income tax in respect of each future instalment of the annuity.

Shrewsbury *v.* Shrewsbury, (1906) 22 [T. L. R. 598—Kennedy, J.

66. *Annuity—Arrears of Annuity—Income Tax not deducted at Time of Payment—Income Tax Acts*, 1842 (5 & 6 Vict. *c.* 35), *s.* 158, *and* 1853 (16 & 17 Vict. *c.* 34), *s.* 40]—A husband and wife agreed to live separate, and the husband agreed to allow her £4,000 a year to be paid quarterly, clear of all deductions. Subsequently it was agreed that the allowance should be reduced to £3,000 a year. Disputes arose as to how long the reduced allowance was to continue, and the wife brought an action to recover arrears of the allowance, and a consent order was made that the wife was entitled to the £4,000 a year as from a year before the action was commenced. No income-tax had been deducted by the husband from any of the payments of the allowance. The husband claimed to deduct income tax in respect of all the payments made and from the arrears.

Held—that the husband might deduct income tax from the arrears, but not from the payments already made.

The Countess of Shrewsbury *r.* The Earl [of Shrewsbury, (1906) 23 T. L. R. 100—Kekewich, J.

67. *"Annuity or other Annual Payment"—Purchase Price of Article—Income Tax Acts*, 1842 (5 & 6 Vict. *c.* 35), *s.* 100, *Sched. D, Case* 1, *r.* 4; *s.* 102, *and* 1853 (16 & 17 Vict., *c.* 34), *s.* 40 *—Customs and Inland Revenue Act*, 1888 (51 & 52 Vict. *c.* 8), *s.* 24, *sub-s.* 3.]—The plaintiffs, who were foreigners resident abroad, sold a secret process for the manufacture of a certain article to the assignors of the defendants, upon the terms that the purchasers, their successors and assigns, should, for a period of forty years, pay annually to the plaintiffs a sum equal to £8 per cent. of the gross receipts on the sale of articles made by the secret process. In 1903 the defendants deducted income tax at the current rate from the amount payable by them to the plaintiffs under the terms of the agreement. In an action to recover the sums so deducted :—

Held—that the amount payable by the defendants was an "annual payment" within the meaning of the Income Tax Act, 1853, s. 40; that it was payable out of "profits or gains," and that the defendants were entitled to deduct income tax.

Delage and Another *r.* The Nugget Polish [Co., Ld., (1905) 92 L. T. 682; 21 T. L. R. 454 —Phillimore, J.

68. *Gas Company — Maximum Dividend—Income Tax paid by Company—Ashton Gas Act*, 1877 (40 & 41 Vict. *c.* clxxxvi.), *s.* 16—*Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 60, *Sched. A*, *r.* 3, *sub-r.* 3.]—By sect. 16 of the Ashton Gas

Deduction of Tax from Rent or Annual Payments —*Continued.*

Act, 1877, the profits of the Ashton Gas Company to be divided among the shareholders in any year were not to exceed the rate of 10 per cent. per annum on the ordinary capital of the company.

HELD—that the dividend to be paid in any year to the shareholders ought to be calculated as including and not excluding the income-tax thereon.

Decision of C. A. ([1904] 2 Ch. 621; 73 L. J. Ch. 673; 68 J. P. 477; 53 W. R. 49; 20 T. L. R. 601) affirmed.

THE ASHTON GAS CO. *v.* THE ATTORNEY-[GENERAL, (1905) 22 T. L. R. 82—H. L. (E.).

69. *Interest payable out of Rents received—Interest on Money lent—Customs and Inland Revenue Act*, 1888 (51 & 52 Vict. *c.* 8), *s.* 24, *sub-s.* 3.]—Income tax is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under the schedules of charge.

Acting under statutory authority, the Metropolitan Board of Works and the London County Council, as their successors, from time to time raised money on loan by the creation and issue of stock known as Metropolitan Consolidated Stock. This stock, and the dividends upon it, and the sums required to form a sinking fund, were charged "indifferently" on the whole of the lands, rents, and property belonging to the council, and, in addition to the benefit of this charge, the stockholders had the security of the rates. For the financial year 1897–8, the dividend on Metropolitan Stock amounted to about £1,140,000. On the other hand, in that year the council received about £500,000 for interest on authorised advances to public bodies. The balance required to make up the dividend was raised by rates. In their return to the Commissioners of Inland Revenue, the council charged themselves with income tax on the proceeds of rates applied towards the payment of the dividend, but they claimed exemption in respect of the rest of the money so applied as having been paid out of profits or gains already brought into charge. The Commissioners disallowed the claim on the ground that the council were bound to pay over the amount of income tax deducted from interest on Metropolitan Stock, so far as the deduction was made out of moneys not brought into charge under Sched. D; they insisted that it was no answer to say that the moneys had been brought into charge under some other schedule.

HELD—that the London County Council were entitled to retain for their own benefit so much of the deduction made by them from the interest paid by them to their mortgagees in respect of income tax as was equal to the income tax paid by them on their real estate under Sched. A, *i.e.*, to account to the Crown only for the deducted income tax, on so much of the interest as was not paid out of their income which had already been taxed.

Decision of the Court of Appeal ([1900] 1 Q. B. 192; 69 L. J. Q. B. 241; 48 W. R. 294; 81 L. T. 698; 16 T. L. R. 122) reversed.

LONDON COUNTY COUNCIL *v.* ATTORNEY-[GENERAL, [1901] A. C. 26; 70 L. J. Q. B. 77; 65 J. P. 227; 49 W. R. 686; 83 L.T. 605; 17 T. L. R. 131—H. L. (E.).

70. *Licensing Acts—Compensation Charge—Deduction from Rent—Amount of Income Tax to be deducted by Tenant—"Rent payable"—Income Tax Act*, 1842 (5 & 6 Vict. *c.* 35), *s.* 60, *Sched. A, No.* 4, *r.* 9—*Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 3 (1), (3).]—A tenant of licensed premises, the rent of which was £100 per annum, paid £20 to the compensation fund under sect. 3 (1) of the Licensing Act, 1904, and deducted £14 of such amount from his rent under sect. 3 (3), and Sched. 2 of that Act. The premises were assessed to income tax at £291 14*s.*, and the tenant paid income tax upon that sum. He deducted from his next payment of rent the sum of £5, being income tax at 1*s.* in the £ upon £100. In an action by the landlords against the tenant to recover 14*s.*, the amount of income tax upon the £14 deducted in respect of the contribution paid under the Licensing Act, 1904.

HELD—that the "rent payable" within the meaning of the Income Tax Act, 1842, was £100, and that the tenant was entitled to deduct income tax on that amount.

HANCOCK & CO. *v.* GILLARD, [1907] 1 K. B. 47; [76 L. J. K. B. 20; 71 J. P. 9; 95 L. T. 680; 23 T. L. R. 12—Bigham, J.

71. *Mortgage—Payment of Interest postponed Payable in Lump Sum at Future Date—"Yearly Interest on other Annual Payment"—Income Tax Act*, 1853 (16 & 17 Vict. *c.* 34), *s.* 40.]—A mortgage deed provided that payment of interest should be postponed; that on the happening of a certain event the debt should be paid with simple interest; and that, if it were not then paid, interest should be paid half-yearly on the aggregate sum, the first payment to be made six months after the occurrence of the specified event. The event having occurred:—

HELD—that in paying off principal and interest, income tax might be deducted in respect of the interest.

Bebb v. *Bunny* ((1854) 1 K. & J. 216) applied; *Goslings and Sharpe* v. *Blake* ((1889) 23 Q. B. D. 324; 58 L. J. Q. B. 446) distinguished.

IN RE CRAVEN'S MORTGAGE, DAVIES *v.* CRAVEN, [1907] 2 Ch. 448; 76 L. J. Ch. 651; 97 L. T. 475—Warrington, J.

72. *Municipal Corporation—Loan for Short Period—Duty to deduct Tax from Interest—Customs and Inland Revenue Act*, 1888 (51 & 52 Vict. *c.* 8), *s.* 24.]—A municipal corporation is bound to deduct income tax from the interest paid by it on loans made to it for periods of less than a year.

LORD ADVOCATE *v.* EDINBURGH CORPORATION, [(1904) 6 F. 1—Ct. of Sess.

Deduction of Tax from Rent or Annual Payments —*Continued.*

73. *Municipal Corporation—Failure to deduct Income Tax from Interest on Loans— Liability —Customs and Inland Revenue Act,* 1888 (51 & 52 Vict. *c.* 8), *s.* 24.]—A municipal corporation failed to deduct income tax (as it ought to have done) when paying interest on loans.

HELD—that it was liable to the Inland Revenue Commissioners for the amount which ought to have been deducted.

LORD ADVOCATE *v.* EDINBURGH CORPORATION, [(1906) 7 F. 972—Ct. of Sess.

74. *Order of Court for Payment of Sum with Interest—Right to deduct Tax—Income Tax Act,* 1853 (16 & 17 Vict. *c.* 34), *s.* 40.]—In an action for reduction of the sale of a portion of a ward's estate, consisting of shares in a company, it was ordered by the Court that on the purchaser repaying the price received by him in respect of the shares, together with interest at 5 per cent., he shall be entitled to restitution of the shares, with the dividends accruing thereon. Tender of the price was made by him with the 5 per cent. interest, but from this interest he claimed to deduct income tax, under sect. 40 of the above Act.

HELD—that this contention could not be maintained.

DUNN *v.* CHAMBERS, (1898) 25 R. 688; 35 Sc. [L. R. 537—Ct. of Sess.

75. *Payment of Interest—Right to deduct and retain Income Tax—Interest "paid out of Profits or Gains brought into Charge"—Tax on Land in Occupation of Owner—Land charged with Payment of Interest—Metropolitan Board of Works (Loans) Act,* 1869 (32 & 33 Vict. *c.* 102) *—Income Tax Act,* 1842 (5 & 6 Vict. *c.* 35), *s.* 60, *No.* 4, *r.* 10, *s.* 102 — *Customs and Inland Revenue Act,* 1888 (51 & 52 Vict. *c.* 8), *s.* 24 (3).]—The London County Council were in receipt of an annual income derived from interest on loans and rents; they also possessed certain lands which they occupied themselves. They had from time to time borrowed large sums of money under statutory powers, and in respect thereof had created capital stock which, with the dividends thereon, was charged upon all their property, including the land occupied by them. The annual interest payable on that stock was in excess of the annual income received by them together with the annual value of the land occupied by them. The amount by which their income was insufficient to pay the interest upon the stock was raised by means of rates. The council, when paying dividends upon the stock, deducted income tax under Sched. D.

HELD—that the council were not entitled to retain out of the income tax so deducted from the dividends such a sum as would recoup them the income tax which they had already paid under Sched. A in respect of the lands in their occupation.

Decision of the C. A. ([1905] 2 K. B. 375; 74 L. J. K. B. 787; 69 J. P. 333; 53 W. R. 677; 93 L. T. 378; 21 T. L. R. 604; 3 L. G. R. 951) reversed.

ATTORNEY-GENERAL *v.* LONDON COUNTY [COUNCIL, [1907] A. C. 131; 76 L. J. K. B. 454; 71 J. P. 217; 96 L. T. 481; 23 T. L. R. 390; 5 L. G. R. 465—H. L. (E.).

INCORPOREAL HEREDITAMENTS.

See REAL PROPERTY AND CHATTELS REAL.

INDECENT ASSAULT.

See CRIMINAL LAW.

INDECENT EXPOSURE.

See CRIMINAL LAW.

INDEMNITY.

See AGENCY, 5; GUARANTEE; MASTER AND SERVANT.

INDIA.

See DEPENDENCIES AND COLONIES.

INDICTMENTS AND INFORMATIONS.

See CRIMINAL LAW AND PROCEDURE.

INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES.

And see under FRIENDLY SOCIETIES.

1. *Debts due from Members—Past Member—Action in County Court—Industrial and Provident Societies Act,* 1893 (56 & 57 Vict. *c.* 39), *s.* 23, *sub-s.* 1.]—Sect. 23, sub-sect. 1, of the Industrial and Provident Societies Act, 1893—which provides that all monies payable by a member to a registered society shall be a debt due to the society, and shall be recoverable as such in a County Court—applies to money

payable by a person whilst he was a member of the society, although such person ceased to be a member before the action was brought.

Gwendolen Land Society *v.* Wicks, [1904] [2 K. B. 622 ; 73 L. J. K. B. 815 ; 91 L. T. 440 ; 10 T. L. R. 593 ; 53 W. R. 219—Div. Ct.

2. *Member—Tenant—Power of Committee of Management to raise Rent—"Fair and usual Rent" to be charged.*]—By the rules of a society registered under the Industrial and Provident Societies Acts, it was provided that "the tenant shall be charged a fair and usual rent for his occupancy of same." The committee of management controlled all business carried on by or on account of the society.

Held—that the members of the society were not entitled to have a fixed rent ; and that the committee of management might increase the rent, as the tenant was to be charged a "fair and usual rent" for the time being.

Tenant Co-operative, Ld. *v.* James, (1902) [18 T. L. R. 237—Wright, J.

3. *Nominee—Disputed Claim—Arbitration—Plaint in County Court—Industrial and Provident Societies Act*, 1893 (56 & 57 Vict. *c.* 39), *s.* 49, *sub-ss.* 1, 5.]—The nominator's daughter claimed as nominee, and his widow also claimed the amount standing in the books of the defendant society to the credit of the nominator, who died in May, 1898. The society did not see fit to allow an interpleader issue to be raised. The nominee proceeded under the provisions of the Arbitration Act, 1889, and obtained, *ex parte*, an award by a sole arbitrator in her favour under sect. 6, sub-sect. (*b*). Subsequently a plaint was taken out in the county court by the daughter under the Industrial and Provident Societies Act, 1893, s. 49, and the judge enforced the award.

Held—that the proceedings in the county court could be treated as an application to the county court under sect. 49, sub-sect. 5, of the Act of 1893.

Jessop *v.* The Huddersfield Industrial [Society, (1899) 80 L. T. 598.

4. *Set off—Sum credited to a Member—Debt due from a Member—Fraudulent Preference—Winding-up—Industrial and Provident Societies Act*, 1893 (56 & 57 Vict. *c.* 39), *s.* 23, *sub-s.* 2—*Companies Act*, 1862 (25 & 26 Vict. *c.* 89), *s.* 164.]—So long as a co-operative society for supplying goods to its members, which is registered under the Industrial and Provident Societies Act, 1893, is carrying on business, it cannot be held to be precluded from exercising the right of set-off mentioned in sub-sect. 2 of sect. 23. The words "set off" in that section are not used in the strict legal sense, but more in the business or accountant's sense, as indicating that the society may deduct or write off from the sum credited the amount of the member's debt, provided that the committee act *bonâ fide* without any fraudulent intention or without the intention of preferring any particular shareholder. Such a member is not a creditor within the meaning of sect. 164 of the Companies Act, 1862.

In re Gwawr-y-Gweithyr Industrial and [Provident Society ; Dovey *v.* Morgan, [1901] 2 K. B. 477 ; 70 L. J. K. B. 614 ; 49 W. R. 655 ; 84 L. T. 824—Div. Ct.

5. *Shop Clubs—Rules of existing Club—No Person leaving Employment to have any Claim on Fund—Rules not registered—Shop Clubs Act*, 1902 (2 Edw. 7, *c.* 21).]—Sect. 6 of the Shop Clubs Act, 1902, provides that "where a workman by the conditions of his employment is a member of a shop club he shall upon his dismissal from or upon leaving his employment, unless contrary to the rules of the club, have the option of remaining a member, or of having returned to him the amount of his share of the funds of the club to be ascertained by actuarial calculation" ; but there is nothing in the Act making it illegal for a society to go on according to existing rules.

The plaintiff was a member of a shop club, to which all employés were obliged to belong, and according to the rules of which he lost all claim to participate in benefits if he quitted his employment. In consequence of the Act of 1902 compulsory membership was abolished, but the society was not registered.

Held—that "the rules of the club" still applied ; and that the plaintiff, having left his employment, was thereby precluded from claiming his share of the accumulated funds.

Balchin *v.* Lord Ebury and Others, (1904) [20 T. L. R. 60—Kekewich, J.

INDUSTRIAL SCHOOLS.

See Prisons and Reformatories.

INEBRIATES.

See Intoxicating Liquors, 113, 114.

INFANTS.

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I. CUSTODY OF INFANTS.

See also Bastardy ; Conflict of Laws ; Criminal Law, 1, 2, 128–134, 199–201 ; Husband and Wife, 131 ; Master and Servant, 25.

1. *Right of Father—Father convicted of Theft.*]—The fact that a father has been convicted of

Custody of Infants—*Continued.*

theft a year ago, and sentenced to four months' imprisonment, is not sufficient ground for refusing to give him the custody of his child, two years old, as against his wife, who is living apart from him.

A. C. *v.* B. C., (1903) 5 F. 108—Ct. of Sess.

2. *Right of Father — Petition by Mother — Costs.*]—In a petition for the custody of the children of the marriage by the mother, it was held that the father was not displaced from his legal position as guardian of the children by merely proving that he had occasionally used profane language, that he had twice thrown one of the children on to the floor, and that he had to some extent taught the children to dislike their mother. The Court held that the petitioner was entitled to expenses down to the date of the interlocutor allowing a proof, and that her account must be taxed as between party and party and not as between agent and client.

MacKellar *v.* MacKellar, (1898) 35 Sc. L. R. [483—Ct. of Sess.

3. *Right of Mother—Abandonment—Custody of Children Act*, 1891 (54 Vict. *c.* 3).]—The father of the infant, who was a farm-labourer, died in 1890, leaving a widow and three children, of whom H. was the youngest. The mother, being in poor circumstances, obtained employment as a domestic servant, and placed the children under the care of the Protestant Orphan Society. In October, 1897, the mother was in the service of M., a farmer possessed of a substantial farm in the county of Fermanagh, and on the 5th October, 1897, an agreement in writing was entered into, between the mother and M., that M. should adopt the child, and the mother agreed to give the child to M., and to have no claim on her. Shortly afterwards the mother was married again to a small farmer near N., in the county of Fermanagh. There was no difference of religion between the parties. In the beginning of 1899 the mother demanded the child from M., who refused to give her back, unless he was paid for her support and maintenance. On a motion for a writ of *habeas corpus*, Kenny, J., sitting as Vacation Judge, saw and had a conversation with the child, and was satisfied that she regarded with the strongest aversion the idea of returning to her mother, and held that, having regard to the handing over of the child under the circumstances deposed to, the character of the mother's evidence, as given in her affidavits, and the circumstances and present position of the child, the latter ought not, from the point of view of its own welfare, to be taken from the custody of M.

Held by C. A. (reversing the decision of Kenny, J.)—that the mother had not deserted or abandoned the child within the meaning of sect. 3 of the Custody of Children Act, 1891, and that she ought to be given into her mother's custody. The Custody of Children Act, 1891, discussed.

In re O'Hara, [1900] 2 Ir. R. 232—C. A.

II. GUARDIANSHIP.

4. *Guardian's Change of Religion—Removal of Guardian.*]—A testamentary guardian's duty is to see that the ward is brought up in the father's religion, and is protected against disturbing influences by persons holding the tenets of a different faith.

The testamentary guardian of a female ward of Court, aged 16, from conscientious motives thought fit to change her religion. She had done her duty in an exemplary manner. The guardian had previously been a Protestant—like the ward's father—and she became a Roman Catholic.

Held—that the application to remove the guardian must be granted, as such a change in religion was calculated seriously to prejudice the ward in being deprived of the opportunity of resorting to the guardian for assistance and instruction in religious matters.

F. *v.* F., [1902] 1 Ch. 688; 71 L. J. Ch. 415—[Farwell, J.

5. *Guardian ad litem — Practice — Appearances in Person.*]—A guardian of infants *ad litem* cannot appear in person on behalf of the infants.

In re Berry, [1903] W. N. 125—Kekewich, J.

6. *Management of Land during Infancy—Appointment of Trustees—Infant taking Land by Descent—Mother's Rights as Guardian—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 42, *sub-s.* 1.]—Sect. 42, subsect. 1, of the Conveyancing and Law of Property Act, 1881, enabling the Court to appoint trustees on the application of the next friend of an infant, who is beneficially entitled to the possession of any land, applies to the case where an infant takes land by descent.

In re Glover ([1899] 1 Ir. R. 337—M.R.) followed.

The Court will hesitate to make an order under sect. 42 adversely to the mother's right as guardian or otherwise, but if she disclaims it feels no difficulty in making the order.

In re Cowley, [1901] 1 Ch. 38; 70 L. J. Ch. 88; [83 L. T. 729—Cozens-Hardy, J.

7. *Protestant Mother sole surviving Guardian—Remarriage of Mother to a Roman Catholic—Appointment of additional Guardian—Discretion of Court—Guardianship of Infants Act*, 1886 (49 & 50 Vict. *c.* 27), *s.* 2.]—By his will X. appointed his wife (during her widowhood) and his own father guardians of his infant son during his minority, and directed that, on the death of either of them, the survivor should be sole guardian. X. and his wife were both Protestants. X. died in 1886, and his father in 1890. In 1896 the widow married again, her second husband being a Roman Catholic, whilst she remained a Protestant, and the infant son was being brought up as a Protestant. In 1897 the infant's paternal grandmother, as his next friend, took out a summons asking that an uncle of the infant (the husband of a sister of X.) might be appointed to

Guardianship—*Continued.*

act jointly with the mother as guardian of the infant.

HELD (dismissing the summons)—that the mother of an infant had entirely new rights conferred upon her under the Guardianship of Infants Act, 1886; she became statutory guardian under the Act, whether she was appointed testamentary guardian by her husband or not. The Court has power, in its discretion, to remove a guardian, or to appoint another guardian to act jointly with the statutory guardian: but the Court will not interfere except on good grounds shown to be clearly for the benefit of the infant.

IN RE X.; X. *v.* Y., [1899] 1 Ch. 526; 68 L. J. Ch. [265; 47 W. R. 345; 80 L. T. 311—C. A.

III. LIABILITY OF INFANTS.

(a) Contracts.

See also BUILDING SOCIETIES. 7.

8. *Agreement to settle Action—Plea in Bar—Contract to Benefit.*]—The plaintiff, an infant, commenced an action by his next friend for wages and damages for assault, false imprisonment, and malicious prosecution.

He voluntarily came to the defendant and offered to take 30*s.* in respect of all his claims as he wished to go abroad, which was paid him, and he signed an acknowledgement that all his wages had been paid, and that he had brought the other claims out of vengeance.

The next friend continued the action, and the plaintiff came over to give evidence.

The defendant pleaded the agreement in bar to the action.

The jury found for the defendant as to the wages and malicious prosecution, but for the plaintiff upon the false imprisonment with 20*l.* damages.

The infant never ratified the agreement.

HELD—that, under the circumstances, the infant was not bound by the agreement, so as to make it a bar to the action.

MATTEI *v.* VAUTRO, (1898) 78 L. T. 682—[Kennedy, J.

9. *Apprenticeship Deed—Not for Benefit of Infant—Want of Mutuality—Employers and Workmen's Act*, 1875 (38 & 39 Vict. *c.* 90), *s.* 6.]—By an apprenticeship deed the respondent, an infant, agreed to serve the appellant, a manufacturer of earthenware, as an apprentice for five years, "excepting the usual holidays and days on which the said branch of the business of her said master shall be at a standstill through accident beyond the control of the master"; and "during the said term, excepting and subject as aforesaid," she was to be paid certain wages.

HELD—that such a clause was valid, and could not be held to be not for the benefit of the infant or void for want of mutuality.

GREEN *v.* THOMPSON, [1899] 2 Q. B. 1; 68 L. J. [Q. B. 719; 63 J. P. 486; 48 W. R. 31; 80 L. T. 691—Div. Ct.

10. *Mortgage—Mortgagee in Possession—Right to recover Possession—Infants Relief Act*, 1874 (37 & 38 Vict. *c.* 62)—*Building Societies Act*, 1874 (37 & 38 Vict. *c.* 42), *ss.* 21, 38.]—A mortgagor is not entitled to recover possession of land which has been taken by the mortgagee without repaying the advances, even though the mortgage was made by the mortgagor while an infant.

THURSTAN *v.* NOTTINGHAM PERMANENT BENE-[FIT BUILDING SOCIETY, (1900) 49 W. R. 56; 83 L. T. 424; 17 T. L. R. 7—Joyce, J.

11. *Restraint of Trade—Agreement not to carry on Milkman's Business within Two Miles nor to solicit Employer's Customers—Penalty by way of liquidated Damages—Validity.*]—An infant entered into a contract with his employers, milk sellers, not to carry on a milkman's business within a distance of two miles nor to solicit his employer's customers, "under a penalty of £200, to be recovered as and by way of liquidated damages and not by way of penalty." In an action for an injunction to restrain the infant from carrying on a milkman's business within the specified distance:—

HELD—that the contract was binding on the infant, the clause as to the payment of the £200 only binding him to pay the damage actually caused by his breach of contract, and not being a penalty clause in the ordinary sense.

MORRISON, FLEET & CO., LD. *v.* FLETCHER, [(1901) 17 T. L. R. 95—Jeune, P.

(b) Necessaries.

12. *Cartridges—Money—Jewellery—Champagne.*]—Where there was no evidence as to the degree, state, or station in life in which an infant moved, it was held that a cartridge-case and cartridges, and money wired to the infant, were not necessaries; that jewellery purchased or bought with the object of being presented to a young lady to whom the infant was engaged during his infancy without the consent of his guardian, and who does become his bride, was not a necessary, and that champagne for celebrating the infant's coming of age was not a necessary.

HEWLINGS *v.* GRAHAM, (1901) 70 L. J. Ch. 568; [84 L. T. 497—Joyce, J.

13. *Infant Defendant to Probate Suit—Agreement that all Parties should take Costs out of Estate—Benefit of Infant—Validity of Agreement.*]—An action was brought against the executor and the infant beneficiary under a will. The plaintiffs propounded a will one day later in date. While the action was part heard the parties, including the infant's guardian *ad litem*, agreed that in any event all parties should have their costs out of the estate. There was judgment against the plaintiffs, who thereupon asked for their costs out of the estate. The defendants did not appear.

HELD—no ground for so ordering. The agreement was not one for necessaries, nor was it for the infant's benefit, inasmuch as in no event was

Liability of Infants—*Continued.*

the Court likely to mulct her and the executor defendant in costs, and therefore the Court could not sanction it after the event.

PRINCE *v.* HAWORTH AND OTHERS, (1904) 20 [T. L. R. 313—Barnes, J.

14. *Racing Bicycle.*]—A racing bicycle may be a necessary for an infant apprentice earning 21*s.* a week, and living with his parents.

CLYDE CYCLE CO. *v.* HARGREAVES, (1898) 78 [L. T. 296 ; 14 T. L. R. 338—Div. Ct.

(c) Torts.

15. *Injunction Against — Costs.*]—Where an order has been made against an infant defendant, granting a perpetual injunction restraining him from carrying on his business under a style calculated to lead the public to believe that it was in any way connected with the similar business of the plaintiff :—

HELD—that the order, in also ordering the defendant to pay the costs, was good.

Chubb v. *Griffiths* ((1865) 35 Beav. 127) and *Lemprière* v. *Lange* ((1879) 12 Ch. D. 675 ; 50 L. J. Ch. 673 ; 27 W. R. 879 ; 41 L. T. 378) followed.

WOOLF *v.* WOOLF, [1899] 1 Ch. 343 ; 68 L. J. Ch. [82 ; 47 W. R. 181 ; 79 L. T. 725—Kekewich, J.

For employment of children, *see* EDUCATION ; FACTORIES ; AND PUBLIC HEALTH, 55–58.

INFECTIOUS DISEASES.

See ANIMALS ; PUBLIC HEALTH.

INHABITED HOUSE DUTY.

1. "*Almshouse*" — "*House provided for the Reception or Relief of Poor Persons*"—*Home for Poor Ladies—House Tax Act*, 1808 (48 Geo. 3, *c.* 55), *Sched.* 13, *Exemptions, Case* 4.]—A house founded for ladies in reduced circumstances, who had an income not less than £25 and not exceeding £55 a year, where each lady was provided with a room free of charge, *held* to be a "house provided for the reception or relief of poor persons" within the House Tax Act, 1808, Sched. B, Exemptions, Case 4, so as to come within the exemption from inhabited house duty allowed by the Act.

THE TRUSTEES OF THE MARY CLARKE HOME [*v.* ANDERSON, [1904] 2 K. B. 645 ; 73 L. J. K. B. 806 ; 91 L. T. 457 ; 20 T. L. R. 626—Channell, J.

2. *Building owned by Bank—Part let and Rest occupied by Bank—Customs and Inland Revenue Act*, 1878 (41 & 42 Vict. *c.* 15), *s.* 13 (1) (2).]—A banking company owned property which consisted of a basement, ground floor, and first and second floors. The first floor was let to solicitors as offices. The rest of the building was occupied by the bank, the ground floor being the bank office and the second floor the residence of a bank official. Access to the first and second floors was provided by two separate internal staircases. The rooms occupied by the bank opened separately into the lobby on the ground floor. From the second floor there was a bolt in connection with the bank office which controlled the opening of the safe. With the exception of the first floor the whole of the premises were assessed for inhabited house duty. The bank claimed exemption for the ground floor, contending that it was a separate tenement occupied solely for the purpose of a business within sect. 13 of the Customs and Inland Revenue Act, 1878.

HELD—that the exemption was not allowable.

UNION BANK OF SCOTLAND, LD. *v.* FOSTER, [(1901) 65 J. P. 824—Ct. of Exch. (Sc.)

2a. *Building owned by Bank—Part let and Rest occupied by Bank—Customs and Inland Revenue Act*, 1878 (41 & 42 Vict. *c.* 15), *s.* 13.]—The basement and ground floor of a building were occupied by a bank, the first and second floor were used as solicitor's offices, and the third and fourth floors as a residence by the bank manager. There was internal communication between the bank and the staircase which led to the floors above, and the solicitors' offices consisted of several rooms with doors opening on to the staircase.

HELD—that the bank was not entitled to exemption from inhabited house duty under sect. 12 (2) of the Customs and Inland Revenue Act, 1878, in respect of any part of the building.

Decision of the Div. Ct. ((1901) 65 J. P. 613) affirmed.

Decision of C. A. ((1902) 66 J. P. 163 ; 85 L. T. 747 ; 18 T. L. R. 133) affirmed.

LONDON AND WESTMINSTER BANK, LD. *v.* [SMITH, (1902) 18 T. L. R. 774 ; 67 J. P. 229 —H. L. (E.).

3. *Building used partly as a Shop and partly for Residential Purposes — Communications between—House Tax Act*, 1808 (48 Geo. 3, *c.* 55), *Sched. B, r.* 3.]—The fact that the three upper floors of part of a large building containing the shop and showrooms of an upholsterer are used for residential purposes and have internal communication with the shop makes the whole of the premises assessable in respect of inhabited house duty.

MAPLE & CO., LD. *v.* WILSON, (1901) 65 J. P. [630 ; 49 W. R. 670 ; 85 L. T. 229 ; 17 T. L. R. 512—Div. Ct.

4. *Dwelling-house in Part licensed for Sale of Intoxicating Liquors — House Tax Act*, 1808 (48 Geo. 3, *c.* 55), *Sched. B, r.* 6—*House Tax Act*, 1851 (14 & 15 Vict. *c.* 36), *Sched.*]—Any dwelling-house, the rental of which exceeds £60, is liable to inhabited house duty at the rate of 9*d.*

in the £, but only 6*d*. when the house "shall be occupied by any person who shall be duly licensed by the laws in force to sell therein by retail beer, ale, wine, or other liquors." By r. 6 of the Inhabited House Duty Act, 1808, Sched. B: "where any house shall be let in different storeys, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to, and shall in like manner be charged to, the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house and shall be charged to the said duties."

A. was the owner of a house, part of which he let as an hotel, and the remaining part as a club. The tenant held the licence for the hotel. The rental of the house exceeded £60.

HELD—that A. was occupier of the house within r. 6, *supra*, and as he did not himself hold the licence, he could not legally claim to be assessed at the lower rate, but was liable to be assessed in full, namely, at 9*d*. in the £.

INLAND REVENUE *v.* CAMPBELL, (1900) 64 J. P. [696 ; 2 F. 244—Ct. of Exch. (Sc.)

5. *Dwelling-house and Offices—Communication by Doors on Ground Floor—Tenements occupied solely for Business Purposes—House "divided and let in different tenements"—Stables—House Tax Act*, 1808 (48 Geo. 3, *c.* 55), *Sched. B, rr.* 2, 3—*Customs and Inland Revenue Act*, 1878 (41 & 42 Vict. *c.* 15), *s.* 13.]—The appellant was the owner of a block of buildings, consisting of a house, offices, and stables, the offices being divided perpendicularly from the residential portion by a wall pierced by two doorways on the ground floor. The appellant let the residential portion at a fixed annual rental to his sister, who, with her two servants, had the exclusive use of two separate entrances to the main street, but she did not use any portion of the offices. The part used as offices was verbally let to a firm of solicitors of which the appellant was the senior partner, and they had the exclusive use of a separate entrance from the main street by which the offices were entered, and the door of which was locked from the outside when all had left the offices. The stables in the yard at the rear were let to a separate tenant at a fixed annual rent, and they had a separate entrance from another street to which they fronted.

The arrangement made between the appellant and the occupier of the residential portion was that the servants kept by her should clean the offices of the firm, and the servants were engaged to do that cleaning as well as their duties in the residential portion, and the firm paid to the occupier the wages of one of the servants. The only communication between the residential portion and the office portion was by two doors on the ground floor, and through these doors the servants passed and repassed to clean the offices. The occupier of the residential portion had the key of these doors, which she could lock and bolt from the inside, but not so as to prevent the servants from passing through to the offices, and she had the sole right to dismiss the servants, who lived and slept in the residential portion. The appellant himself did not occupy any part of the premises, which were separately rated to poor rate in the names of the three tenants.

HELD—that the house was not separately "let in different tenements" within the meaning of sect. 13, sub-sect. 1, of the Customs and Inland Revenue Act, 1878 ; and that the building, consisting of the dwelling-house and the offices, formed one house chargeable in one *cumulo* sum to inhabited house duty under the House Tax Act, 1808, but that the stables did not form part of the house and were exempt.

KNIGHT *v.* MANLEY, (1905) 92 L. T. 506 ; 21 [T. L. R. 203—Phillimore, J.

6. *Fire Station—Firemen's Dwellings—"One House"—Not within Exemptions—House Tax Act*, 1808 (48 Geo. 3, *c.* 55), *Sched. B—Customs and Inland Revenue Acts*, 1878 (41 & 42 Vict. *c.* 15), *s.* 13 ; 1890 (53 & 54 Vict. *c.* 8), *s.* 26 (2) ; *and* 1891 (54 & 55 Vict. *c.* 25), *s.* 4 (1).]—A fire station, a building of four storeys, consisted of engine-room, stables, office, store, gymnasium, with "houses" for the firemaster and firemen above. There was complete internal communication between all parts of the building, but each of the firemen's "houses" had an outer door.

HELD—that the whole was assessable for inhabited house duty as "one house," and that no part of it fell within the exemption of houses under £20 in value, or houses occupied solely for trade.

ALLAN *v.* EDINBURGH CORPORATION, (1903) 5 [F. 875—Ct. of Sess.

7. *"Full and just yearly Rent"—Poor Rate—Tied House—Rent as Free House—House Tax Act*, 1808 (48 Geo. 3, *c.* 55), *Sched. B—House Tax Act*, 1851 (14 & 15 Vict. *c.* 36).]—In assessing premises, situated outside the metropolitan area, for inhabited house duty, regard need not be had to the poor rate assessments where such assessments are not based upon the full rental value of the premises. In assessing a public-house for inhabited house duty, a covenant entered into by the tenant to deal exclusively with his landlords, who were a firm of brewers, for excisable and other articles, and covenants by the tenant to pay additional rent in any year in which he should deal for those articles with persons other than the landlords, and also in any year in which his indebtedness to the landlords should exceed a certain sum, should be taken into consideration.

The annual value according to which duty was payable upon the premises under the House Tax Act, 1851, was the full and just yearly rent for which it could be let as a free house.

PETER WALKER & SON, LD. *v.* BRISLEY (SUR- [VEYOR OF TAXES) ; GRINTER *v.* FLEMING (SURVEYOR OF TAXES), [1900] 2 Q. B. 735 ; 69 L. J. Q. B. 875 ; 64 J. P. 709 ; 49 W. R. 23 ; 83 L. T. 347—Div. Ct.

8. *"Hall or Office"—Library—Liability to Duty—House Tax Act*, 1808 (48 Geo. 3, *c.* 55), *Sched. B, r.* 5—*House Tax Act*, 1851 (14 & 15 Vict. *c.* 36), *ss.* 1, 2.]—The dining hall and offices

for the use of members of the Middle Temple, one of the Inns of Court, with lecture rooms and rooms for the benchers adjoining, occupied during the daytime only and empty at night, are liable to be assessed to inhabited house duty as being a hall within the meaning of rule 5 of Sched. B of the House Tax Act, 1808, which, revived by the House Tax Act of 1851, enacts that every hall or office whatever belonging to any person or persons, or to any body politic or corporate, shall be liable to duty "as inhabited houses."

The library, however, when used as such, is distinguishable from a "hall or office," and not being inhabited, is not liable to inhabited house duty.

Judgment of Div. Ct. ((1899) 68 L. J. Q. B. 157; 63 J. P. 213; 47 W. R. 383; 79 L. T. 760; 15 T. L. R. 120) affirmed.

STYLES *v.* SOCIETY OF THE MIDDLE TEMPLE, [(1899) 68 L. J. Q. B. 1046; 63 J. P. 725; 48 W. R. 164; 81 L. T. 426; 16 T. L. R. 6—C. A.

10. *House "occupied solely for the Purposes of any Trade"—Trade Premises on Ground Floor—Dwelling-house on Upper Floor—House Tax Act*, 1808 (48 Geo. 3, *c.* 55), *Sched. B, r.* 3—*House Tax Act*, 1817 (57 Geo. 3, *c.* 25), *s.* 1—5 Geo. 4, *c.* 41, *s.* 4—*Customs and Inland Revenue Act*, 1878 (41 & 42 Vict. *c.* 15), *s.* 13, *sub-s.* 2.]—By sect. 13, sub-sect. 2, of the Customs and Inland Revenue Act, 1878, "every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempt from the duties [Inhabited House] by the said commissioners upon proof of the facts to their satisfaction."

G., the appellant, a licensed retailer of spirits, was the owner of premises consisting of a building of two storeys under one roof. The ground floor was occupied and used by G. for the purpose of carrying on the trade of licensed retailer of spirits, and the upper storey was occupied by him as his dwelling-house. Access to the ground floor was by a door opening from the street. Access to the upper storey was by a different door opening from the street to the staircase leading to the upper storey. There was no internal communication between the two storeys.

HELD—that ground storey was exempt from inhabited house duty, and that the inhabited house duty ought to be confined to the value of the upper storey.

GRANT *v.* LANGSTON, [1900] A. C. 383; 69 L. J. [P. C. 66; 64 J. P. 644; 82 L. T. 629; 16 T. L. R. 416—H. L. (Sc.).

11. "*Inhabited Dwelling-house*"—*Occupation—Furnished House not lived in during Year of Assessment—House Tax Act*, 1851 (14 & 15 Vict. *c.* 36), *s.* 1.]—The words "inhabited" and "occupied" in various passages in the House Tax Act, 1851, must be regarded as synonymous.

If the owner of a house, which he has at times lived in or let furnished, keeps it furnished and ready for occupation by himself or a tenant, he is liable for inhabited house duty, although in fact no person happens to have slept in it during the year of assessment. The presence of the furniture constitutes occupation; and the house must be regarded as inhabited for the purposes of the Act.

Glasgow Corporation v. *Inland Revenue*, ((1880) 18 Sc. L. R. 1) followed.

SMITH *v.* DAUNEY, [1904] 2 K. B. 186; 73 L. J. [K. B. 646; 90 L. T. 760; 20 T. L. R. 444; 53 W. R. 54—Channell, J.

12. *Office belonging to and occupied with Dwelling-house—Tenement occupied only for Purposes of Trade or Profession—House Tax Act*, 1808 (48 Geo. 3, *c.* 55), *Sched. B, r.* 2—*House Tax Act*, 1851 (14 & 15 Vict. *c.* 36), *Sched.*—*Customs and Inland Revenue Act*, 1878 (41 & 42 Vict. *c.* 15), *s.* 13 (2).]—M. owned and occupied a dwelling-house, in the yard behind which was an office used by him solely for his professional work. A passage led from the street under the house into the yard, and the front door of the house opened into this passage. There was a door at the street end of the passage which was shut and locked at night, thus cutting off all access from the street to the house, yard, or office. The office was detached from the house and could only be reached by crossing the yard.

HELD—that the office was occupied with and formed part of the dwelling-house and was not exempt from assessment under sect. 13 (2) of the Customs and Inland Revenue Act, 1878, as being a "tenement" occupied solely for the purposes of a profession.

NICHOLLS *v.* MALIM, [1906] 1 K. B. 272; 75 [L. J. K. B. 140; 54 W. R. 404; 94 L. T. 161 —Walton, J.

13. "*One House*"—*Inhabited House Duty Act*, 1851 (14 & 15 Vict. *c.* 36.]—The respondents' premises consisted of two upper floors, occupied by their manager and used for storing lumber, and on the ground floor a shop, repairing room, and yard. The upper storeys were reached by an external staircase from the yard, but the manager's usual mode of access to his residential rooms from the street was through the front door into the shop, and thence into the yard and up the staircase, the other door from the street into the yard being invariably kept locked.

HELD—that the premises formed "one house" for the purposes of the Inhabited House Duty.

COLE *v.* BISHOP BROTHERS, (1903) 67 J. P. 128 [—Ridley, J.

14. *School Buildings—Part Residences—Part Fives-courts, Gymnasium, and Offices—Structural Separation — House Tax Act*, 1808 (48 Geo. 3, *c.* 55), *Sched. B—House Tax Act*, 1851 (14 & 15 Vict. *c.* 36), *s.* 1—*Customs and Inland Revenue Act*, 1878 (41 & 42 Vict. *c.* 15), *s.* 13, *sub-s.* 2.]—The appellant carried on a school at which boys were boarded, educated, and prepared for public schools. Part of the property which was admitted to have been correctly included in the assessment included

the residences of the appellant, the assistant-master, and the dormitories and living-rooms used by the boys. The portion of the property which the appellant contended had been wrongly included in the assessment consisted of fives-courts, closets, changing-rooms, a play-room with a gymnasium over it, class-room, a carpenter's shop with store-room above, and a chapel. No persons slept in or over any of the above rooms. The buildings in dispute were separated from the rest of the school buildings by a wall, and the only means of internal communication between the buildings in dispute and the rest of the school buildings was by a doorway and door in the wall on the ground floor, which was reached by a roofed passage.

HELD—that the whole of the buildings fell within the words "all other offices, and all yards, courts and curtilages, and gardens and pleasure grounds belonging to and occupied with" a dwelling-house, and must be included in the assessment.

Decision of Phillimore, J. ((1902) 67 J. P. 9; 18 T. L. R. 688) reversed.

BROWNE *v.* FURTADO, [1903] 1 K. B. 723; 72 [L. J. K. B. 296; 67 J. P. 161; 88 L. T. 309; 19 T. L. R. 266—C. A.

15. *Separate Business Premises—Customs and Inland Revenue Act*, 1878 (41 & 42 Vict. *c.* 15), *s.* 13 (1) (2)—*Customs and Inland Revenue Act*, 1891 (54 & 55 Vict. *c.* 25), *s.* 4—*Revenue Act*, 1903 (3 Edw. 7, *c.* 47), *s.* 11.]—Premises consisted of five floors and a basement. On the ground floor were four shops, A, B, C, and D, and a hall leading to the upper floors and basement, in which hall was a w.c. for the use of the tenants of the shops; the tenants of B, C, and D had access to it internally through the hall; but the tenant of A could only reach it externally, either through the street or through the area. The basement contained a room under each shop, such room being let to the tenant of that shop, and two of the shops had rooms behind communicating with such shops. The tenants of B, C, and D had keys of the front door leading into the hall, which hall gave access to the self-contained tenement dwellings let to separate tenants on the upper floors.

HELD—on an assessment to Inhabited House Duty—that these premises were not within sect. 13 (1) of the Act of 1878, as the whole of the house was not divided into different tenements—that is to say, tenements which were structurally separated—but that, so far as shop A was concerned, such shop was within sect. 13 (2) of that Act.

HELD, further, that neither sect. 4 of the Act of 1891 nor sect. 11 of the Act of 1903 applied.

HILLMAN *v.* ANKERSON, (1906) 95 L. T. 452—[Walton, J.

16. *Separate Dwellings—Common Front Door, Hall and Staircase—"Let in different Storeys"—House Tax Act*, 1808 (48 Geo. 3, *c.* 55), *Sched. B*, *r.* 6—*Customs and Inland Revenue Act*, 1890 (53 Vict. *c.* 8), *s.* 26, *sub-s.* 2—*Customs and Inland Revenue Act*, 1891 (54 & 55 Vict. *c.* 25), *s.* 4.]—In a house of the annual value of less than £20, "originally built or adapted by additions and alterations and used for the sole purpose of providing separate dwellings," each set of rooms may be a "separate dwelling" within the exemption in sect. 26 (2) of the Customs and Inland Revenue Act, 1890, as amended by the Customs and Inland Revenue Act, 1891, s. 4, notwithstanding the existence of a common front door, entrance hall, and a common staircase on to which the rooms open directly, and notwithstanding the absence of a structural division between each set. The owner of such house is, therefore, exempt from inhabited house duty, nor does the House Tax Act, 1808, which provides that the owner of a house "let in different storeys, tenements, lodgings or landings" shall be charged to such duty, prevent the application of the exemption.

SEAMAN *v.* LEE, (1899) 68 L. J. Q. B. 593; 63 [J. P. 499; 15 T. L. R. 292—Div. Ct.

17. *Stables—Belonging to and occupied with Dwelling-house—House Tax Act*, 1808 (48 Geo. 3, *c.* 55), *Sched. B*, *r.* 2.]—An inn was let to an innkeeper, together with some stables. After a time these stables, which were used for the purposes of the inn, were found to be insufficient, and others were rented close by.

HELD—that as an inn is a dwelling-house, and stables occupied for the purposes of the inn are properly considered as belonging to and occupied with the dwelling-house so as to make the whole place assessable to the inhabited house duty, the second set of stables was an adjunct of the house, and were properly assessable as belonging to and occupied with the inn.

SWAIN *v.* FLEMING, (1899) 81 L. T. 202—[Div. Ct.

18. *Stud Farm with Cottages let to Stud Groom—House Tax Act*, 1851 (14 & 15 Vict. *c.* 36), *s.* 9.]—The appellant, who occupied a stud farm, employed a stud groom at a wage of 40*s.* per week, and allowed him to reside free in a cottage on the farm. Subsequently he increased the groom's wages and let the cottage to the groom on a quarterly tenancy.

HELD—that the stud groom occupied the cottage, and consequently that the appellant was not liable to pay inhabited house duty in respect of the cottage.

COOPER *v.* ROSE, (1907) 71 J. P. 492; 97 L. T. [337; 23 T. L. R. 707—Bray, J.

19. *Two Houses—Separate Owners—Houses connected—One Dwelling-house—Inhabited House Duty Act*, 1808 (48 Geo. 3, *c.* 35), *Sched. B.*]—Two adjoining houses, A. and B., were connected by a doorway on the ground floor and were inhabited thus:—A doctor was tenant of B., owned by his uncle, and used certain rooms in it for the purposes of his practice; he and a sister had bedrooms in it. His father owned A. and occupied it with other members of his family. The only kitchen was in A., and the whole family from the two houses took their meals in A.

HELD—that A. and B. formed one dwelling-house in the joint occupation of the father and son, who were jointly liable for duty on the whole premises.

MURDOCH *v.* INLAND REVENUE, (1905) 7 F. 111 [Ct. of Sess.

23. *Working Class Lodging-houses—"Separate Dwellings"—Housing of the Working Classes Act*, 1890 (53 & 54 Vict. *c.* 70), *Part III.—Customs and Inland Revenue Acts*, 1890 (53 & 54 Vict. *c.* 25), *s.* 26 (2), and 1891 (54 & 55 Vict. *c.* 25), *s.* 4, *sub-s.* 1—*Revenue Act*, 1903 (3 Edw. 7, *c.* 46), *s.* 11, *sub-s.* 1.]—A house for the accommodation of the working classes contained a ground floor, where there were reading and dining rooms, lavatory, and other accommodation, and on the three floors above there were separate sleeping rooms or cubicles opening on to landings. The walls of the sleeping rooms or cubicles extended up to the ceiling, except upon the side nearest the landing, where there was an opening about 18 in. high between the wall and the ceiling. Each room provided separate sleeping accommodation for one man, and had a bolt on the inside. A charge of 6*d.* a night was made for each room, and the occupant had the use of the rooms and accommodation on the ground floor, and the sleeping rooms had to be vacated in the day time.

HELD—that the sleeping rooms were not "separate dwellings" within the meaning of sect. 26, sub-sect. 2, of the Customs and Inland Revenue Act, 1890, and sect. 11, sub-sect. 1, of the Revenue Act, 1903, and, therefore, the house was not exempt from inhabited house duty, as being "used for the sole purpose of providing separate dwellings" for the working classes.

LONDON COUNTY COUNCIL *v.* COOK, [1906] 1 [K. B. 278; 75 L. J. K. B. 187; 70 J. P. 105; 54 W. R. 403; 93 L. T. 836; 22 T. L. R. 125; 4 L. G. R. 153—Walton, J.

INHERITANCE.

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

INJUNCTIONS.

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I. INTERLOCUTORY 289
II. MANDATORY 291
And see CONTRACTS; PRACTICE, 18—21.

I. INTERLOCUTORY.

1. *Motion by Defendant before Pleading—Relief arising from same Cause of Action—Deed of Arrangement—Interfering with Possession of House and Conduct of Business.*]—The plaintiff executed a deed of arrangement by which he assigned to the defendant as trustee for his creditors his business of a hotel proprietor, and the trustee was to engage at £100 a year as manager the plaintiff, who and whose wife and family were to reside during such engagement in rooms on the premises. The plaintiff, who, with the approval of the committee of inspection, was dismissed as manager, claimed a declaration that he was entitled under his contract to be retained as manager. The defendant, before delivering a defence, moved for an injunction until the trial to restrain the plaintiff and his family from interfering with the conduct of the hotel business.

HELD—that there was no foundation for the plaintiff's claim to retain possession of the rooms, and that the defendant was entitled to an injunction to restrain the plaintiff from interfering with or disturbing the defendant in his possession and occupation of the hotel, and from in any way interfering with the conduct and management of the business.

Spurgin v. *White* ((1860) 2 Giff. 473; 7 Jur. (N. S.) 15; 9 W. R. 266; 3 L. T. (N. S.) 609) followed.

Decision of Buckley, J. ((1901) 17 T. L. R. 315) affirmed.

COLLISON *v.* WARREN, [1901] 1 Ch. 812; 70 [L. J. Ch. 382; 84 L. T. 482; 17 T. L. R. 362 —C. A.

2. *Undertaking as to Damages — Whether implied when Defendant gives Undertaking.*]—Where the Court grants an interlocutory injunction it only does so upon the plaintiff giving an undertaking (express or implied) to be answerable for damages.

But, as a general rule, no such undertaking by the plaintiff is to be implied where the defendant, before the application is opened, offers to give an undertaking which is embodied in a consent order.

HOWARD *v.* PRESS PRINTERS, LD., (1905) 74 [L. J. Ch. 100; 53 W. R. 98; 91 L. T. 718—C. A.

3. *Undertaking in Lieu of Injunction—Implied Cross-undertaking in Damages.*]—In an action by principals for an injunction to restrain an agent from making use of confidential information, the plaintiffs obtained an interlocutory injunction on December 21st, 1904. The matter came before the Court on January 13th, 1905, when the defendant gave a limited undertaking as to soliciting customers, but no cross-undertaking in damages was given. On January 20th, 1905, the motion for an injunction was finally dismissed by Joyce, J. The defendant counterclaimed for damages in respect of the interlocutory injunction; and the question arose whether a cross-undertaking in damages under this head could be implied:—

HELD (following a practice note in [1904] W. N. 203)—that whenever an undertaking to the Court was given in lieu of an interlocutory injunction, there should be inserted in the order a cross-undertaking in damages by the applicant, unless the contrary was agreed and expressed at

Interlocutory—*Continued.*

the time; and that in the present case the defendant was entitled to damages.

Oberrheinische Metallwerke *v.* Cocks, [1906] W. N. 127—Kekewich, J.

4. *Purpose of—Land situate in a Foreign Country—Mining Agreement—Interference with the Right to Possession—Jurisdiction of Court.*]—The Court, though asked for an injunction, was, in substance, asked to give specific performance of an implied covenant for quiet enjoyment with reference to land in the island of Milos (otherwise Milo), in the Grecian Archipelago, belonging to the defendants, who had conferred by agreement certain mining rights on the plaintiffs, and who had excluded the plaintiffs from the possession of the mines for non-payment of royalties, and other breaches of their agreement.

Held — that in the present state of the authorities it was sufficient for the Court to say that, if there be such a jurisdiction, it is one which ought to be exercised with the greatest caution. The proper office of an interlocutory injunction is to preserve matters *in statu quo* until the case be tried. As the defendants were in possession, that possession ought not to be disturbed unless, on the materials before the Court, the defendants were clearly in the wrong.

Black Point Syndicate, Ld. *v.* Eastern [Concessions, Ld., (1899) 79 L. T. 658; 15 T. L. R. 117—Stirling, J.

II. MANDATORY.

5. *Exercise of Statutory Powers—Damages in Lieu of Injunction—Acquiescence.*]—The defendants were a corporation, constituted by Act of Parliament, for improving the navigation of the Newry River and Carlingford Lough. In 1884 they obtained a further Act of Parliament, which Act expressly referred to certain oyster beds in the lough, the property of the original sole plaintiff, as equitable tenant for life, and provided that the defendant should, during the construction of these works, protect these oyster beds from injury. Between May, 1890, and January, 1896, the defendants cast a quantity of stones, ballast, and rubbish upon a portion of the ground within the ambit of the oyster beds. They were expressly warned against so doing by the plaintiff and his lessee, but the present action was not commenced until 1895. It was proved that the expense of removing the deposit and restoring the beds as far as possible to their original state would occasion an expense to the defendants considerably out of proportion to any advantage the plaintiff would derive from such restoration. The trustee of the property, who intervened in the action, having insisted on a mandatory injunction instead of damages:—

Held—that there was no acquiescence which would deprive the plaintiffs of their right to such relief, and that they were entitled to an injunction directing the defendants to remove from the oyster beds the ballast and rubbish so deposited, and to restore them to their previous condition and levels.

Woodhouse *v.* Newry Navigation Co., [1898] 1 I. R. 161—C. A. (Ir.)

6. *Practice — Enforcement — Supplemental Order fixing a Time—R. S. C., Ord.* 41, *r.* 5.]—A mandatory injunction in the negative form in common use before the decision in *Jackson* v. *Normanby Brick Co.* ([1899] 1 Ch. 438) was made restraining the defendant from permitting stones, soil, &c., to remain so as to interfere with plaintiff's access to his land.

Held—that such an order can be enforced by obtaining a supplemental order fixing a time for compliance, and then moving for an attachment or committal upon proof of personal service of both orders, the supplemental order being endorsed as required by Ord. 41, r. 5.

Mansell *v.* Jones, [1905] W. N. 168; 120 [L. T. Jo. 107; 40 L. J. N. C. 819—C. A.

7. *Practice—Must be certain and definite—Not granted to do Repairs.*]—It is a necessary requisite of every mandatory injunction that it should be certain and definite in its terms, so as to show clearly and specifically what the enjoined person is required to do, and it therefore is not the practice of the Court to grant a mandatory order to do repairs, since the Court cannot superintend the work to be done.

Attorney-General *v.* Staffordshire [County Council, [1905] 1 Ch. 336; 74 L. J. Ch. 153; 69 J. P. 97; 53 W. R. 312; 92 L. T. 288; 21 T. L. R. 139; 3 L. G. R. 379—Joyce, J.

8. *Pulling down and removing Buildings—Form of Order.*]—In future, on an application for a mandatory injunction restraining the defendant from allowing buildings to remain on land, it will be better for the Court to say in plain terms what it means, and in direct words to order the buildings to be pulled down and removed.

Jackson *v.* Normanby Brick Co., [1899] 1 [Ch. 438; 68 L. J. Ch. 407; 80 L. T. 482—C. A.

9. *Public Health—Proceedings before Magistrates for Penalties — Jurisdiction to grant Injunction or make Declaration in restraint of such Proceedings.*]—Where an Act of Parliament provides a mode of proceedings before magistrates for penalties, the Court will only grant an injunction or make a declaration in restraint of such proceedings under very special circumstances.

Grand Junction Waterworks *v.* Hampton [Urban District Council (No. 1), [1898] 2 Ch. 331; 62 J. P. 566; 67 L. J. Ch. 603; 78 L. T. 673; 14 T. L. R. 467; 46 W. R. 644—Stirling, J.

INJURIES TO PASSENGERS.

See Negligence and Railways.

INNS AND INNKEEPERS.

I. Duty to Receive Guests.

II. Liability for Loss of Goods.

And see Intoxicating Liquors; Landlord and Tenant, 155—170.

I. DUTY TO RECEIVE GUESTS.

1. *Bedrooms all full—Request to pass Night in Public Sitting-room — Refusal — Cause of Action.*]—An innkeeper may not pick and choose his guests; he must give the accommodation he has to persons who come to the inn as travellers for rest and refreshment.

A person who comes to an inn has no legal right to demand to pass the night in a public sitting-room if the bedrooms are all full.

A county court judge found as facts that the defendant's house, at a little before two o'clock in the morning, was full as regarded proper sleeping accommodation: that there was no empty bedroom; that there were, however, at least two rooms available for the shelter and accommodation of the plaintiff and his friend, and that that accommodation was refused.

Held—that, assuming that there was some place in the house where the defendant might have permitted the plaintiff to stay for the night, it would be straining the common law liability to hold that the plaintiff had a good cause of action.

Browne *v.* Brandt, [1902] 1 K. B. 696; 71 [L. J. K. B. 367; 50 W. R. 654; 86 L. T. 625; 18 T. L. R. 399—Div. Ct.

2. *Refusal of Victuals—Lady Traveller in "Rational" Dress — Acquittal.*] — H., a lady traveller in "rational" dress, was refused by the defendant, an innkeeper, permission to enter the coffee-room of the inn, but was offered refreshment in the bar parlour. On an indictment charging the defendant with wilfully and unlawfully neglecting and refusing to supply H. with refreshment without sufficient cause, the jury returned a verdict of Not guilty.

Reg. *v.* Sprague, (1899) 63 J. P. 233—Surrey [Quarter Sessions.

II. LIABILITY FOR LOSS OF GOODS.

3. *Absence of Negligence on Innkeeper's Part.*—An innkeeper cannot negative his liability for the safe custody of the goods of a guest by proving that there was no negligence on his part.

Butler & Co., Ld. *v.* Quilter, (1901) 17 [T. L. R. 159—Ridley, J.

4. *Absence of Negligence—Evidence*—Onus *on Innkeeper.*]—Where goods are given into the sole custody of a person and accepted by him as bailee, and they are lost while in his custody, the *onus* lies upon him to show circumstances negativing negligence on his part.

Held—where a visitor at an hotel gave a valuable dog into the custody of a servant indicated by the manager, and it was lost in some unexplained way.

Phipps *v.* The New Claridge's Hotel, Ld., [(1905) 22 T. L. R. 49—Bray, J.

5. *Boarding House — Duty of Boarding-house Keeper — Negligence.*] — The plaintiff, who went as a guest to the defendant's boarding-house, had, to the knowledge of the defendant, articles of jewellery with her, and asked for a second key to her bedroom, so that she might lock it when away, but she was not supplied with one, being told that she need be under no apprehension, as everyone living in the house was well known. There was a chest of drawers in the room without a key, and the plaintiff asked for a key for this, so that she might lock the jewellery up, but it was not supplied. She thereupon locked her jewel case and placed it in a locked bag in one of the drawers. During her absence in the day time the jewel case was stolen by another guest who was staying in the house, and who was a thief well known to the police. The defendant was unaware of the character of the thief, but admitted him into the house without any reference or inquiry. The plaintiff sued the defendant in respect of her loss, but the judge withdrew the case from the jury.

Held—that there was some evidence of negligence on the part of the defendant which might render her liable to the guest for the loss of the jewellery, and there must be a new trial.

The duties of lodging-house and boarding-house keepers as to looking after the property of lodgers discussed.

Decision of Darling, J. (21 T. L. R. p. 570) reversed.

Scarborough and Wife *v.* Cosgrove, [1905] [2 K. B. 805; 74 L. J. K. B. 892; 54 W. R. 100; 93 L. T. 530; 21 T. L. R. 754—C. A

6. *Deposit expressly for Safe Custody — Negligence — Contributory Negligence — Non-disclosure of Value or Nature of Goods deposited —Innkeepers Act*, 1863 (26 & 27 Vict. *c.* 41) *s.* 3.] —The plaintiff went as a guest to the defendants' inn. While there a parcel (containing jewellery) was sent him on approval. On receiving the parcel, the plaintiff handed it to the manageress at the office, or bar, saying, "Keep that for me," but not stating anything as to its value or contents. The parcel was stolen, but not through the wilful act, default or neglect of the defendants, or any servant in their employ. The usual notices in compliance with the Act were hung up in the room. The plaintiff, who lent the jeweller the value of the parcel (£186), having brought this claim for damages for its loss:—

Held (on new trial motion)—that the non-disclosure by the plaintiff of the value and contents of the parcel did not amount to contributory negligence on his part; but that the deposit was not a deposit "expressly for safe custody" within the Innkeepers Act, 1863; and that, therefore, in the absence of evidence of any wilful act, default or neglect on the defendants' part, the plaintiff could not hold them responsible to a greater amount than £30.

Liability for Loss of Goods—*Continued.*

A guest who deposits an article with an innkeeper cannot, in the absence of default or neglect, hold the innkeeper responsible to a greater amount than £30 for its loss, unless, when making the deposit, he informs the innkeeper in a reasonable and intelligible manner that the deposit is for safe custody of the article.

O'Connor *v.* Grand International Hotel [Co., Ld., [1898] 2 Ir. R. 92—Q. B. D. (Ir.).

7. *Person coming in to dine—Lost Coat.*]—The keeper of an hotel, who admits persons for the purpose of dining only in the dining-room of his house, is liable for a coat of one of such persons which was lost from his dining-room.

Orchard *v.* Bush, [1898] 2 Q. B. 284; 67 [L. J. Q. B. 650; 78 L. T. 557; 14 T. L. R. 425; 46 W. R. 527—Div. Ct.

INNS OF COURT.

See Barristers.

INQUEST.

See Coroner.

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INSURANCE.

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See also Companies, 10; Conflict of Laws; Contracts; Evidence; Misrepresentation and Fraud; Revenue, 57–59; Trade, 5, 67.

I. ACCIDENT.

1. *Agent—Verbal Statements—Height and Weight—Mis-statements in Proposal Form.*]—The agent of an insurance company obtained from the plaintiff a proposal for insurance against accident. In the proposal the plaintiff overstated his height and understated his weight. The proposal form stated that the statements therein were to form the basis of the policy, and that the proposed insurance was not to be binding on the company until a policy should be issued in respect thereof. The plaintiff paid the first year's premium to the agent and received a receipt, upon which was printed "Held covered for 14 days from date hereof, subject to the conditions of the policy, unless the proposal be previously declined." There was evidence that the agent told the plaintiff that he would be insured right away, and if he did not hear within 14 days he might treat himself as insured. After the expiration of 14 days the plaintiff was injured by an accident. The proposal was in fact declined by the company, but no notice of the refusal was sent to the plaintiff.

Held—that the agent had no authority to make the statements to the plaintiff, and that the plaintiff was not insured at the time of the accident.

Held, also, that the misstatements avoided the policy.

Levy *v.* Scottish Employers' Insurance [Company, (1901) 17 T. L. R. 229—Div. Ct.

2. *Proposal—Risk accepted—Issue of Policy—Liability to pay Premium.*]—The defendant filled up a proposal form for a policy of insurance against claims in respect of drivers' accidents. The proposal form provided that if the risk was accepted the defendant would pay the premium when called upon to do so. The risk was accepted by the insurance company, and a policy issued. The policy contained terms which did not appear in the proposal form.

Accident—*Continued.*

HELD—that the defendant was liable to pay the premium.

GENERAL ACCIDENT INSURANCE CORPORATION [*r.* CRONK, (1901) 17 T. L. R. 233—Div. Ct.

3. *Proposal Form—Declaration—"Insured or proposing to Insure" with any other Office—Conditions Precedent.*]—M., on May 31st, 1900, made a proposal in writing to an insurance company for a policy of insurance against accidents and fevers. One of the questions of the proposal form was "Are you insured or proposing to insure against accident or disease with any office or offices? If so, state the name or names and amount." M.'s answer was "No." M. afterwards made a proposal to a second insurance company on June 14th, 1900, giving as answer to the like question as above "No. But I may insure with another company." This policy was issued on June 14th, 1900. The first insurance company issued their policy on June 26th, 1900, the principal proviso of which said that the policy and insurance were subject to the conditions endorsed thereon, and that the conditions were conditions precedent to the rights to recover; and, further, that if at any time during the continuance of the policy the insured was insured in any other company against death or disablement by accident or disease without notice being given and the written consent of the directors obtained, the policy was to be absolutely void. No such notice was given. The assured afterwards met with an accident and sued the former insurance company.

HELD—that the policy was void, as the proposal and declaration were the basis of the contract and the assured was bound by the conditions of the policy; that though his statement when made was true, it became untrue before the policy was issued on June 26th, 1900; and that the insurance company were entitled to succeed on both grounds.

MARSHALL *v.* SCOTTISH EMPLOYERS' LIABILITY [AND GENERAL INSURANCE CO., LD., (1902) 85 L. T. 757—Wright, J.

4. *Agent—Misstatements in Proposal Form made by Agent of Insurers without Insurer's Knowledge—Form signed by Insured without reading same—Adoption of Form by Insured—Invalidity of Policy.*]—The plaintiff was canvassed by the agent of the defendants, who induced him to send in a proposal for insurance against accidents. The company's agent filled up the proposal form without consulting the plaintiff as to the answers to be given, and then invited the plaintiff to sign the form so filled up, which the plaintiff did without reading it. The proposal form so signed contained not only the questions, with the answers inserted by the agent, but also a declaration at the foot to which the plaintiff himself signed his name, and which stated (*inter alia*) that "no company has ever declined to assure me nor to renew my policy," and also that he requested the company to grant "a policy in accordance with the above particulars"; by the declaration the plaintiff further agreed that "the above statements shall form the basis of the contract." The answers inserted by the agent were false in many material particulars; but the plaintiff was not aware of their falsity, and apparently was not aware of what the answers were, in fact, or of what were the questions to which they were the answers. This false proposal form was afterwards transmitted to the company by the agent and the proposal was accepted; the premium was then paid by the plaintiff through the agent, and the policy was issued. Some little time afterwards the plaintiff met with an accident, and the question now was whether he was entitled to recover on the policy.

HELD—that as the plaintiff chose to sign without reading it the proposal form which the agent filled in and he acquiesced in that being sent in as signed by him without taking the trouble to read it, he must be treated as having adopted it; that the agent could not be treated as the agent of the defendants to invent the answers to the questions in the proposal form, but for that purpose he was the agent of the plaintiff; and that the policy was not binding on the defendants, and the plaintiff was not entitled to recover on the policy.

New York Life Insurance Co. v. *Fletcher* ((1886) 117 N. S. 519) followed.

BIGGAR *r.* ROCK LIFE ASSURANCE CO., [1902] [1 K. B. 516; 71 L. J. K. B. 79; 85 L. T. 636; 18 T. L. R. 119—Wright, J.

5. *Workmen—Insurance against Claims under the Workmen's Compensation Acts—"Immediate Notice" of any Accident to be given—Time to be deemed of the Essence of the Condition—Notice not given until Claim made by Workmen—Condition Precedent.*]—The plaintiffs, who were employers of labour, took out a policy with the defendant company against claims by their employés under the Workmen's Compensation Acts. Clause 3 of the policy provided that "The employers shall give immediate notice to the company of any accident causing injury to a workman. . . . Time shall be deemed to be the essence of this condition."

A workman was injured on October 10th, and the plaintiffs knew of the accident within a week, but did not inform the company until he sent in a claim for compensation on December 1st.

HELD—that the arbitrator was right in finding that "immediate notice" had not been given; that such notice was a condition precedent, and that the plaintiff could not recover.

What is "immediate notice" is in almost every case a question of fact.

IN RE WILLIAMS AND THOMAS AND THE [LANCASHIRE AND YORKSHIRE ACCIDENT INSURANCE CO., (1903) 51 W. R. 222; 19 T. L. R. 82—Bigham, J.

6. *Disease supervening on Accident—"Direct and sole Cause of Death"—Liability of Company.*]—A deceased was insured by a policy whereby the company were to pay compensation,

Accident—*Continued.*

"in case he shall be injured by external and accidental violence:—

"A. If such injury shall be the direct and sole cause of the death of the deceased within three months of the happening of the injury. . . . Provided that . . . this policy applies only to death . . . caused by some outward and visible means . . . and not to death caused by, or arising wholly, or in part, from disease or other intervening cause, even although the disease or other intervening cause may either directly or otherwise be brought on or result from accident."

It was agreed that the deceased died of septic pneumonia following septicæmia, and that the septic germs were introduced into his body by, and at the time of, the infliction of an accidental wound.

HELD—that death was directly and solely caused by the accident, and that the company was liable.

MARDORF *v.* ACCIDENT INSURANCE CO., [1903] [1 K. B. 584; 72 L. J. K. B. 362; 88 L. T. 330; 19 T. L. R. 274—Wright, J.

7. *Mis-statements in Proposal—Proposal filled up by Company's Agent—Assured ignorant of Contents—Effect.*]—An insurance policy against driving accidents contained a provision that any mis-statement in the proposal should avoid the policy.

An agent of the company filled up a proposal form for Y. at the latter's request. He did not ask Y. what were the correct answers to certain questions, and Y. signed it blindly. It proved to contain a false statement to the effect that no accident had happened to the horses or vehicles then in use by Y.

HELD—that the mis-statement was a material one, that the writer was acting as Y.'s agent in filling up the form, and that, therefore, the policy was void.

LIFE AND HEALTH ASSURANCE ASSOCIATION *v.* [YULE, (1904) 6 F. 437—Ct. of Sess.

8. *Workmen's Compensation—Premium payable according to Wages paid—Assured to furnish Account of Wages.*]—An employer insured against his liability under the Workmen's Compensation Act, 1897, or at common law, in respect of accidents to his workmen. The proposal stated that the total estimated amount of wages paid annually by the assured was £3,000, and he agreed to pay a premium of *5s. 6d.* per cent. on the total amount of wages paid, and to render at the end of each year an account of the wages paid. The first payment "on account of premiums" was £8 *5s.*, which was *5s. 6d.* on the £3,000 estimated amount of wages. The assured ceased to insure at the end of the second year.

HELD—that the assured was bound to render an account of the wages actually paid during the two years.

GENERAL ACCIDENT ASSURANCE CORPORATION [LD. *v.* DAY, (1905) 21 T. L. R. 88—Buckley, J

9. *Proposal filled in by Servant of Insurance Company and signed by Insured—Mis-statement in Proposal.*]—A. was insured by a policy which stated that he had delivered "a proposal in writing which he has agreed shall be the basis of this contract and be considered as incorporated herein": it also contained a condition that "if this policy be obtained through any misrepresentation or concealment by or on behalf of the insured," it should become absolutely void; and that "the company shall not be held liable in respect of any knowledge of, or notice to, an agent which shall not have been communicated to, and have been acknowledged in writing by, the company at its registered office." The proposal was signed by A., and contained answers to a number of printed questions and this clause: "I warrant that the above statements are true, and I agree that this proposal shall be taken as the basis of the proposed contract between me and your company, and shall be deemed to be incorporated in such contract." The answers, one of which was untrue, were filled in by an inspector in the employment of the insurance company. In an action on the policy A. alleged that he had given correct information to the inspector; that he had not himself read over the answers before signing the proposal, because he had relied on the inspector filling in the answers correctly.

HELD—that the company was not liable, as the inspector in filling in the answers was acting as the agent of A., who was responsible for the correctness of the answers.

M'MILLAN *v.* ACCIDENT INSURANCE CO., (1907) [S. C. 484—Ct. of Sess.

10. *Condition Precedent*—"*Immediate Notice of Accident*"—"*Essence of the Contract*"—*Payment of Premium—Policy executed subsequently.*]—On December 28th, 1904, the claimants signed a proposal for insurance by an insurance association against their liability under the Workmen's Compensation Act, 1897, and on the same day the association gave a covering note stating, "cover to hold good from this date." On January 3rd, 1905, a policy was executed, and it was delivered to the claimants on January 9th. By clause 2 of the policy, "the employer shall give immediate notice to the association of any accident causing injury to a workman"; and by clause 7, "the observance and performance by the employer of the times and terms above set out, so far as they contain anything to be done by the employer, are the essence of the contract." On January 2nd, 1905, an accident happened to a workman in the employment of the claimants, and on March 14th they gave notice of the accident to the association. On March 15th the workman died, and his widow recovered compensation from the claimants under the Workmen's Compensation Act, 1907. The claimants claimed to recover from the association under the policy the amount so paid to the widow.

HELD, by Vaughan Williams and Buckley, L.JJ., Fletcher Moulton, L.J. dissenting, that, as the accident happened before the policy was delivered to the claimants, and as the association had not proved that the claimants at that time

Accident—*Continued.*

knew of the condition as to giving immediate notice of any accident, the condition never became applicable to that risk, and the claimants were entitled to recover.

Semble, by Vaughan Williams and Buckley, L.JJ., the former doubting, the term as to giving immediate notice of any accident was not, upon the construction of the policy as a whole, a condition precedent.

In re an Arbitration between Coleman's [Depositories, Ld., and the Life and Health Assurance Association, [1907] 2 K. B. 798 ; 76 L. J. K. B. 865 ; 97 L. T. 420 ; 23 T. L. R. 638—C. A.

11. *Agent—Authority—Knowledge of Agent—Insurance Company receiving Premiums—Estoppel.*]—The plaintiff effected an insurance with an insurance company through their agent against his liability to his workmen under the Workmen's Compensation Act, 1897. The plaintiff was, to the knowledge of the agent, a joiner and builder. The agent filled in a proposal form, which was stated to be the basis of the contract, and in which the plaintiff was described as a joiner. The plaintiff did not read the form, but when the policy arrived he objected to his being described as a joiner, and refused to take up the policy with that description in it, and the agent obtained the sanction of the chief clerk of the insurance company's branch office for the district to alter the policy by inserting the words "and builder" after the word joiner. This was accordingly done, and the plaintiff paid the first premium, and he continued to pay the premiums, which were forwarded to the company. No communication was made to the head office of the company of the addition to the policy. A workman in his employment having been injured by an accident, the plaintiff had to pay him compensation under the Workmen's Compensation Act, 1897, and sued to recover the amount from the company under the policy.

Held—that the company were liable, upon the grounds (1) that, by receiving the premiums, they were precluded from denying the agent's authority to alter the contract, and that in those circumstances the knowledge of the agent was the knowledge of the company ; and (2) that, even if the policy had not been altered, the company would have been liable, because the contract must be treated as having been negotiated by the agent with a joiner and builder, and the knowledge of the agent must be treated as the knowledge of the company.

Holdsworth *v.* Lancashire and Yorkshire [Insurance Co., (1907) 23 T. L. R. 521—Bray, J.

II. FIRE.

See also Landlord and Tenant, 100, 101.

12. *Lloyd's Fire Policy—"To pay the same Percentage as may be settled by the Sun on their Policy"—Fraudulent Claim against Company—Loss not Paid—Right to recover on Lloyd's Policy.*]—The plaintiff insured his stock-in-trade with the Sun Insurance Office, and the profits of his business with the defendants, underwriters at Lloyd's. Both policies were against loss by fire. The Lloyd's policy contained the following clause : "In the event of fire to pay the same percentage as may be settled by the Sun on their policy." A fire having taken place at the plaintiff's premises, he made a claim against the company, which was referred to arbitration. The umpire found the value of the stock on the premises at the time of the fire, but he found also that the claim was so exaggerated as to be fraudulent, and that by reason of the provisions of the company's policy nothing was due under that policy. The plaintiff then brought this action on the Lloyd's policy to recover a loss of profits.

Held—that the company had not "settled" within the meaning of their policy, and that therefore the plaintiff was not entitled to recover on the Lloyd's policy.

Beauchamp *v.* Faber, (1898) 3 Com. Cas. 308 ; [14 T. L. R. 544—Bigham, J.

13. *Lloyd's Fire Policy—Warranty—Condition Precedent—Liability—Principal and Agent.*]—The defendant and others, underwriters at Lloyd's, subscribed a fire policy on the plaintiffs' stock-in-trade. The policy contained the following clause :—"Warranted same gross rate, terms, and conditions as, and to follow, the British Law, which company has £1,750 on the block of brick buildings in which the risk is a portion of the same." The buildings were not insured with the British Law Company for £1,750, but for £1,350. During the currency of the policy some of the plaintiffs' goods were destroyed by fire.

Held—that the clause was a warranty that the British Law Company had insured the buildings for £1,750, and was a condition precedent to the liability of the underwriters ; that the condition precedent not having been performed, the underwriters had a good defence to an action on the policy ; and that the plaintiffs had not proved, as they were bound to do, that the insurance agent was not the agent of the assured, but of the underwriters.

Decision of Mathew, J. ((1900) 16 T. L. R. 138 ; 5 Com. Cas. 110) affirmed.

Bancroft *v.* Heath, (1901) 17 T. L. R. 425 ; [6 Com. Cas. 137—C. A.

14. *Policy Moneys—Insurance of Premises effected by Lessor—Duty of Insurance Company to reinstate Premises—Security for Rebuilding by Lessor—Rights of Lessee—Fires Prevention (Metropolis) Act*, 1774 (14 Geo. 3, *c.* 78), *s.* 83.] —H. S. demised to the plaintiffs a club-house and premises. The lessor covenanted to keep the main walls and timbers, and the outside of the club-house, and the sewers and drains in good order and sanitary condition during the term. The lessees undertook to keep the interior of the club-house in good and tenantable repair, damage by fire excepted. H. S. insured the club-house with the defendants from all damage by fire in

Fire—*Continued.*

the sum of £4,000. The club-house was completely destroyed by fire, and the defendants agreed with H. S. that the amount of indemnity for the loss should be £3,750, and the defendants obtained a bond without sureties from H. S. in the sum of £7,500, that the sum of £3,750 should be laid out and expended as far as the same would go towards rebuilding, reinstating and repairing the club-house. The plaintiffs made two distinct grounds of claim—one as to the efficiency of the security, and the other as to the remedy. Neither party wished to have a similar building erected, and the parties were not agreed as to what should be built.

HELD—that the bond might be rectified; that if it were shown that the bond was sufficient it would be a complete answer to the action; that a *mandamus* could not be granted on the ground that the obligation under the Fires Prevention (Metropolis) Act, 1774, could not be imperative; that the best remedy would have been a claim for an injunction to restrain the defendants from paying the insurer without obtaining sufficient security.

WIMBLEDON PARK GOLF CLUB, LD. *v.* [IMPERIAL INSURANCE CO., LD., (1902) 18 T. L. R. 815—Wright, J.

15. *Agent — Authority of Insurer's Agent — Knowledge of Agent—Policy taken out in Wrong Name—Estoppel.*]—Rags, the property of the plaintiff, were stored in a wharf, and were injured by an accidental fire; the wharf was occupied by C., a wharfinger, when the fire occurred. C. kept up with the defendants a fire policy in his own name for the benefit of the plaintiff. The defendants' agent filled up a proposal form in the name of C. It was the intention of the agent that the plaintiff should be directly insured, and it was supposed that the policy would effect an insurance for the benefit of the plaintiff.

HELD—that it was impossible to say that in point of law there could not be an estoppel against the defendants.

HOUGH *v.* GUARDIAN FIRE AND LIFE ASSUR- [ANCE CO., LD., (1902) 18 T. L. R. 273—Wright, J.

16. *Proposal to Mutual Insurance Company—Right to refuse Policy on learning its Terms.*]—A firm agreed to insure their works against fire with the pursuers; but refused to accept a policy which stated that the insured had agreed to become members of the insurance company. Under the articles of association of the company the members were liable to contribute in the event of the liquidation of the company. In an action by the insurance company against the firm for payment of the premium:—

HELD—that they had not agreed to become members of the company.

STAR FIRE AND BURGLARY INSURANCE CO. *v.* [DAVIDSON, (1903) 5 F. 83—Ct. of Sess.

17. *"Subject of Average"—No Average Clause attached—Other Policies—Applying Policies Rateably.*]—A timber yard was insured as a whole by a Lloyd's policy for £11,450 "subject to average," but with no average clause attached. It was also insured in "zones" for £30,500, *i.e.*, a policy for £2,000 on zone A, one for £3,000 on zone B, and several policies, £25,500 in all, on zone C. A fire occurred when there was timber worth £36,500 in the yard, *i.e.*, £1,940 in A, £13,260 in B, and £21,300 in C, and timber was destroyed worth £12,850, *i.e.*, £1,900 in A, £9,400 in B, and £1,550 in C.

HELD—that the fact that no average clause had been attached made no difference, and that, upon the true meaning of the words "subject to average," the owners of the yard could not claim to have the Lloyd's policy applied rateably with the others, but must be regarded as insured on only a portion of the property at risk and their own insurers as to the rest, and so liable to bear a proportion of the loss, and that, therefore, the Lloyd's underwriters were only liable for $\frac{11450}{30500}$ of £12,850.

ACME WOOD FLOORING CO., LD. *v.* MARTEN, [(1904) 90 L. T. 313; 20 T. L. R. 229; 9 Com. Cas. 157—Bruce, J.

18. *Indemnity — Vendor and Purchaser — Notice to Treat—Fire after Notice—Payment by Insurers—Subrogation.*]—The defendant insured a house with the plaintiffs against fire. During the currency of the policy the local authority served upon the defendant notice to treat for the purchase of the house under the Lands Clauses Acts. After the notice had been served and before anything was done under it the house was destroyed by fire, and the plaintiffs paid to the defendant the amount of the loss. The defendant thereupon agreed to take from the local authority a sum arrived at by taking into account the amount received by him from the plaintiffs. The plaintiffs sued the defendant to recover the amount which the latter might have received from the local authority.

HELD—that the plaintiffs upon paying the loss, became entitled to all the rights then vested in the defendant in respect of the house, including the right to be paid by the local authority the value of the house as at the date of the notice to treat; that the defendant could not deprive the plaintiffs of the benefit of that right by any agreement with the local authority; that the local authority were not entitled to the benefit of the policy; and that, therefore, the plaintiffs were entitled to recover.

THE PHŒNIX ASSURANCE CO., LD. *v.* SPOONER, [1905] 2 K. B. 753; 74 L. J. K. B. 792; 93 L. T. 306; 21 T. L. R. 577; 10 Com. Cas. 282 54 W. R. 313—Bigham, J.

19. *Re-insurance — Limitation of Time in Original Policy—Re-insurance Slip attached to Policy—Incorporation of Limitation Clause—Reasonableness.*]—A contract of re-insurance against loss by fire was effected by attaching to a printed form of fire insurance policy a typewritten slip containing the special terms of re-insurance. Among the clauses in the printed policy there was the following:—"No suit or action on this policy for the recovery of any claim shall be

Fire—*Continued.*

sustainable in any Court of law or equity . . . unless commenced within twelve months next after the fire." The policy contained many terms inapplicable to re-insurances.

HELD—that this clause was not to be regarded as applying to the contract of re-insurance, since, though reasonable in an insurance, it would not be reasonable in a re-insurance.

Decision of the Supreme Court of Canada (35 Can. S. C. R. 208) reversed.

HOME INSURANCE CO. OF NEW YORK *v.* [VICTORIA-MONTREAL FIRE INSURANCE CO., [1907] A. C. 59 ; 76 L. J. P. C. 1 ; 95 L. T. 627 ; 23 T. L. R. 29—P.C.

20. *Condition — Second Insurance on same Property — Second Policy Operative only if Premium paid—Premium not Paid—Recital of Payment of Premium.*]—In October, 1904, a policy of insurance was issued by the appellants, an insurance company, to the respondents upon goods against fire, which contained a clause that no additional insurance on the property thereby covered was allowed except with the consent of the appellants, and that a breach of that condition would render the policy null and void ; and there was a condition indorsed thereon that the respondents must give notice of any other insurance on the goods, and that the giving of the notice was a condition precedent to the right of the respondents to recover on the policy. In December, 1904, a policy of insurance against fire upon the same goods was executed by another insurance company in favour of the respondents, to whom it was handed. This policy contained a statement that the respondents "having paid" the premium, the company insured the goods against damage by fire ; by a condition indorsed on the policy it was provided that the insurance would not be in force, nor would the company be liable in respect of any loss or damage happening before the premium was actually paid. No premium was in fact paid upon this policy and the respondents did not give notice of it to the appellants. A few days after this latter policy was executed the goods were damaged by fire.

HELD—that the premium had not been paid upon the second policy, that policy never became effective, and that therefore the policy issued by the appellants was still effective, and the respondents were entitled to recover on it.

EQUITABLE FIRE AND ACCIDENT OFFICE, LD. [*r.* THE CHING WO HONG, [1907] A. C. 96 ; 76 L. J. P. C. 31 ; 96 L. T. 1 ; 23 T. L. R. 200 —P.C.

III. GENERAL.

21. *River Policy—Loss arising from Detention for Repairs—Liability under Policy.*]—By a river insurance policy entered into between the plaintiff and the defendant company it was provided : "Now this policy witnesseth that if during this insurance the insured shall sustain or become liable to others for loss or damage by reason of the collision of any vessel of the insured named in the schedule indorsed hereon with any other vessel, or with any buoy, mooring, bridge, stage, pier, or wharf, or any other similar structure while such vessel of the insured is on the waters of the rivers Thames or Medway . . . the corporation shall, subject as herein mentioned, pay or make good to the insured such loss or damage and indemnify him against such liability." Provided also that the policy shall not extend to or cover . . . (d) loss or damage which the insured may sustain or be liable to others for . . . in respect of the cargo or engagements of the insured's vessel."

HELD—that under this policy the defendant company were not liable for loss in consequence of the detention of barges during the time occupied with the repairs.

SHELBURNE & CO. *v.* LAW INVESTMENT AND [INSURANCE CORPORATION, LD., [1898], 2 Q. B. 626 ; 3 Com. Cas. 304 ; 67 L. J. Q. B. 944 ; 79 L. T. 278 ; 8 Asp. M. C. 445—Kennedy J.

22. *Solvency—Concealment of material Facts* —Uberrima fides.]—The doctrine as to the concealment of material facts applies to all contracts of insurance, and not merely to marine, fire and life insurances. Where a contract may with equal propriety be called a contract of insurance or a contract of guarantee, the question whether it is a contract requiring *uberrima fides* depends upon its substantial character and how it came to be effected.

SEATON *v.* HEATH, [1899] 1 Q. B. 782 ; 68 L. J. [Q. B. 631 ; 47 W. R. 487 ; 80 L. T. 579 ; 15 T. L. R. 297 ; 4 Com. Cas. 193—C. A.

NOTE.—Reversed on a question of fact [1900] A. C. 135.—H. L. (E.).

23. *Money deposited with Bank—First Liquidation — Reconstruction — Second Liquidation— Purchase by Assets Company—Final Dividend.*] —The defendants, in May, 1893, insured the plaintiff against loss which he might incur in respect of money deposited by him in the C. M. Bank, and undertook to pay interest if the bank made default. The policy gave the plaintiff leave to exchange his deposit receipts for other deposit receipts (but not for shares) in pursuance of any scheme of reconstruction without prejudice to the insurance. The interest was payable thereunder until the principal was paid, and the principal sums, less any portion previously received from the bank, "when the final dividend in bankruptcy or liquidation is declared." Four days afterwards the bank suspended payment. In June, 1893, the C. M. Bank was reconstructed, and the bank issued to the plaintiff deposit receipts in exchange for those mentioned in the policy. In June, 1895, the reconstructed bank stopped payment, and was compulsorily wound up. Subsequently dividends were paid to the plaintiff and other creditors. The last was paid in February, 1898, of 1*s.* in the £, which did not, however, purport to be a final dividend. Nothing was paid afterwards by the liquidator. The liquidation was not formally closed, but was for all business purposes at an end. What assets remained had been taken over by an assets company.

General—*Continued.*

Held—that as no further dividends in the liquidation could be declared, the final dividend had been declared; that the plaintiff was not bound to wait *ad infinitum*. The debentures and shares in the assets company must be treated as salvage, and the defendants must pay the balance of the plaintiff's claim with interest.

Murdock *v.* Heath, (1899) 80 L. T. 50 — [Bigham, J.

24. *Fraudulent Mis-statement — Inaccurate Answer to Query.*]—It was a condition of a contract of insurance that fraudulent mis-statements made in answer to queries addressed by the insurers to the insured should render the policy void. The answer to one such query was inaccurate.

Held (dissenting Ld. Moncrieff, L.C.J. Macdonald absent)—that the policy was void.

Reid & Co. *v.* Employers' Accident, &c. [Insurance Co., (1899) 36 S. L. R. 825.

25. *Burglary and House-breaking — "Actual forcible and violent Entry"—Entry by opening unlocked Shop Door—Wrenching off Padlock of inner Door.*]—A policy of insurance on a jeweller's stock-in-trade recited that the assured was desirous of effecting an insurance against "loss or damage by burglary and housebreaking as hereinafter defined," and in its operative part it insured him against loss of the property therein described "by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate." In the proposal for the insurance the assured stated that the premises were a shop, warehouse and dwelling, and that they were protected by wood shutters and iron bars, and iron plates inside. The policy contained a condition that the assured should take all due precaution for the safety of the property insured as if the same were not insured as regards, *inter alia*, securing all doors, windows and other means of entrance. During the temporary absence of the porter, who was taking down the shop shutters in the morning, the front door being shut, but neither locked nor bolted, a thief opened the door by turning the handle and entered the shop, and, having forcibly wrench an iron plate and padlock off an inner door of the shop-front, stole therefrom part of the insured jewellery.

Held—that the loss was not covered by the policy.

Decision of Wills and Kennedy, JJ. ([1898] 2 Q. B. 136; 67 L. J. Q. B. 807; 46 W. R. 557; 78 L. T. 813; 14 T. L. R. 435) reversed.

In re George and the Goldsmiths and [General Burglary Insurance Association, [1899] 1 Q. B. 595; 68 L. J. Q. B. 365; 47 W. R. 474; 80 L. T. 248; 15 T. L. R. 230 —C. A.

26. *Loan—Repayment—Guarantee by Underwriters — Contract, whether of Insurance or Suretyship.*]—An instrument addressed to the plaintiff bank, but in respect of which the defendant syndicate paid the premium, was subscribed by underwriters at Lloyd's and handed to the bank by the syndicate as security for a loan made for the syndicate upon the personal guarantee of two of the directors of the syndicate. By the instruments it was witnessed that the underwriters agreed to "guarantee" to the bank the repayment of the loan. Default having been made in the repayment of the loan by the syndicate and the sureties, the underwriters paid to the bank the amount thereof, and brought an action in the name of the bank against the syndicate and the sureties.

Held—that the contract of the underwriters was one of insurance and not of suretyship: that the underwriters, having paid the loss, were thereby subrogated to the rights of the assured, and were entitled to sue in the name of the assured, and to recover from the principal debtor and the sureties the amount of the loan and interest; and that the underwriters and the sureties did not stand in the relation of co-sureties.

Parr's Bank *v.* Albert Mines Syndicate, [(1900) 5 Com. Cas. 116—Mathew, J.

27. *Solvency—Concealment of Material Facts—* Uberrima fides.]—Underwriters at Lloyd's subscribed a policy by which, after a recital that the plaintiff had advanced to B. £15,000 on a promissory note, the repayment of which H. had guaranteed, the underwriters guaranteed the solvency of H. in respect to the promissory note to the extent of £15,000. The underwriters were not informed as to all the circumstances under which the advance of £15,000 by the plaintiff to B. was made and were not told, and did not inquire as to, the rate of interest charged for the loan, which was in fact 30 per cent. The underwriters made independent inquiries as to the solvency of H. The £15,000 was not repaid to the plaintiff by B. or by H., who became insolvent. In an action against one of the underwriters, the judge asked the jury whether the transaction was one of exceptional risk.

Held—that the circumstances under which the loan to B. was made, and the rate of interest charged, were not facts material to the risk underwritten, which was the solvency of H., and that the right question had been left to the jury.

Decision of C. A. ([1899] 1 Q. B. 782; 68 L. J. Q. B. 631; 47 W. R. 487; 80 L. T. 579; 15 T. L. R. 297; 4 Com. Cas. 193) reversed.

Seaton *v.* Burnand, [1900] A. C. 135; 69 L. J. [Q. B. 409; 82 L. T. 205; 16 T. L. R. 232; 5 Com. Cas. 198—H. L. (E.)

28. *Fidelity Guarantee — Bond — Receiver appointed by Mortgagees under sects.* 19, 24, *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *ss.* 19, 24—*Receiver's Default—Right to sue on Bond.*]—The National Bank, who were the mortgagees of A.'s estate, appointed B. receiver under their statutory power conferred by the Conveyancing Act, 1881, and B. and the defendant corporation entered into a

General—*Continued.*

bond with the bank conditioned for B.'s due discharge of his duty as statutory receiver. A. was not a party to this bond. B. having made default, the bank were paid off the full amount of their demand out of the mortgaged estate.

HELD (*dissentiente* Walker, L.J.), reversing the decision of the Master of the Rolls—that A. and the bank were entitled to sue on the bond for the amount of the default.

KENNEY *v.* EMPLOYERS' LIABILITY ASSURANCE [CORPORATION, [1901] 1 Ir. R. 301—C. A. (Ir.).

29. *Fidelity Policy—District Council Clerk—Increase of Duties and Risk.*]—An insurance company by a fidelity policy undertook with an urban council that the clerk to the council would faithfully discharge the duties of his office and account for all sums of money received by him whilst in that office. At the date of the policy the council had a surveyor under whom certain works were being carried out, and the surveyor paid the men their wages. The surveyor subsequently left the council's employment, and the men were then paid by the clerk. In connection with these payments the clerk failed to account for certain moneys.

HELD—that the loss was not covered by the policy, as the clerk's duties had been increased, and there was an increase of risk.

WEMBLEY URBAN DISTRICT COUNCIL *v.* POOR [LAW AND LOCAL GOVERNMENT OFFICERS' MUTUAL GUARANTEE ASSOCIATION, LD., (1901) 65 J. P. 330; 17 T. L. R. 516—Wills, J

30. *War—Seizure by Belligerent Country—Goods commandeered—Compliance with Laws of War and of Belligerent Country.*]—The plaintiffs, clothiers and outfitters, insured "the contents" of their two stores at Johannesburg. The risk was described as being against "direct loss or damage to the above property by riot, rebellion, or war; no indirect damage is recoverable under this policy." While the plaintiffs' goods were protected by the policy there was a seizure by the agents of the Transvaal Government, at war with Great Britain, the goods being used for the use of the Transvaal troops then in the field; in other words, the goods were commandeered.

HELD—that the seizures were analogous to damage or destruction by military operations or to capture of enemies' goods on the high seas; that the fact that the seizure was in accordance with the law of the belligerent country and the laws of war did not alter its hostile character; and that the loss was therefore within the policy, and the defendant, one of the underwriters at Lloyd's, was liable.

Decision of Mathew, J. ((1901) 17 T. L. R. 718) affirmed.

CURTIS & CO. *v.* HEAD, (1902) 18 T. L. R. 771—[C. A.

31. *Dog—Against "All Risks, including Mortality from any Cause"—"Walking . . . to be deemed a Safe Arrival"—Inability to use one Leg—Liability under the Policy.*]—By a policy of insurance a fox terrier dog which had taken several prizes was insured from the Mersey to Bombay, and thence by rail to Lahore. The policy was in the form of an ordinary Lloyd's policy, with the addition of the following written clause: "This insurance is against all risks, including mortality from any cause, jettison, and washing overboard, but walking at Lahore, Punjab, to be deemed a safe arrival." During the transit the dog was injured, and in consequence of the injury was unable upon arrival at Lahore to use one of its legs, being, therefore, only capable of locomotion upon three legs.

HELD—(1) that the risk of the injury was covered by the policy, inasmuch as the insurance against "all risks" was an addition to the ordinary perils; (2) that the words "walking at Lahore, Punjab, to be deemed a safe arrival" did not merely qualify the risk of mortality, but had reference also to the other risks insured against, so that if the dog walked at Lahore within the meaning of the policy no claim under it could be made; and (3) that "walking" at Lahore meant that the dog must be capable of locomotion in the usual way, upon four legs, and that, as it was unable to use one leg, the insurers were liable under the policy.

JACOB *v.* GAVILLER, (1902) 50 W. R. 428; 87 [L. T. 26; 18 T. L. R. 402; 7 Com. Cas. 116—Kennedy, J.

32. *Agent's Brokers—Authority of Agent to receive Amount of Loss in Cash only—Amount collected by Brokers—Settlement in Account with Agent—Liability of Broker to Assured.*]—The plaintiff employed an insurance agent to effect an insurance of his mare and unborn foal. The agent sent a proposal form to the defendants, insurance brokers, who effected an insurance with underwriters at Lloyd's. A loss having occurred, the plaintiff informed the agent of the fact, and the agent obtained the policy from the plaintiff and sent it to the defendants. They collected the amount due from the underwriters, and paid to the agent the balance after deducting from the amount a sum due to the defendants from the agent in respect of other transactions. The agent did not pay to the plaintiff the sum received by him.

HELD—that the plaintiff was entitled to recover from the defendants the whole amount received by them from the underwriters less £1 per cent. commission for collecting, on the ground that there had been no receipt in any mode within the insurance agent's authority.

LEGGE *v.* BYAS, (1902) 18 T. L. R. 137; 7 Com. [Cas. 16—Walton, J.

33. *Solvency—Contract by Underwriters—Joint or several Liability—Defendants guaranteeing solvency of Underwriters—One Underwriter not in fact Liable—Liability of Guarantors.*]—The plaintiffs agreed to discount G.'s acceptances provided that certain underwriters guaranteed payment of the bills, and also provided that the defendant company guaranteed the solvency of the underwriters. The defendant

General—*Continued.*

company required that M. should be one of the underwriters; and upon a policy with the names of M. and four other underwriters being produced, the defendant company issued a solvency policy.

M.'s signature to the policy was attached without his authority, and he was therefore not liable under it; G. and the other four underwriters failed, and the plaintiffs now sued the defendant company on their solvency policy.

HELD—that, although M. (who was solvent) was not liable to them, they could nevertheless recover against the defendant company in respect of the "line" of each of the other four underwriters, for (1) the terms of the policy were inconsistent with any verbal condition that, unless M. was bound, it should be ineffective; and (2) the liability of the other four underwriters for the amount of their "line" was not affected by the fact that M. was never bound, each insuring the whole debt with a limit to his liability.

ANGLO-CALIFORNIAN BANK, LD., *v.* LONDON [AND PROVINCIAL MARINE AND GENERAL INSURANCE CO., LD., (1904) 20 T. L. R. 665; 10 Com. Cas. 1—Walton, J.

34. *"Ordinary Business of an Underwriter at Lloyd's" — Policy guaranteeing Solvency.*]—Policies guaranteeing that a person will meet his pecuniary obligations are within the "ordinary business of an underwriter at Lloyd's."

Decision of Bigham, J. ([1903] 2 K. B. 399; 72 L. J. K. B. 662; 51 W. R. 652; 89 L. T. 180; 19 T. L. R. 584; 8 Com. Cas. 252), affirmed.

HAMBRO & SON *v.* BURNAND AND OTHERS, [1904] 2 K. B. 10; 73 L. J. K. B. 669; 52 W. R. 583; 90 L. J. 803; 90 L. J. 803; 20 T. L. R. 398; 9 Com. Cas. 251—C. A.

IV. LIFE.

See also BANKRUPTCY, Nos. 195, 1244; FRIENDLY SOCIETIES; MORTGAGES.

(a) Avoidance of Policy and Recovery of Premiums: Insurable Interest.

35. *Insurable Interest—Void Policy — Life Assurance Act*, 1774 (14 Geo. 3, *c.* 48), *s.* 1.]—Only the insurer is entitled to plead that a policy is void from want of interest in the life of the insured on the part of the person claiming the proceeds of the policy.

HADDEN'S TRUSTEES *v.* HADDEN, (1899) 1 F. [710; 36 T. L. R. 524.

36. *Agent—False and Fraudulent Statement by —Statute of Limitations—Discovery of Fraud.*]—The plaintiff sued the P. Assurance Company, Ld., to recover back the premiums paid by her under a policy of insurance on the life of her father granted by the defendants in 1881. The policy was granted upon a proposal signed by her father and was in form valid and regular, but it was proved that all the premiums had been paid by the plaintiff. It appeared that she had been repeatedly urged by an agent of the defendants to take out the policy before she consented to do so, and she made the payments in consequence of a statement by the defendants' agent that she would be entitled to receive the money on her father's death, which statement was false and fraudulent. The plaintiff did not know until shortly before she brought her action in 1902 that the policy was void. The defendants, among other defences, set up the Statute of Limitations.

HELD—that the plaintiff was entitled to a return of the premiums, and that the Statute of Limitations did not begin to run until the discovery of the fraud.

BEER *v.* PRUDENTIAL ASSURANCE CO., LD., [(1902) 66 J. P. 729—Judge Bompas.

36a. *No Insurable Interest—Innocent Misrepresentation as to Validity of Policy—Recovery of Premiums paid on void Policy—Life Assurance Act*, 1774 (14 Geo. 3, *c.* 48), *s.* 1—*Gaming Act*, 1845 (8 & 9 Vict. c. 109), *s.* 18.]—Where a contract has been entered into through an innocent misrepresentation, the person on whose behalf it is made is not entitled to retain the money paid by the other party.

The respondent, a collier, effected through an agent of the appellant company an insurance on a life in which the respondent had no insurable interest. The justices found that the agent knew this and yet informed the respondent that the policy would be "all right" and the money would be paid on the death of the assured. The respondent effected the assurance relying on this statement. The respondent, having been advised that the policy was bad, as he had no insurable interest, claimed the return of the premiums. The justices held that the respondent was entitled to the return of the premiums.

HELD—that the man with whom the respondent negotiated was skilled in insurance matters, and any statement made by him would be justly relied upon; that there was evidence on which the justices could come to the conclusion that the representation led the respondent to believe that the policy would be valid and effective in law; and that the justices were right.

Decision of Div. Ct. ((1902) 18 T. L. R. 425) affirmed.

BRITISH WORKMAN'S AND GENERAL ASSUR- [ANCE CO., LD. *v.* CUNLIFFE, (1902) 18 T. L. R. 502—C. A.

37. *Quarterly Payments—Days of Grace.*]—By a life policy the premiums were payable quarterly; and if at the time of the death of the assured any premium was more than thirty days in arrears the policy was to be void; the quarterly payments were "on account of the premium for the year"; the instalment due at an intermediate quarter day was paid by the assignee after, but in ignorance of, the death of the assured, and during the days of grace (the jury finding a valid agreement to add one day).

HELD (reversing Ridley, J.)—that the holder could recover; that there was no question of revival or renewal of the policy in the case of

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payment of an intermediate instalment during the days of grace; and *quære*, whether in the case of annual payments, "days of grace" can be said to mean only a continuing offer to renew at the old rate of premium, if the assured is still alive at the time of payment.

Dicta in *Pritchard* v. *Merchants and Tradesmen's Life Insurance Society* ((1858) 3 C. B. (N.S.) 622; 4 Jur. (N.S.) 307; 27 L. J. C. P. 169; 6 W. R. 340) doubted and distinguished.

Decision of Ridley, J. ((1902) 18 T. L. R. 511) reversed.

STUART *v.* FREEMAN, [1903] 1 K. B. 47; 72 [L. J. K. B. 1; 51 W. R. 211; 87 L. T. 516; 19 T. L. R. 24—C. A.

38. *Life—Mortuary Calls by a Mutual Society—"To be apportioned according to Age of Members"—Whether "age at Date of Policy," or "age at Date of Call"—Construction of Contract—"Tricky and misleading" Documents—Ground for Rescission.*]—The plaintiff in 1881 insured his life in the defendant association, and duly paid all mortuary calls, which according to the contract were to take the form of an assessment on all the members "to be apportioned among the members according to the age of each member." For many years these calls were apportioned according to age of members at the date of their policy; but the directors suddenly began to apportion them according to the age of each member at the date of the call.

The plaintiff claimed a declaration that the contract did not allow of this course, and also rescission on the ground of misrepresentation.

HELD—that the contract (which is too long to refer to here in any detail) must be set aside on the ground of misrepresentation (apart from fraud); for the documents circulated by the association, and especially one headed "Life Assurance at half the usual rates," were "inaccurate, tricky, and misleading," and the nature of the policy granted to the plaintiff was quite inconsistent with the agent's letters and verbal representations, as to which there had been no cross-examination of the plaintiff.

The order was for rescission, and a return of all moneys paid under the policy, with interest at the rate of 4 per cent. from the date of each payment.

Decision of C. A. (19 T. L. R. 342) affirmed.

FOSTER *v.* MUTUAL RESERVE FUND LIFE [ASSOCIATION, (1904) 20 T. L. R. 715—H. L. (E.).

39. *Lapse of Policy by non-payment of Premium—Subsequent Receipt upon Conditions—Neglect of Assured to read such Conditions—Effect.*]—A policy upon the life of W. lapsed by reason of a premium being unpaid for thirty days. The premium was subsequently sent to the company, who returned a receipt therefor. W. knew that there was some printing on the back of such receipt, but did not trouble to read it; it, in fact, stated that the policy had lapsed, and that the present payment was only accepted on the condition that the assured had been in good health for twelve months.

HELD—that the company could rely upon the condition; and that, as W. was admittedly in bad health at the time, the policy was of no effect.

HANDLER *v.* MUTUAL RESERVE FUND ASSOCIA-[TION, (1904) 90 L. T. 192—C. A.

40. *Want of Insurable Interest — Funeral Expenses—Innocent misrepresentation by Agent as to validity of Policy — Premiums paid on Void Policy not recoverable — Life Assurance Act*, 1774 (14 Geo. 3, *c.* 48), *ss.* 1, 2.]—Money paid under an illegal contract cannot be recovered, where the parties are *in pari delicto*.

The plaintiff took out two policies on his mother's life on the innocent representation of the defendants' agent that they would be valid. Both were in fact void for want of insurable interest under the Life Assurance Act, 1774, unless one was made valid by a statement in the proposal form that it was for the mother's funeral expenses. The jury found that in fact nothing was said to the plaintiff about funeral expenses, and the Divisional Court held both policies to be void.

HELD—that as the agent had made the statement innocently, the plaintiff could not recover the premiums paid by him.

British Workman's and General Assurance Co. v. *Cunliffe* ((1902) 18 T. L. R. 502, No. 36a, *supra*) followed.

Decision of Div. Ct. ([1903] 2 K. B. 92; 72 L. J. K. B. 630; 19 T. L. R. 474; 89 L. T 94) reversed.

HARSE *v.* PEARL LIFE ASSURANCE CO., LD., [[1904] 1 K. B. 558; 73 L. J. K. B. 373; 52 W. R. 457; 90 L. T. 245; 20 T. L. R. 264—C. A.

40a. *Innocent Mis-statement as to Age—Different Conditions in Proposal and Policy—Reading Documents together — Acceptance of Premiums after Discovery of Mistake—Affirmance of Contract.*]—A lady took out a policy entitling her to receive a lump sum on attaining the age of sixty. In the proposal form she by error stated herself to be three years younger than she really was.

The mistake when discovered was notified to the company, who subsequently accepted two annual premiums.

The proposal contained a clause to the effect that the proposal and declaration as to age should be the basis of the contract, and that any untrue statement therein should render the policy void and premiums forfeited.

The policy contained a proviso for avoidance and forfeiture in the event of the policy having been obtained by wilful misrepresentation.

HELD—(1) that the proposal and declaration must be read with the policy.

Fowkes v. *Manchester and London Life Assurance and Loan Association* ((1863) 3 B. & S. 917) followed.

(2) that, therefore, only a wilful misrepresentation would entitle the company to avoid the policy and forfeit the premiums.

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(3) that on discovering the error they might have returned past premiums and declined to continue the policy; but

(4) that, on the facts, they had elected to affirm the policy, and must pay the policy moneys upon the assured actually attaining the age of 60.

HEMMINGS *v.* SCEPTRE LIFE ASSOCIATION, LD., [1905] 1 Ch. 365; 74 L. J. Ch. 231; 92 L. T. 221; 21 T. L. R. 207—Kekewich, J.

40b. *Mutual Society—Maximum Calls—Misrepresentation—Delay—Rescission of Contract.*]—Policy holders in a mutual insurance company brought actions for rescission and return of premiums with interest on the ground of misrepresentation: the complaint being that it had been represented to them that the maximum amount of calls was fixed, whereas in fact they were not fixed and in recent years largely increased calls had been made upon him.

The company did not dispute the misrepresentation, but contended that the plaintiffs had lost their rights by *laches*.

HELD—that in paying the increased calls under protest the plaintiffs had not waived their rights, and that under the circumstances they had not been guilty of unreasonable delay and were entitled to succeed. The question as to what was a reasonable time within which to apply for relief was "inextricably involved in the nature of the transactions."

Foster v. *Mutual Reserve Life Insurance Co.* (20 T. L. R. 715—H. L., No. 38, *supra*) followed.

CROSS *v.* MUTUAL RESERVE LIFE INSURANCE [CO., (1905) 21 T. L. R. 15—Buckley, J.

MERINO *v.* MUTUAL RESERVE LIFE INSURANCE [CO., (1905) 21 T. L. R. 167—Joyce, J.

MOLLOY *v.* MUTUAL RESERVE LIFE INSURANCE [CO., (1905) 22 T. L. R. 59—Eady, J.

41. *Insurance effected on Sister's Life in Name of the Assured—"Persons Interested"—Illegality of Contract—Insurances Upon Lives Act*, 1774 (14 Geo. 3, *c.* 48), *ss.* 2, 3.]—The plaintiff insured the life of his sister with the defendant company, but the policy purported to be signed by the sister only, and his name did not appear in that document. On a claim to recover the amount of the policy;—

HELD—that the name of the plaintiff, who admittedly was the person interested in the policy, not appearing in the policy, the action could not be maintained.

FORGAN *v.* PEARL LIFE ASSURANCE CO., (1907) [51 Sol. Jo. 230—Div. Ct.

(b) "Carrying on Business."

42. *Representation by Agent—False Representation—Inducing Assured to continue Policy—Authority of Agent.*]—The plaintiff took out a policy of insurance with the defendants through an agent of the latter upon the life of another. The policy provided for the payment of the premiums during the life of the person whose life was insured; and one of the conditions was that all alterations in the policy must be made and signed at the defendants' office on their printed and stamped forms. After paying one year's premiums, upon the plaintiff stating that she would pay no more premiums, the agent told her that when she had paid five years' premiums in all she would be entitled to the policy free of future premiums. The plaintiff thereupon paid the premiums for four years more, and refused to pay any further premiums. The defendants, who had not authorised the agent's representation, demanded premiums after the five years as a condition of the policy being kept on foot. The plaintiff thereupon sued to recover the four years' premiums.

HELD—that plaintiff was entitled to recover.

KETTLEWELL *v.* REFUGE ASSURANCE CO., LD., [1907] 2 K. B. 242; 76 L. J. K. B. 711; 97 L. T. 106; 23 T. L. R. 506—Div. Ct.

See also Nos. 51, 58, 60.

43. *Annuities upon Human Life—Life Annuities granted to Customers of Tea Dealers who should become Widows—Life Assurance Act*, 1870 (33 & 34 Vict. *c.* 61), *ss.* 2, 3.]—N. & Co., tea dealers, perfectly *bonâ fide*, and in order to promote the sale of their tea, offered to every woman who should have become a widow since Christmas, 1897, and who since that date should have purchased not less than a specified quantity of tea per week for the last five consecutive weeks previously to her becoming a widow, a pension of 10*s.* or 5*s.* a week, payable as long as she remained a widow, and they offered a similar pension to every woman who became a widow previously to Christmas, 1897, or previously to her commencing to purchase N. & Co.'s tea, provided she should have purchased a specified quantity of tea per week for ten years. Cards were issued to women who desired to qualify for a pension at a charge of 1*d.* The holder of a card entered the purchases of tea made by her, and the entries were checked from time to time by N. & Co.'s manager. Records of the purchases were also kept in N. & Co.'s books, which were to be *primâ facie* evidence of the fact of the purchases. By a trust deed N. & Co. undertook to pay to trustees a proportion of their profits for the purpose of forming a fund for the payment of these pensions.

HELD—that in connection with their tea business N. & Co. were carrying on a scheme of insurance by granting annuities to women who bought their tea, which became effective on the death of their husbands; and that the magistrates came to a perfectly right conclusion on the facts that N. & Co. were carrying on the business of life assurance in the United Kingdom within the meaning of the Life Assurance Companies Act, 1870.

NELSON & CO. *v.* BOARD OF TRADE, (1901) 65 [J. P. 487; 49 W. R. 590; 84 L. T. 565; 17 T. L. R. 456—Div. Ct.

44. *Company carrying on other Businesses—Winding-up—Proposed Scheme—Reduction of Contracts—Life Assurance Companies Act*, 1870

Life—*Continued.*

(33 & 34 Vict. *c.* 61), *ss.* 4, 22.]—A company carrying on business as tea dealers offered to customers pensions payable during widowhood. To form the premium income required for this purpose, the price of tea was loaded with a sum of 8*d.* per pound.

HELD—that it was being carried on in breach of sect. 4 of the Life Assurance Companies Act, 1870, because the 8*d.* per pound was not a separate sum capable of being carried to a separate account as required by that section, the whole sum paid being a contributory sum for securing two benefits, *i.e.*, the present receipt of a pound of tea, and the expectation of a future contingent payment.

The company being insolvent was ordered to be wound up upon the petition of creditors. Thereupon, a scheme was proposed by which a new company should take over the insurance part of the business.

HELD—that although sect. 22 of the Act of 1870 provides for a reduction of contracts, it does not authorise a provision by which assured persons will get reduced benefits as a result of new contracts with a new company.

Effect of sect. 22 discussed.

IN RE NELSON & CO., [1905] 1 Ch. 551 ; 74 L. J. [Ch. 290 ; 53 W. R. 361 ; 92 L. T. 404 ; 21 T. L. R. 274 ; 12 Mans. 54—Buckley, J.

46. *Winding-up — Company carrying on other Business—Fund set apart for Life Policies—Right of General Creditors of Company—Life Assurance Companies Acts.* 1870 (33 & 34 Vict. *c.* 61), *s.* 4 ; *and* 1872 (35 & 36 Vict. *c.* 41), *s.* 1.]—A company was formed to acquire the business and goodwill of a tea dealer and to effect insurances for life and to issue pensions. By the articles of association the directors were to set aside three-fourths of the profits earned by the company in each week as a fund to meet the liability of the company in respect of customers' pension cards, and the sum so set aside was to be applied in discharge of the company's liability thereunder, and so far as in any week the whole amount should not be distributed, the balance was to be carried forward and might be applied at the discretion of the directors in making good any deficiency in any future weeks in respect of such pensions ; but the company were not to be liable in respect of the pensions beyond the amount of the three-fourths of the profits, and if the three-fourths should be insufficient to pay the weekly pensions in full, the pensions should abate. The company issued cards to their customers, upon which the purchases of tea were entered, and each customer who became a widow was to be entitled to a weekly pension provided that she had purchased a certain quantity of tea for 52 weeks before widowhood. The company deposited £20,000 in Court under sect. 4 of the Life Assurance Companies Act, 1870. The company having been ordered to be wound up :—

HELD—that the £20,000 and the sum specially appropriated out of the profits to meet the pensions were available to satisfy the obligations of the company to their pensioners and customers ; and, further, that as between the pensioners and the customers the claims of the pensioners had priority.

IN RE NELSON & CO., LD., (1907) 24 T. L. R. 74 [—C. A.

See also No. 64.

(c) Construction of Policy.

47. *Condition Precedent—Interest in the Life—Settlement of Difference or Dispute—Vesting Jurisdiction.*]—A policy granted by the defendants on the life of a third person contained a recital that the proposer alleged that she was interested in the life of the assured, "of which allegation satisfactory proof has to be furnished to the directors of the company," and went on to provide that should any difference or dispute arise between the proposer, or any one claiming on her behalf, and the company, the difference should be referred to and decided by the judge of the county court, who, or his deputy, should alone have jurisdiction to hear and determine it.

HELD—that the language of the policy was far too ambiguous to justify the Court in holding that the proof of insurable interest was a condition precedent of the defendants' liability ; and that as there was no express agreement that the difference or dispute should not be tried before a jury in the county court, there was nothing to oust the jurisdiction of the jury.

COWELL *v.* YORKSHIRE PROVIDENT LIFE [ASSURANCE CO., (1901) 17 T. L. R. 452—Div. Ct.

48. *Policy taken out by a Person "for behoof of" and payable to Another—Presumption that the Latter, if no Relation to the Former, is a Trustee for the Former.*]—If a purchase of real or personal property be made by one in the name of another, the presumption is that the latter is a trustee of the property for the person who pays the money, unless the parties stand in the relation of parent and child.

A policy was taken out by S. on his own life a great many years ago, "for behoof of" his wife's sister, and her name appeared in the policy as the person to whom the money was to be paid. The policy was never handed to her, and she died before S., and the premiums were always paid, and were paid for many years after her death, by S.

HELD—that it was a case of a man taking the policy out in the name of another, not standing in any relation to him, and that would meet the presumption as to a purchase made by one in the name of another ; and that although the legal personal representative of the lady would be the person entitled to receive the money at law and to give a receipt for it, in equity the money belonged to the legal personal representative of S., who took out the policy.

IN RE A POLICY NO. 6,402 OF THE SCOTTISH [EQUITABLE LIFE ASSURANCE SOCIETY, [1902] 1 Ch. 282 : 71 L. J. Ch. 189 ; 50 W. R. 327 ; 85 L. T. 720 ; 18 T. L. R. 210—Joyce, J.

Life—*Continued.*

49. *Policy for Benefit of Wife and Children—Second Wife—Children of both Marriages—Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *s.* 11.]—A man who had a wife and children alive effected an insurance on his life for the benefit of "my wife and children" under sect. 11 of the Married Women's Property Act, 1882. His wife died, and he married again, and had children by his second wife.

Upon his death, his wife and some children of each marriage being alive :—

HELD—that his second wife and children of both marriages took under the policy as joint tenants.

IN RE BROWNE'S POLICY, BROWNE *v.* BROWNE, [1903] 1 Ch. 188 ; 72 L. J. Ch. 85 ; 51 W. R. 364 ; 87 L. T. 588 ; 19 T. L. R. 98—Kekewich, J.

50. *Policy "for Benefit of his Wife, or, if she be dead, between his Children in equal Proportions"—Children born subsequently—Death of Wife—Child of a Second Marriage—Married Women's Property Act*, 1870 (33 & 34 Vict. *c.* 93), *s.* 10.]—A man, with a wife and children alive, effected an insurance upon his life under the Married Women's Property Act, 1870, "for the benefit of his wife, or, if she be dead, between his children in equal proportions." After the birth of other children his wife died ; and subsequently he had a child by a second wife, who survived him. On his death :—

HELD—that the policy moneys must be divided equally between the children of the first and second marriages, and that the widow took no interest in them.

In re Browne's Policy (*supra*) distinguished.

In re Burrow's Trusts ((1864) 10 L. T. 184) followed.

In re Lyne's Trust ((1869) L. R. 8 Eq. 65 ; 38 L. J. Ch. 471 ; 20 L. T. 735 ; Malins, V.-C.) not followed.

IN RE GRIFFITH'S POLICY, [1903] 1 Ch. 739 ; 72 [L. J. Ch. 330 ; 88 L. T. 547—Joyce, J.

51. *Suicide, Warranty not to commit—Effect.*]—The defendants issued to the plaintiffs a policy upon the life of F. ; in the application therefor (which was made part of the contract) he "warranted and agreed" not to commit suicide, whether sane or insane, within a year. During the year he did commit suicide in a fit temporary insanity.

HELD—that the plaintiffs could not recover, the warranty constituting a limitation of the defendants' liability under the policy, and not merely a personal covenant by F., for breach of which the defendants could recover damages against his estate.

Decision of Bigham, J. ([1904] 1 K. B. 832 ; 73 L. J. K. B. 546 ; 52 W. R. 366 ; 90 L. T. 484 ; 20 T. L. R. 368 ; 9 Com. Cas. 217), affirmed.

ELLINGER & CO. *v.* MUTUAL LIFE INSURANCE [CO. OF NEW YORK, [1905] 1 K. B. 31 ; 53 W. R. 134 ; 91 L. T. 733 ; 10 Com. Cas. 22 ; 74 L. J. K. B. 39 ; 21 T. L. R. 20—C. A.

52. *Insurance by Newspaper—Decision of Editor as to Next of Kin—Finality of Decision.*]—A. was killed in a railway accident, and thereupon, by reason of his carrying a certain newspaper, £1,000 became payable to "the person adjudged by the editor to be 'his next of kin.'" The advertisement of the insurance scheme provided that "the person or persons who shall be adjudged by the editor to be the next of kin of the deceased shall be the only person or persons to receive and give a valid discharge for the money."

A. was survived by three brothers and one sister ; but the editor learning that she had been practically dependent on him, adjudged her to be the next of kin and paid her the £1,000.

HELD—that as the editor had acted *bonâ fide* in giving his decision, the brothers had no claim against their sister.

HUNTER *v.* HUNTER, (1905) 7 F. 136—Ct. of [Sess.

53. "*Violent, accidental, external and visible means*"—*Heart Failure—Ejecting Drunken Man*]—A policy of insurance against death by accident provided that the policy moneys should become payable if "the assured shall sustain any bodily injury caused by violent, accidental, external and visible means within the meaning of this policy and the conditions hereto, and such injury shall be the sole and immediate cause of the death of the assured." The assured, who was apparently in good health, was ejecting a drunken man from his premises, using some force by pushing and pulling him in order to overcome his passive resistance. Immediately afterwards he complained of a pain in his chest, and he died of heart failure in a month. At the time of the injury his heart was in a weak and unhealthy condition, though this was not known to the assured. The effect of the exertion was to cause dilation of the heart, which was the cause of death.

HELD—that there was no "accident," and the policy moneys were not recoverable.

SCARR *v.* THE GENERAL ACCIDENT ASSUR- [ANCE CORPORATION, LD., [1905] 1 K. B. 387 ; 74 L. J. K. B. 237 ; 92 L. T. 128 ; 21 T. L. R. 173—Bray, J.

54. *Death from Accident—"Outward, external and visible Cause"—Cause of Death—Found Drowned—Condition against Suicide—Burden of Proof—Presumption against Crime.*]—H. insured his life with the defendant company under a policy, which was to become a claim if he sustained any bodily injury by accident from an outward external and visible means or cause, and died solely from the effects of such accident within ninety days ; but the company was only bound to pay after proof, satisfactory to the directors, of the cause of death had been given. The policy was not to extend to death by suicide.

H. was found drowned.

HELD (1)—that death by drowning is death from an outward external and visible means or cause, and is *primâ facie* death by accident ; if

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there be the same weight of evidence in favour of accident and suicide there is a presumption of law against the latter sufficient to support a claim under the policy; (2) That under the policy the *onus* was on H.'s representatives to give to the company such proof of his death by drowning and the proximate cause thereof as ought reasonably to satisfy them that the drowning was accidental.

HARVEY *v.* OCEAN ACCIDENT AND GUARANTEE [CORPORATION, (1905) 2 Ir. R. 1—C. A.

55. *Husband and Wife—Policy of Insurance—Policy for Benefit of Widow—Second Wife—Married Women's Property Act*, 1870 (33 & 34 Vict. *c.* 93), *s.* 10.]—A married man purporting to act under the provisions of the Married Women's Property Act, 1870, took out a policy on his own life for the benefit of his "widow, or widow and children, or some one of them, in such shares, proportions, and interest, and generally in such manner" as the husband should by deed or will appoint. His wife subsequently died, leaving children, and the husband married again and had a child by his second wife. By deed he appointed the policy moneys to his second wife absolutely.

HELD—that "widow" in the policy meant the person who at the death of the husband should become his widow, and that therefore the widow, whether she was or was not within the Act, took the policy moneys under the appointment by virtue of the contract with the insurance company.

HELD, also, that she was entitled under the Act.

In re Browne's Policy ([1903] 1 Ch. 188; 72 L. J. Ch. 85; 51 W. R. 364; 87 L. T. 588; 19 T. L. R. 98—Kekewich, J., No. 49, *supra*) followed.

IN RE PARKER'S POLICIES, PARKER *v.* PARKER, [1906] 1 Ch. 526; 75 L. J. Ch. 297; 54 W. R. 329; 94 L. T. 477; 22 T. L. R. 259—Eady, J.

56. *Husband and Wife—Wife insuring her Life in favour of Husband — Husband predeceasing Wife — Title to Policy — Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *s.* 11.]—A wife insured her own life in favour of her husband under the Married Women's Property Act, 1882, the insurance company covenanting to pay £1,000 to the husband or his executors, administrators, or assigns on the death of the wife. The husband paid the premiums on the policy, but predeceased the wife.

HELD—that his interest in the policy was not dependent on his surviving his wife, and that the policy belonged to his executor and not to his wife.

PRESCOTT *v.* PRESCOTT, [1906] 1 Ir. R. 155—M. R.

(d) Jurisdiction of Justices.

57. *Industrial Assurance Company—Moneys due under Policy—Dispute—Receipt of Smaller Sum in Full Discharge—Inability of Claimant to appreciate Legal Position—Power of Court of Summary Jurisdiction to ignore Receipt—Collecting Societies and Industrial Assurance Companies Act*, 1896 (59 & 60 Vict. *c.* 26), *s.* 7.]—A dispute having arisen between an industrial assurance company and the widow of a person insured as to the payment of moneys under the policy of assurance, and an agreement having been made between the company and the widow that the widow should accept repayment of the premiums in full satisfaction of her claim:—

HELD—that the court of summary jurisdiction, before whom the widow claimed the policy moneys, might ignore the agreement on the ground that at the time of entering into it she was incapable of deciding whether or not there was good ground for dispute, and might adjudicate upon the claim.

REFUGE ASSURANCE CO., LD. *v.* LAWRENCE, [(1903) 67 J. P. 396—London Qr. Sess.

58. *Premiums on Void Policy — Industrial Assurance Company—Person insuring Life of Another—Policy Void—Claim for Return of Premiums—Life Assurance Act*, 1774 (14 Geo. 3, *c.* 48), *s.* 1—*Gaming Act*, 1845 (8 & 9 Vict. *c.* 109), *s.* 18—*Collecting Societies and Industrial Assurance Companies Act*, 1896 (59 & 60 Vict. *c.* 26), *s.* 7.]—Where a person has effected with an industrial assurance company an insurance on the life of another, and afterwards, upon finding that the policy is void for want of insurable interest, claims the return of premiums paid by him on the ground that the policy is void, the court of summary jurisdiction for the place where the person resides has no jurisdiction under sect. 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, to determine such claim, as the claimant's case being that there never was a valid insurance, he cannot say that he was a "person insured" within the meaning of that section.

LONDON, EDINBURGH, AND GLASGOW ASSUR- [ANCE CO., LD. *v.* PARTINGTON, (1903) 67 J. P. 255; 88 L. T. 732; 19 T. L. R. 389—Div. Ct.

59. *Policy exceeding £20—Collecting Societies and Industrial Assurance Companies Act*, 1896 (59 & 60 Vict. *c.* 26), *ss.* 1, 7.]—The respondent brought a complaint against an insurance company under the Collecting Societies and Industrial Assurance Companies Act, 1896, claiming £22 19*s.* under a policy of assurance granted by them on the life of her husband.

HELD—that the fact that the assurance company did grant assurances in some cases on one life for a less sum than £20 did not give the justices jurisdiction over the claim in question.

Quære, whether, if a company grants policies for sums of £20 and upwards, and also for sums under £20, justices have jurisdiction in the case of such last-mentioned policies.

COWLING *v.* TOPPING, [1906] 1 K. B. 466; 75 [L. J. K. B. 176; 70 J. P. 95; 54 W. R. 423; 94 L. T. 209; 22 T. L. R. 219—Div. Ct.

Life—*Continued.*

(e) **Practice.**

60. *Repudiation of Validity of Policy—Action for Declaration of Validity prior to Insured's Death—Terms of Dismissal of Action.*]—P. insured his life with the defendants and assigned the policy on his life to the plaintiff, of which due notice was given to the defendants. Two half-yearly premiums had been paid to the defendants in respect of the policy. The defendants refused to receive the premium payable on July 16th, 1898, or any future premiums, and denied that the policy was valid and subsisting. One ground of defence was that the policy, although effected nominally by P., who had an insurable interest in his own life, was in fact effected by the plaintiff, who had not an insurable interest.

The plaintiff brought his action for a declaration that the policy was valid, and an injunction to restrain the defendants from repudiating it.

HELD—that if the defendants would give an undertaking that in case any action should be thereafter brought on the policy they would not rely on the non-payment on the due dates for payment of the premium due on July 16th, 1898, or the subsequent premiums, as being in itself a bar to the plaintiff's right to recover, the action would be dismissed.

HONOUR *v.* EQUITABLE LIFE ASSURANCE [SOCIETY OF THE UNITED STATES, [1900] 1 Ch. 852; 69 L. J. Ch. 420; 48 W. R. 347; 82 L. T. 144—Buckley, J.

61. *Payment into Court—Life Assurance Companies (Payment into Court) Act*, 1896 (59 & 60 Vict. *c.* 8), *s.* 3—*R. S. C., Ord.* 54 (*c*), *r.* 3.]—A policy had been lost for many years, and upon an action being brought for the policy moneys, the directors of the insurance company asked to be allowed to pay the money into Court under the Act of 1896; and filed an affidavit to the effect that in the opinion of their board "no sufficient discharge can otherwise be obtained." The policy had been assigned to trustees, from whom the company had accepted the premiums since its loss, and the company had received no notice of any other assignment or claim.

HELD—that they should be allowed to pay the money into Court; if it should prove subsequently that the plaintiff's title was quite clear, they might be ordered to pay the costs caused by their so doing.

HARRISON *v.* ALLIANCE ASSURANCE CO., [1903] [1 K. B. 184; 72 L. J. K. B. 115; 51 W. R. 281; 88 L. T. 4; 19 T. L. R. 89—C. A.

62. *Staying Proceedings—Effect of Condition to "submit all Disputes" to a Foreign Court.*]—The Budapest office of an English insurance company issued a policy on the life of a Hungarian, the premiums and insurance money being payable at Budapest. There was a condition (in French) "expressly agreeing to submit disputes to the Courts of Budapest." An action having been brought upon the policy in England:—

HELD—that it must be stayed, for both parties had by the condition placed the foreign Court in the position of an arbitrator to settle their disputes.

AUSTRIAN-LLOYD STEAMSHIP CO. *v.* GRESHAM [LIFE ASSURANCE SOCIETY, LD., [1903] 1 K. B. 249; 72 L. J. K. B. 211; 51 W. R. 402; 88 L. T. 6; 19 T. L. R. 155—C. A.

63. *Staying Proceedings — Submission to Arbitration — Railway Passengers' Assurance Company's Acts*, 1864 *and* 1892 (27 & 28 Vict. *c.* cxxv.) *and* (55 & 56 Vict. *c.* viii.)—*Arbitration Act*, 1889 (52 & 53 Vict. *c.* 49), *s.* 4.]—H. was the holder of an accident policy issued under the Railway Passengers' Assurance Company's Act, 1864, ss. 3, 16, and 33 of which provided for disputes being referred to arbitration, and also empowered a judge to stay proceedings if an action was commenced against the company in respect of matters thus required to be referred. The policy itself contained a condition that any questions arising under it should, if either party desired, be referred to arbitration in the manner specified in the Act.

A consolidating Act of 1892 repealed the earlier Act, but all contracts in force at the date were to remain valid and effectual.

H. was killed in an accident, and his widow named an arbitrator. On the company objecting to the person named, she commenced an action.

HELD—that there was a subsisting submission to arbitration to which sect. 4 of the Arbitration Act, 1889, applied; and that on the company's application there was jurisdiction under that section to make an order staying the action.

HODSON *v.* RAILWAY PASSENGERS' ASSURANCE [CO., [1904] 2 K. B. 833; 73 L. J. K. B. 1001; 91 L. T. 648—C. A.

64. *Company carrying on other Businesses—Insufficiency of Insurance Fund—Winding up Petition—Scheme for future Working—Form of Scheme—Life Assurance Companies Act*, 1870 (33 & 34 Vict. *c.* 61), *s.* 4.]—A company which carried on the business of selling tea combined with that of life assurance was ordered to be wound up.

On appeal, a scheme having been prepared and approved by all parties enabling the company to carry on its businesses separately so as to comply with sect. 4 of the Life Assurance Companies Act, 1870, and affording reasonable security to the assured:—

HELD—that on the company undertaking for the future to carry on its business in accordance with the scheme, the winding up order should be discharged and the scheme sanctioned.

Form of scheme discussed.

IN RE BRITISH WIDOWS' ASSURANCE CO., [1905] [2 Ch. 40; 74 L. J. Ch. 525; 54 W. R. 53; 93 L. T. 38; 21 T. L. R. 519; 12 Manson, 407—C. A.

(f) Transfer, Mortgage, and Alteration of Rights.

65. *Mortgage—Payments by the Puisne Mortgagee to keep up Policy—Salvage Claim—Paramount Claim—Life Assurance Companies (Payment into Court) Act*, 1896 (59 & 60 Vict. *c.* 8), *s.* 3.]—In 1872 the owner of two policies of

Life—*Continued.*

assurance on her life mortgaged the same, along with an annuity and certain sums of money charged upon lands, to Mrs. H. to secure the sum of £1,700. In 1877 K., who was the agent of the mortgagor and solicitor for mortgagor and mortgagee, took a puisne mortgage of the policies to secure some advances made by him to the mortgagor. The lands on which the annuity and charges were secured were evicted for non-payment of rent, and the policies thus became the only security for the loan. The mortgagor ceased paying the premiums on the policies, and the same were paid by K., who did not for some years inform Mrs. H. of the fact. In 1888 he wrote first saying that he had been paying the premiums for her benefit, but not stating that he was himself a mortgagee. She replied repudiating the idea that she had ever given him any authority to pay the premiums. K. answered that he had no objection to continue paying the premiums, and to be reimbursed for the same out of the policy moneys. Mrs. H. made no reply to this letter. The mortgagor died in the year 1896, and K. and his representatives continued paying the premiums down to her death. The insurance company paid the money into Court under the Life Assurance Companies (Payment into Court) Act, 1896.

HELD, by the Vice-Chancellor, that K. was entitled to a salvage claim or lien upon the policy moneys, in priority to Mrs. H.'s mortgage, for the premiums paid by him, and interest thereon.

HELD, by the Court of Appeal (varying the decision of the Vice-Chancellor), that K. was only entitled to a lien in such priority for the premiums paid by him, and interest thereon, after the date of the correspondence.

In re Leslie, Leslie v. *French* ((1883) 23 Ch. D. 552 ; 52 L. J. Ch. 762 ; 31 W. R. 561 ; 48 L. T. 564—Fry, J.) considered and discussed.

HELD, by the Vice-Chancellor, that the insurance company was not entitled to any costs of lodging the money in Court under the Life Assurance Companies (Payment into Court) Act, 1896, s. 3.

IN RE POWER'S POLICIES, [1899] 1 Ir. R. 6—[V.-C. ; 12—A. C.

66. *Transfer of Business—Notices to Policy-holders—New Policy-holders since Notices served—Life Assurance Companies Act*, 1870 (33 & 34 Vict. *c.* 61), *s.* 14.]—Before the application to the Court on a petition presented under the Life Assurance Companies Acts, 1870, 1872, for the sanction of the Court to the transfer of the society's business and liabilities and all its assets (except certain assets to be divided amongst its members) to another company, notices had, in accordance with sect. 14 of the Life Assurance Companies Act, 1870, been "forwarded to each policy-holder of the transferred company," but not to the holders of other policies taken out between that time and the hearing.

HELD—that it was unnecessary to send notices to the new policy-holders.

IN RE UNIVERSAL LIFE ASSURANCE SOCIETY, [(1902) 18 T. L. R. 198—Eady, J.

67. *Alteration of Rights — Participation in Profits—Life Assurance Company—Power of Company to alter Rights of Policy-holder—Companies Act*, 1862 (25 & 26 Vict. *c.* 89), *ss.* 50, 209—*Companies (Memorandum of Association) Act*, 1890 (53 & 54 Vict. *c.* 62), *s.* 1.]—The settlement deed of an insurance company provided for a division of the profits in the manner directed by the bye-laws for the time being in force.

In 1886 the plaintiff applied for and received a policy in that department ; he did so in reliance upon a statement in a prospectus to the effect that the entire profits of the department were divided among the policy-holders without any deduction for a reserve fund.

In 1903 it was proposed, under sect. 1 of the Companies (Memorandum of Association) Act, 1890, to register the company with limited liability, and substitute for the settlement deed and bye-laws a memorandum and articles, one of which provided that 5 per cent. of the profits of the mutual department should be put to a reserve.

HELD—that the company had power to do so, the prospectus not amounting to a contract that the company would not exercise its power to change its bye-laws in the future.

Decision of C. A. ([1904] 1 Ch. 374 ; 73 L. J. Ch. 240 ; 52 W. R. 549 ; 90 L. T. 335 ; 20 T. L. R. 242 ; 11 Mans. 169) reversed.

BRITISH EQUITABLE INSURANCE CO. *v.* BAILY, [1906] A. C. 35 ; 75 L. J. Ch. 73 ; 94 L. T. 1 ; 22 T. L. R. 152 ; 13 Mans. 13—H. L. (E.).

V. MARINE.

See also AGENCY, No. 72 ; BANKRUPTCY, No. 1 ; DISCOVERY.

(a) Brokers' Rights and Liabilities.

68. *Policy—Liability of Broker for Premiums—Custom of Merchants.*]—An express promise by the assured in a policy of marine insurance to pay the premiums to the underwriter is not inconsistent with, and does not exclude, the general custom in marine insurance that the broker, and not the assured, is liable to the underwriter for the payment of premiums.

Decision of Collins, J. ([1897] 1 Q. B. 205 ; 2 Com. Cas. 28 ; 66 L. J. Q. B. 16 ; 13 T. L. R. 39) affirmed.

UNIVERSE INSURANCE CO. OF MILAN *v.* MERCHANTS' MARINE INSURANCE CO., [1897] 2 Q. B. 93 ; 8 Asp. M. L. C. 279 ; 2 Com. Cas. 180 ; 66 L. J. Q. B. 564 ; 76 L. T. 748 ; 13 T. L. R. 435 ; 45 W. R. 625—C. A.

69. *Custom of Lloyd's—Policy effected through Broker—Broker and Underwriter settling Differences between Losses and Premiums due on Policies — Failure of Broker — Discharge of Underwriter.*]—Where a person insures goods by a policy of marine insurance through a broker with an underwriter at Lloyd's, the custom of Lloyd's, whereby a broker and an underwriter periodically settle losses in respect of claims and premiums due upon all policies effected by the

Marine—*Continued.*

broker with the underwriter, is not, unless the assured has actual knowledge of it, binding upon him, so as to make payment to the broker of the amount due in respect of a loss payment to him.

It lies upon the underwriters to establish the assured's knowledge of the custom.

Whether the custom, though long established, is reasonable, *quære.*

Sweeting v. *Pearce* ((1861) 30 L. J. C. P. 109; 9 C. B. (N.S.) 534; 9 W. R. 343) approved.

MATVIEFF *v.* CROSFIELD, (1903) 51 W. R. 365; [19 T. L. R. 182; 8 Com. Cas. 120—Kennedy, J.

70. *Relation of Broker or Underwriter—Duty of Broker — Open Covers — Rectification of Policies—Evidence—Stamp Act*, 1891 (54 & 55 Vict. *c.* 39.]—A firm of insurance brokers effected a number of open covers for the purpose of reinsuring risks taken by their principals. The premiums were to be the same as those received by the original insurers, less a brokerage. The brokers passed on to the reinsurers the amounts of the various premiums as handed in to them by the original insurers, and the reinsurers made out the policies accordingly.

HELD—that the brokers owed no duty to the reinsurers to see that the amounts of the premiums had been properly calculated.

HELD, also, that the coverslips could not be admitted in order to show that the reinsurers were entitled to larger premiums than those mentioned in the policies.

EMPRESS ASSURANCE CORPORATION, LD. *v.* [BOWRING & CO., LD., (1906) 11 Com. Cas. 107—Kennedy, J.

71. *Managing Owner—Liability of to Insurance Broker—Course of Dealing.*]—M. & Co., the managing owners of the *G.*, instructed brokers to insure the *G.* and other ships managed by them for various owners. The course of dealing was for the brokers to pay the premiums and for M. & Co. to accept bills drawn by the brokers for sums representing the total premiums on the various ships. It was agreed that if any acceptance was not met by M. & Co. the insurance brokers would be entitled to cancel any of the policies in whole or in part, and apply the return premiums due in respect of such cancellation in liquidation of any debt due to them by M. & Co. On the bankruptcy of M. & Co. certain premiums disbursed by the brokers on the *G.* had not been paid to them by M. & Co. In an action by the brokers against the owners of the *G.* for payment of these premiums :—

HELD—that the defendants were not liable as the pursuers had elected to take M. & Co. as their sole debtors.

LAMONT, NISBET & CO. *v.* HAMILTON, [1907] [S. C. 628—Ct. of Sess.

(b) Collision.

72. *"Collision with any other Ship or Vessel"—Collision with Temporarily Sunken Barge.*]—The steamship *N.* was insured against damage arising from "collision with any other ship or vessel." The *N.* came into contact with a barge temporarily sunken in a navigable river and received damage.

HELD—that this damage came within the terms of the insurance.

CHANDLER *v.* BLOGG, [1898] 1 Q. B. 32; 8 Asp. [M. L. C. 349; 3 Com. Cas. 18; 67 L. J. Q. B. 336; 77 L. T. 524: 14 T. L. R. 66—Bigham, J.

73. *Construction of Proviso "Clause not to extend to any Sum paid for Removal of Obstructions under Statutory Powers."*]—The appellants insured their ship by a policy of insurance which contained a collision clause to which a proviso was appended: "Provided always that this clause shall in no case extend to any sum which the assured shall become liable to pay, or shall pay, for removal of obstructions under statutory powers consequent on such collision." The appellants' ship came into collision with the ship *H.* in the river Tees, and the *H.* sank and became a total loss. The Tees Conservancy, under their statutory powers removed the wreck of the *H.* By agreement the appellants paid to the owners of the *H.* a moiety of the expenses of removing the obstruction caused by the wreck, as being loss sustained by the collision.

HELD (affirming the judgment of the Court below)—that the underwriters were protected by the proviso, and were not liable to indemnify the appellants for the payment so made.

The North Britain ([1894] P. 77) approved and followed.

THE ENGINEER, TATHAM, BROMAGE & CO. *v.* [BURR, (1898) 67 L. J. P. 61; 78 L. T. 473; 14 T. L. R. 369; 46 W. R. 530; 8 Asp. M. C. 401—H. L. (E.).

74. *Policy on Ship — Cost of discharging Damaged and Worthless Cargo.*]—A ship, while insured by a time policy on hull and materials, on machinery and boilers, against perils of the sea and all other perils, losses and misfortunes which might come to her hurt, detriment or damage, was injured by collision. She was carrying a cargo of cotton seed, which was so damaged by sea water and mud in consequence of the collision that it became rotten and worthless, and the consignees refused to accept it.

HELD—that the shipowners were not entitled to recover from their underwriters the cost of discharging the worthless cargo at the port of destination.

Judgment of Bigham, J. ([1898] 1 Q. B. 821; 67 L. J. Q. B. 528; 46 W. R. 490; 78 L. T. 293; 14 T. L. R. 310; 8 Asp. M. C. 384) affirmed.

FIELD STEAMSHIP CO. *v.* BURR, [1899] 1 Q. B. [579; 68 L. J. Q. B. 426; 47 W. R. 341; 80 L. T. 445; 15 T. L. R. 193; 4 Com. Cas. 106; 8 Asp. M. C. 529—C. A.

75. *Sum paid "in respect of Injury to such other Ship or Vessel itself"—Cost of removing Wreck under Statutory Powers.*]—A collision

Marine—*Continued.*

clause in a policy of marine insurance covered sums paid by the owner of the insured vessel "in respect of injury to such other ship or vessel itself." The insured vessel collided with, and sank, a tug in a river under the statutory control of a conservancy. The owners of the tug had to pay the conservancy the cost of dispersing the wreck. The insured vessel was alone to blame for the collision, and as part of the damages her owner paid to the owner of the tug the cost of dispersing the wreck.

HELD—that the sum so paid was not recoverable under the policy.

Judgment of Mathew, J. (15 T. L. R. 506; 4 Com. Cas. 328) reversed.

BURGER *v.* INDEMNITY MUTUAL MARINE [ASSURANCE CO., LD., [1900] 2 Q. B. 348; 69 L. J. Q. B. 838; 48 W. R. 643; 82 L. T. 831; 16 T. L. R. 456; 5 Com. Cas. 315; 9 Asp. M. C. 85—C. A.

76. "*Actual Collision*" *with another Vessel — Fouling Anchor attached to Ship in Bed of River — Anchor deemed Part of Vessel.*]—Damage arose from the act of a vessel at anchor called the *Excel*, which was lying partly on the mud, but with her bows attached by a chain of some twenty or thirty fathoms to an anchor fixed in the bed of the river. The *Ada* collided with this anchor, and the question was whether the anchor could properly be regarded as part of the vessel, as the *Ada* was insured against damage arising from "actual collision" with another vessel.

HELD—that the assured was entitled to recover under the policy for the damage done to the *Ada*, as the anchor must be treated as part of the *Excel*.

IN RE MARGETTS AND THE OCEAN ACCIDENT [AND GUARANTEE CORPORATION, [1901] 2 K. B. 792; 70 L. J. K. B. 762; 59 W. R. 669; 85 L. T. 94; 17 T. L. R. 538; 9 Asp. M. C. 217—Div. Ct.

77. *Exemption in respect of Moneys Paid "for Removal of Obstructions under Statutory Powers."*]—A vessel was insured under a policy which excluded the underwriters' liability in the event of collision, so far as concerned "any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers."

Through negligence she collided with the steamship *Hermia*, which was then sunken in the Clyde, and which the trustees of the Clyde (acting under their statutory powers of removal) had engaged a salvage company to salve under a "no cure, no pay" contract.

The owners had to pay, £2,350 to the salvage company for the increased cost of raising the *Hermia*, £250 to the salvage company for damage to buildings and trunkways upon the *Hermia*, and £1,008 for depreciation in value of the *Hermia* to her owners and to the Clyde trustees (who had a lien on her for their costs).

HELD—that the proviso to the collision clause exempted the underwriters from liability in respect of the sum of £2,350.

The North Britain ([1894] P. 77; 63 L. J. P. 33; 42 W. R. 243; 70 L. T. 210—C. A.) applied.

CHAPMAN *v.* JAMES FISHER & CO., (1904) 20 [T. L. R. 319—Walton, J.

(c) Concealment.

78. *Policy — Cotton on Deck — Damaged Cotton.*]—The plaintiffs, who had insured a cargo of damaged cotton, reinsured the same with the defendant, but did not inform him that it was damaged cotton.

The slip contained the terms, "cotton on deck, f. p. a. and c., including jettison and washing overboard." When the policy of reinsurance was tendered to the defendant for signature it differed from the slip, for, instead of the words "f. p. a. and c., &c.," it was "f. p. a., &c., as in original policy," and in that policy the risk was described as "f. p. a., but including risk of jettison and washing overboard"; but he signed it without inquiry or objection. The quantity of cotton insured "on deck" amounted to £7,500.

HELD—that the instructions being to insure such a quantity "on deck" clearly showed that it was damaged cotton, and that, under the circumstances, there was no concealment; also, that, although an attempt had been made to establish that the course of business was to say that cotton was damaged, no such course of business was established.

BRITISH AND FOREIGN MARINE INSURANCE [CO., LD. *v.* STURGE (1897) 8 Asp. M. L. C. 303; 2 Com. Cas. 244; 77 L. T. 203; 13 T. L. R. 526—Mathew, J.

79. *Prohibition never acted upon—Importation of Arms—Illegal Adventure.*]—By an edict of the Persian Government, in 1881, the importation of arms and ammunition was forbidden into Persia. This ediet has never been enforced, but was probably only to allow the farmers of the customs to levy arbitrary and heavy duty on such goods.

The plaintiffs shipped some cases of cartridges and rifles, some of which were for a port in Persian territory and others were to go *viâ* such ports.

The prohibition was believed by the plaintiffs to be a dead letter, but these goods were seized and confiscated by H.M.S. *Lapwing*. They were insured under two policies of marine insurance with the defendants, and an action was now brought to recover a total loss caused by the capture at sea.

HELD—that these facts, as to the prohibition as known to the plaintiffs, were not circumstances material in estimating the risk, and that therefore the plaintiffs had not, when effecting the insurance, concealed a fact material to the estimation of the risk; and—

Further, that this adventure was not illegal.

FRACIS *v.* SEA INSURANCE CO., (1898) 79 L. T. [28; 47 W. R. 119; 8 Asp. M. C. 418—Bigham, J.

Marine—*Continued.*

80. *Wagering Policy—P.p.i. Clause—Proof of Interest—Material Fact—Marine Insurance Act*, 1745 (19 Geo. 2, *c.* 37), *s.* 1.]—Where an insurance on ship is affected as a mere bet on behalf of a person who has no insurable interest in the subject-matter of insurance, the Court will not enforce the contract in favour of the assured, even though the Marine Insurance Act, 1745, is not pleaded or relied on as a defence to the action.

A "p.p.i." policy was effected on a ship "to pay a total loss in the event of the vessel not arriving at Yokohama on or before" a certain date. The assured did not inform the underwriters, as the fact was, that the insurance was purely speculative.

Semble, there was a concealment of a material fact.

GEDGE *v.* ROYAL EXCHANGE ASSURANCE [ASSOCIATION, [1900] 2 Q. B. 214; 69 L. J. Q. B. 506; 82 L. T. 463; 16 T. L. R. 344; 5 Com. Cas. 229; 9 Asp. M. C. 57—Kennedy, J.

81. *Underwriter at Lloyd's—Reinsurance—Knowledge of Lloyd's Agent — Constructive Notice.*]—The plaintiffs, who were underwriters at Lloyd's, reinsured a risk on goods by a certain steamer on a voyage to a port abroad. At the time of the reinsurance the ship had arrived and the cargo had been partly discharged and examined by Lloyd's surveyor at the port, and found damaged, but this fact was not known to the plaintiffs.

HELD—that the knowledge of Lloyd's agent at the port abroad could not be treated as the knowledge of the plaintiffs, and that they were therefore entitled to recover on the policy. Even if the agent was bound to inform Lloyd's as a whole, he owed no duty to individual members.

WILSON AND OTHERS *v.* SALAMANDRA ASSURANCE CO., (1903) 88 L. T. 96; 19 T. L. R. 229; 8 Com. Cas. 132; 9 Asp. M. C. 370—Bruce, J.

(d) Construction.

82. *Difference of Freight—"To pay a Total Loss in the event of the Steamer being unable to fulfil her Charter by non-arrival or inability to load by Nov. 20 from any cause whatever"—Vessel part loaded by November 20th.*]—The plaintiffs had chartered the *Gladys Royle* to load a cargo at Taganrog at a certain rate of freight, and were in a position to make a profit by the shipment of cargo by other shippers at higher rates of freight. The plaintiffs effected with the defendants policy for £150 "on difference of freight by the *Gladys Royle*, to pay a total loss in the event of the steamer being unable to fulfil her charter by non-arrival or inability to load by November 20th from any cause whatever." On November 20th the *Gladys Royle* had loaded half her cargo, and on November 24th she was compelled by ice to leave with only four-fifths of her cargo on board.

HELD—that the defendants were not liable for a total loss.

SMITH AND SCARAMANGA *v.* FENNING, (1898) [3 Com. Cas. 75; 14 T. L. R. 222—Kennedy, J.

83. *Marine Insurance — Policy — "Slip" or "covering Note" — Reinsurance of Excesses — "Contract for Sea Insurance" — Stamp — Invalidity—Stamp Act*, 1891 (54 & 55 Vict. *c.* 39), *ss.* 93 *and* 95.]—A slip or covering note by which underwriters agree to reinsure excesses over certain amounts up to a certain limit upon marine risks, is a contract for sea insurance, which, as it does not contain "the sum or sums insured" is invalid under sect. 93 of the Stamp Act, 1891.

Judgment of Mathew, J. ([1898] 1 Q. B. 829; 8 Asp. M. L. C. 386; 3 Com. Cas. 172; 67 L. J. Q. B. 554; 78 L. T. 465; 14 T. L. R. 366) affirmed.

HOME MARINE INSURANCE CO. *v.* SMITH [1898], 2 Q. B. 351; 67 L. J. Q. B. 777; 78 L. T. 734; 14 T. L. R. 459; 46 W. R. 661; 8 Asp. M. L. C. 408—C. A.

84. *"Sailing"—Insurance on Ships "sailing" after a certain Day—Commencement of Voyage—Intention of Master.*]—A vessel had completed her loading, cleared the Custom House, and was at the wharf ready to proceed to sea about 10 p.m. on the 29th February.

By a regulation of the port vessels were not permitted to leave after dark.

The master then moved the vessel about 500 yards out into the stream and there anchored. He did this for the purpose of leaving room at the wharf for other vessels and of keeping his crew from going ashore, and he did not intend then to commence the voyage.

On the following morning, March 1st, the vessel proceeded on her voyage.

HELD—that the vessel had not "sailed" until March 1st within the meaning of a policy of insurance on goods per ships "sailing on or after March 1st."

Decision of Mathew, J. ((1897) [1898] 1 Q. B. 27; 3 Com. Cas. 1; 67 L. J. Q. B. 22; 14 T. L. R. 20) affirmed.

SEA INSURANCE CO. *v.* BLOGG, [1898] 2 Q. B. [398; 67 L. J. Q. B. 757; 78 L. T. 785; 14 T. L. R. 474; 47 W. R. 71—C. A.

85. *Reinsurance—"To take Excess per Named Lines"—Loss of Goods intended for Named Line.*]—A contract of reinsurance provided that the reinsurers should take the excesses of the original insurers over a certain amount upon steamers belonging to certain lines. The contract covered such excesses on voyages (*inter alia*) from A. to B., and B. to C. Goods on board a "tramp" steamer on a voyage from A. to B., which would have formed part of the cargo of a liner on a voyage from B. to C., and would have been covered by the contract, were totally lost between A. and B.

HELD—that the loss was not covered by the contract.

Marine—*Continued.*

Judgment of Bigham, J. (14 T. L. R. 334; 3 Com. Cas. 159) affirmed.

INSURANCE CO. OF NORTH AMERICA *v.* NORTH [CHINA INSURANCE CO., (1899) 15 T. L. R. 101; 4 Com. Cas. 67—C. A.

86. "*Ship and its Furniture*"—*Separation Cloths and Dunnage Mats.*]—Dunnage mats and separating cloths, which are used on board a ship in connection with the carriage of a grain cargo, are covered by a time policy on ship in the ordinary Lloyd's form, although they are not being used on the voyage in the course of which the loss occurred.

Judgment of Bigham, J. ([1899] 2 Q. B. 401; 68 L. J. Q. B. 888; 48 W. R. 47; 15 T. L. R. 467; 4 Com. Cas. 280) affirmed.

HOGARTH *v.* WALKER, [1900] 2 Q. B. 283; 69 [L. J. Q. B. 634; 48 W. R. 545; 82 L. T. 744; 16 T. L. R. 410; 5 Com. Cas. 292; 9 Asp. M. C. 84—C. A.

87. *Mutual Insurance Association—Payment of Premiums—Insurance by Agent, Member of the Association—Liability of Assured who are not Members.*]—G., the managing-owner and part owner of a ship, with the authority of the defendants, his co-owners, entered the ship in a mutual marine insurance association, and thereby became a member of the association within the meaning of the memorandum and articles of association. A policy, in most respects in the usual Lloyd's form, was issued by the association, by which G. insured the ship "as well in his own name as for and in the names of all others to whom the same doth or shall appertain." The policy, which contained no express statement or provision as to the payment of premium, incorporated the memorandum and articles of association and rules of the association. By the memorandum one of the objects of the association was declared to be "the mutual insurance of the ships of members, and of ships which members may be authorised to insure in their own names." By the articles of association a member was defined to be "any person who on behalf of himself or any other person insures any ship in the association," and provision was made for levying contributions from members to provide the association with funds to meet claims and to pay expenses. The rules provided for the payment of premiums, but did not state expressly by whom they were to be paid, and for the distribution of any surplus of premiums amongst the members. They also provided that a member should be uninsured as to any interest entered, if he became bankrupt or insolvent, and that in case of loss "the owner" should be liable for certain premiums.

G. became insolvent, and failed to pay the premiums due upon the policy. The association sued the defendants, as undisclosed principals of G., to recover their respective shares of the premiums.

HELD—that there was nothing in the documents forming the policy to relieve the defendants of their *primâ facie* obligations, as the persons on whose behalf and for whose benefit the insurance was effected, to pay the premiums, and that the association was entitled to recover from each of the defendants his proportion of the premiums.

United Kingdom Mutual Steamship Assurance Association v. *Nevill* ((1887) 19 Q. B. D. 110; 56 L. J. Q. B. 522; 35 W. R. 746—C. A.) distinguished.

BRITISH MARINE MUTUAL INSURANCE ASSO- [CIATION *v.* JENKINS, [1900] 1 Q. B. 299; 69 L. J. Q. B. 177; 82 L. T. 297; 5 Com. Cas. 143; 9 Asp. M. C. 27—Bigham, J.

88. "*Usual Lloyd's Conditions*"—*Jute Shipped from Calcutta to Dundee—Warehouse to Warehouse Clause.*]—A contract for the sale of jute, to be shipped from Calcutta to Dundee, contained the following clause: "Insurance . . . to be effected under an f.p.a. policy on usual Lloyd's conditions, at Lloyd's or with a London insurance company, or with Calcutta insurance companies or agencies having a responsible and well-known London agent." Policies were effected with three insurance companies. Each policy contained a clause by which the goods were covered while temporarily placed on quay, and until delivered to the export vessel, or at any wharf or warehouse within the limits of the port.

HELD—that by the terms of the contract the policies effected with the companies must contain the usual Lloyd's conditions; that the clause in question was not a usual Lloyd's condition; and that the usual Lloyd's condition in such a case was a clause covering the goods until they were safely delivered into the warehouse of the consignee.

IDE *v.* CHALMERS, (1900) 5 Com. Cas. 212— [Kennedy, J.

89. *Hull and Machinery of Torpedo-boat Destroyer*—"*Latent Defect*"—"*Breakage of Shafts*"—"*Trials*"—*Breakage of Connecting Rod on Trial Trip.*]—A policy of marine insurance upon the hull and machinery of a torpedo-boat destroyer covered the following perils: "Fire in shops and on board, on stocks, trials, and all marine risks to completion and acceptance by the Admiralty . . . and all other perils, losses or misfortunes." Attached to the policy was this clause: "This insurance is also specially to cover loss of or damage to hull or machinery through the negligence of mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect . . . with leave to go on trial trips." During a trial the connecting rod of the starboard engine broke, causing great damage.

HELD—that "latent defect in machinery" did not cover a weakness in design; that the breakage of the connecting rod was not a "breakage of shafts," and that "trials" did not denote a period during which the assured were

Marine—*Continued.*

to be insured against fire, but specified a particular peril insured against—viz., peril of trials.

JACKSON *v.* MUMFORD, (1902) 51 W. R. 91; [19 T. L. R. 18; 8 Com. Cas. 61—Kennedy, J.

Latter part of judgment affirmed, *see* No. 90, *infra*.

90. "*Fire in Shops and on Board on Stocks, Trials and all Marine Risks*"—*Accident on Trial caused by Weakness of Design—Whether included.*]—A policy of insurance on the machinery of a torpedo-boat destroyer, which was being built, covered "fire in shops and on board on stocks, trials, and all marine risks to completion and acceptance by the Admiralty." The policy also stated "with leave to go on trial trips." While the vessel was on a trial the connecting-rod of one of the high-pressure engines broke, the breakage being due to the weakness of the design.

HELD—that "trial" was one of the perils insured against, and that therefore the policy covered damage to machinery occurring during a trial.

JACKSON *v.* MUMFORD, (1904) 52 W. R. 342; [20 T. L. R. 172; 9 Com. Cas. 111—C. A.

91. *Perils insured against—Ice—*"*Landing, warehousing, and forwarding Charges*"*—Import Duties.*]—The plaintiffs insured with the defendants goods and freight by named steamers from London to inland towns in Siberia, *via* the Kara Sea. The policy enumerated the usual perils, and was "to pay landing, warehousing and forwarding charges," should the same be incurred.

In August the steamers were blocked by ice in the Kara Sea, the ice being unusual at that time of the year: ultimately they had to return to London. The plaintiffs thereupon sold part of their own goods, and returned goods which they had agreed to carry to the owners.

Subsequently they forwarded the rest of their own goods by land, and in consequence had to pay heavy duties in Russia.

HELD—(1) that the ice was under the circumstances a peril insured against; (2) that the plaintiffs could recover in respect of landing, warehousing and forwarding charges; and (3) that the forwarding charges included the increased duties.

POPHAM AND ANOTHER *v.* ST. PETERSBURG INSURANCE CO., (1905) 10 Com. Cas. 31—Walton, J.

92. *Reinsurance* — "*Warranted free from Particular Average*" — "*Each Craft to be Deemed a Separate Insurance*"*—Loss of Cargo in Barge.*]—The plaintiffs insured a cargo of wheat to the United Kingdom, their proportion of the risk being £1,914. The plaintiffs reinsured with the defendants for "£1,000 in excess of £500," the policy of reinsurance containing a clause, "Warranted free from particular average unless the ship or craft or cargo be stranded," and also a clause, "including all risks of craft [and] [or] raft [and] [or] of any special lighterage, each craft, raft, or lighter to be deemed a separate insurance." A barge containing part of the cargo for the ship sank, and the wheat was lost. The plaintiff paid £298 upon the original policy, and sued the defendants on the policy of reinsurance. The defendants contended that the above clauses exempted them from liability, as the plaintiffs' risk on the wheat in the barge did not exceed £500, and as each barge was to be a separate insurance.

HELD—that the above clauses did not relieve the defendants from liability for the loss, and that notwithstanding them the "excess" was to be calculated on the plaintiffs' whole interest at risk, and not on their interest in particular craft.

SOUTH BRITISH FIRE AND MARINE INSURANCE [COMPANY OF NEW ZEALAND *v.* DA COSTA AND OTHERS, [1906] 1 K. B. 456; 75 L. J. K. B. 276; 54 W. R. 420; 94 L. T. 435; 22 T. L. R. 305; 11 Com. Cas. 81; 10 Asp. M. C. 227—Bigham, J.

93. *Right to sue on Policy—Insurance effected by Shipowners—Intention—Collision caused by Negligence of Charterers—Right of Charterers to sue on Policy.*] — By a charter-party, which amounted to a demise of a steamship for three years, it was provided that in the event of the steamer, from stress of weather, putting into a port other than that to which she was bound, it was understood that the charterers were covered as to expenses as the owners were by their insurance; and another clause provided that the owners were to pay for the insurance on the vessel. The owners effected a policy on the ship "as well in their own names as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." There was a running down clause in the policy. During the currency of the policy the ship came into collision with another vessel, and the charterers were held liable, and had to pay damages. In the collision action the charterers stated that they had no insurance on the ship.

In an action by them against the underwriters upon the policy:—

HELD—that the charterers were not covered by the policy, there being no obligation upon the owners to insure on behalf of the charterers, nor any intention on their part to do so, and that the charterers could not claim to have adopted or ratified the policy.

Decision of C. A. ([1905] 1 K. B. 637; 74 L. J. K. B. 273; 53 W. R. 420; 92 L. T. 515; 21 T. L. R. 248; 10 Asp. M. C. 37; 10 Asp. M. C. 260—C. A.) affirmed.

THE BOSTON FRUIT CO. *v.* THE BRITISH AND [FOREIGN MARINE INSURANCE CO., [1906] A. C. 336; 75 L. J. K. B. 537; 54 W. R. 557; 94 L. T. 806; 22 T. L. R. 571; 11 Com. Cas. 196—H. L. (E.).

94. "*Whilst at Port or Ports, Place or Places in New Caledonia*"*—Vessel lost on Reef near New Caledonia.*]—The defendants reinsured the

Marine—*Continued.*

plaintiffs in respect of a vessel "whilst at port or ports, place or places in New Caledonia." The vessel was damaged by striking on a reef in Gazelle Passage, which is a passage through the barrier reef of New Caledonia, distant about ten miles from the mainland.

HELD—that the loss did not occur, within the meaning of the policy, at a "port or ports, place or places in New Caledonia." The word "place" in the collocation "port or ports, place or places" means some place at which the vessel has arrived for some purpose (*e.g.*, for loading, discharging, coaling, repairs, or shelter), and not a place where the vessel may happen to be in passing.

THE MARITIME INSURANCE CO., LD. *v.* THE [ALIANZA INSURANCE CO. OF SANTANDER, [1907] 2 K. B. 660; 23 T. L. R. 703—Walton, J.

95. *Damage to Hull or Machinery—Latent Defect in Machinery.*] — A policy of marine insurance on ship for a year, while in port at San Francisco, contained a clause that the insurance was also "specially to cover loss of [and] [or] damage to hull or machinery through the negligence of the master, mariners, engineers, or pilots, or through explosions howsoever and wheresoever occurring, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage had not resulted from want of due diligence by the owners of the vessel, or any of them, or by the manager." During the year covered by the policy the ship, on arriving back from a voyage, was docked at San Francisco for a Lloyd's survey, and upon the tail shaft being drawn and examined a crack or fracture was discovered in it and it was condemned. The fracture was caused by a new end having been imperfectly welded on to the shaft many years before, and this latent defect was not visible on the surface in the form of a crack at the previous Lloyd's survey, made about two-and-a-half years before.

HELD—that there was no evidence of any loss through a latent defect during the time when the policy attached—that was to say, while the ship was in port in San Francisco—the policy not covering the mere discovery of a latent defect at San Francisco.

Per Fletcher Moulton, L.J.—The policy upon its true construction did not cover a latent defect in the machinery unless such defect caused actual loss of or actual damage to the machinery, and the mere wearing out of the machinery owing to a latent defect was not within the policy.

Per Buckley, L.J. — The policy covered a latent defect in the machinery, which became apparent on the surface and was discovered during the currency of the policy, and which caused its condemnation.

Decision of Walton, J. ((1906) 95 L. T. 607; 22 T. L. R. 527; 11 Com. Cas. 179; 10 Asp. M. C. 303) affirmed.

OCEANIC STEAMSHIP CO. *v.* FABER, (1907) 97 [L. T. 466; 23 T. L. R. 673—C. A.

(e) Damages and Contribution.

96. *Ship placed in Dry Dock for Repairs, for which Underwriters are liable—Ship Surveyed for Lloyd's Classification—Expenses and Dock Charges—Contribution.*]—A ship, owned by the plaintiffs and insured by the defendants, was placed in dry dock for the purpose of repairs, for which the defendants were liable. While she was in dry dock the plaintiffs had her surveyed for the purpose of the renewal of her classification at Lloyd's.

HELD—that the plaintiffs were not liable to contribute to the pilotage and towage expenses incurred in getting the ship into, and out of, the dry dock.

Marine Insurance Co. v. *China Transpacific Steamship Co.* ((1886) 11 App. Cas. 573; 56 L. J. Q. B. 100; 35 W. R. 169; 55 L. T. 491; 6 Asp. M. C. 68—H. L. (E.)) distinguished.

Decision of C. A. ([1898] 1 Q. B. 722; 67 L. J. Q. B. 548; 46 W. R. 417; 78 L. T. 402; 14 T. L. R. 330; 3 Com. Cas. 148; 8 Asp. M. C. 369) reversed.

RUABON STEAMSHIP CO. *v.* LONDON ASSURANCE [1900] A. C. 6; 69 L. J. Q. B. 86; 48 W. R. 225; 81 L. T. 585; 16 T. L. R. 90; 5 Com. Cas. 71; 9 Asp. M. C. 2—H. L. (E.).

97. *Policy on Cases of Whisky—Damage to Labels and Packing by Sea Peril—Affecting Selling Value of the Whisky.*]—The plaintiffs insured cases of whisky for a voyage from Glasgow to Singapore. Owing to a sea peril the straw in which the bottles were packed became wet and discoloured, and some of the labels were damaged by contact with the straw. The cases of whisky were sold in their damaged condition at Singapore.

HELD—that the plaintiffs were entitled to recover from the underwriters the amount of the loss upon the sale, and were under no obligation to re-pack or re-label the bottles before selling.

Cator v. *Great Western Insurance Co., of New York* ((1873) L. R. 8 C. P. 552; 42 L. J. C. P. 266; 29 L. T. (N.S.) 136) distinguished.

BROWN BROTHERS *v.* FLEMING AND OTHERS, [(1902) 7 Com. Cas. 245—Bigham, J.

98. *Items of Damage—Damage to Ship Abroad — Items allowable against Underwriters — Expense of sending out Surveyor to represent Owner—Banker's Charges on Remittances, &c. — Commission on Disbursements — Method of Repairing.*]—It must depend upon the circumstances of each case whether underwriters are chargeable with any part, or all, of the expenses of a surveyor sent out on behalf of the owner to watch the repairing of an insured vessel in a foreign port. Where such a surveyor was sent out from Liverpool to Melbourne, £759 was claimed for his fees and expenses, and 100 guineas was allowed.

It is fair to allow to the owners "banker's charges on sums remitted and overdrafts," and also a "commission on disbursements" at the rate of 2½ per cent.

Marine—*Continued.*

A shipowner may fairly object to a method of repairing a ship, which, though adequate to restore the injured part to its original strength, is so unsightly as to depreciate the vessel's selling value.

AGENORIA STEAMSHIP CO., LD. *v.* MERCHANTS' [MARINE INSURANCE CO., LD., (1903) 19 T. L. R. 442; 8 Com. Cas. 212—Kennedy, J.

99. *Sale of Goods—Seller's Obligation to Insure and to Deliver Goods—Insurance to be for a Certain Sum—Right of Seller to Policy Moneys in Excess of Stipulated Amount.*]—The appellants sold to the respondents Manilla hemp at a certain price, cost freight and f.p.a. insurance, to be shipped to London. The contract provided that, should the hemp, or any portion thereof, not arrive in London from loss of vessel or other unavoidable cause, the contract was to be fulfilled by handing documents including insurance policy against payment of invoice: insurance for 5 per cent. over invoice amount to be effected by sellers for account of buyers under a f.p.a. policy. The contract contained a submission of dispute to arbitration, which provided that the evidence and proceedings might be taken in a mercantile way without regarding legal technicalities respecting evidence. The hemp was subsequently paid for, the sellers handing to the buyers the shipping documents, including an undertaking to hold £1,280, the amount of the policy on the hemp, for the buyers. This sum was in excess of the net invoice price *plus* 5 per cent. A portion of the hemp having been destroyed by fire, the amount due under the policy was paid by the insurance company, but the sellers claimed to be entitled to such a proportion of the insurance money as represented the difference between the net invoice price *plus* 5 per cent. and £1,280. The arbitrator held that the sellers were so entitled.

HELD—that the interest under the policy passed to the buyers, who were entitled to the whole of the insurance moneys, and that as the error in law appeared on the face of the award the Court could set it aside.

IN RE LANDAUER & CO. AND ASSER & CO., [1905] [2 K. B. 184; 74 L. J. K. B. 659; 53 W. R. 534; 93 L. T. 20; 21 T. L. R. 429; 10 Com. Cas. 265—Div. Ct.

100. *Costs—Part Insurance—Action in Interests of Assured and Underwriters—Contribution.*]—Goods which were partly insured under a marine policy were lost while in a barge. At the suggestion of the goods owner, the underwriters assented to his bringing an action against the barge owner to recover the loss, but the action proved unsuccessful. The goods owner claimed the whole of the costs of the action from the underwriters.

HELD—that there was no rule of law as to who should bear the costs, the rights of the parties depending upon what was the agreement when the suggestion that the action should be brought was made and assented to; and that, there being no express agreement as to costs, the proper inference was that the parties had tacitly agreed that each should pay a share of the costs proportionate to their respective interests in the litigation.

DUUS, BROWN & CO., *v.* BINNING AND OTHERS, [(1906) 22 T. L. R. 529; 11 Com. Cas. 190—Walton, J.

(f) Freight and Cargo.

101. *Exception "Claim consequent on Loss of Time"—Loss of Time from Peril of Sea.*]—A time policy of insurance on freight contained a clause "warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." After the commencement of a voyage the ship sustained damage from a peril of the sea, and returned to her port of loading. The necessary repairs caused a delay which frustrated the object of the venture, and the charterers, as they were entitled to do, cancelled the charter, and the freight was totally lost. In an action on the policy for a total loss of freight:—

HELD (affirming the judgment of the Court below)—that the claim was consequent on loss of time within the meaning of the exception, and that the underwriters were not liable.

BENSAUDE *v.* THAMES AND MERSEY MARINE [INSURANCE CO., [1897] A. C. 609; 8 Asp. M. L. C. 315; 2 Com. Cas. 238; 66 L. J. Q. B. 666; 77 L. T. 282; 13 T. L. R. 501; 46 W. R. 78—H. L. (E.).

102. *Reinsurance of Steamers in Freight Club—Constructive Total Loss of Ship—Notice of Abandonment—Freight earned by Underwriters on Ship.*]—By a policy of reinsurance freight on steamers entered in a freight club was reinsured, "to pay only in the event of total or constructive total loss." By the rules of the club the amount insured was payable in the event of the total loss of the ship entered. A ship, in question, became a constructive total loss and notice of abandonment of ship was given to and accepted by the underwriters on ship, who eventually earned the freight. The plaintiffs paid a total loss of freight on the original policy.

HELD—that they could recover on the reinsurance policy.

UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION, LD. *v.* BOULTON, (1898) 3 Com. Cas. 330—Bigham, J.

103. *Cargo of Coals—Imminent Danger of Fire—No actual Fire—Cargo discharged for Safety of whole Adventure—Perils "of the Seas, Fire, Jettisons, and all other Perils, Losses, and Misfortunes"—Loss* ejusdem generis.]—The owners of a sailing ship, which was chartered to carry a cargo of coals from Newcastle, N.S.W., to Valparaiso against an agreed freight payable on delivery, insured the freight with the defendants. The perils insured against included perils "of the seas, fire, jettisons, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage" of the subject-matter of insurance. After the ship had sailed with the coal on

Marine—*Continued.*

board, the cargo was discovered to be getting hot, and, for the safety of the whole adventure, the vessel was taken into Sydney, where surveys were held, which resulted in a portion of the cargo being discharged and necessarily and properly sold. The vessel then proceeded with the remainder of the cargo. No freight was payable or paid in respect of the cargo so sold, and the shipowners lost that portion of the freight which they would otherwise have earned under the charter-party.

In an action by the shipowners to recover directly from the underwriters on the ground that the freight had been lost by perils insured against :—

HELD, that there was an actual existing state of peril of fire, and not merely of fear of fire, and that the loss, although not a loss by fire, was a loss *ejusdem generis*, and covered by the general words "all other perils, losses, and misfortunes," and the defendants were therefore liable to make good to the plaintiffs the loss of freight as a partial loss under the policies.

THE KNIGHT OF ST. MICHAEL, [1898] P. 30 ; 3 [Com. Cas. 62 ; 67 L. J. P. 19 ; 78 L. T. 90 ; 14 T. L. R. 191 ; 46 W. R. 396—Barnes, J.

104. *Master Part Owner of Ship—Loss of Ship—Negligence of Master—Notice of Abandonment.*]—The assured can recover upon a policy of marine insurance if the loss is caused directly by perils of the sea, though the loss has occurred through the negligence of the assured, such negligence not being wilful.

Where freight is insured and it becomes impossible to earn that freight owing to the loss of the vessel, it is not necessary to give notice of abandonment to the underwriter on freight.

Decision of Kennedy, J. ((1897) 8 Asp. M. L. C. 300 ; 2 Com. Cas. 216) affirmed.

TRINDER, ANDERSON & CO. *v.* THAMES AND [MERSEY MARINE INSURANCE CO. ; SAME *v.* NORTH QUEENSLAND INSURANCE CO. ; SAME *v.* WESTON, CROKER & CO., [1898] 2 Q. B. 114 ; 8 Asp. M. L. C. 373 ; 3 Com. Cas. 123 ; 67 L. J. Q. B. 666 ; 78 L. T. 485 ; 14 T. L. R. 386 ; 46 W. R. 561 —C. A.

105. *Lump Chartered Freight—Cesser Clause—Lien for Bill of Lading Freight—No Lien on Cargo for Chartered Freight—Policy against Perils of the Sea—Loss by Perils of the Sea of Part of Cargo—Loss of Chartered Freight.*]—By a charter-party a ship was chartered for a voyage at the lump freight of £3,000, payable on delivery of the cargo. The master was to sign bills of lading at any rate of freight the charterers might require, but not under chartered rates, or differences to be settled in cash on signing bills of lading ; the charterers' liability to cease on shipment of the cargo provided it was worth the freight, dead freight and demurrage on arrival at the port of discharge, but the vessel to have a lien thereon for the recovery of all freight, dead freight and demurrage. The charterers loaded a full general cargo under bills of lading which made the goods comprised in each bill of lading deliverable to the consignee thereof on payment of the bill of lading freight. The shipowners effected a policy against perils of the sea on the chartered freight. During the voyage part of the cargo was lost by a peril of the sea, and on the ship's arrival at the port of discharge the bills of lading freights payable to the shipowners upon that part of the cargo which arrived was less by £645 than the chartered freight, though the cargo which arrived was worth the chartered freight. In an action by the shipowners upon the policy to recover the £645 as being a loss of chartered freight by a peril of the sea :—

HELD—that the loss was not caused by a peril of the sea, but by the master not having signed bills of lading giving the shipowners a lien upon the goods comprised in each bill of lading for the whole chartered freight.

BRANKELOW STEAMSHIP CO. *v.* CANTON [INSURANCE OFFICE, [1899] 2 Q. B. 178 ; 68 L. J. Q. B. 811 ; 47 W. R. 611 ; 81 L. T. 6 ; 4 Com. Cas. 239 ; 8 Asp. M. C. 863—C. A.

106. "*Free from any Claim consequent on Loss of Time*" — *Destruction of Refrigerating Machinery by Fire—Delay — Frustration of Adventure—Liability of Underwriters.*]—The plaintiffs' steamer was one of a line trading regularly to Australia, and fitted for carrying frozen meat, engagements for freight being booked while the steamer was on the outward voyage. The plaintiffs effected an insurance with the defendants on "freight of frozen meat chartered, or as if chartered." The policy contained the following clause:—"Chartered freights and freights are warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." While the steamer was at Sydney, a fire occurred on board, destroying the refrigerating machinery. The damage could not be repaired at Sydney, and it was therefore impossible for the steamer to carry the frozen meat which had been engaged, or any frozen meat on the homeward voyage, and the freight was lost. In an action on the policy for total loss of freight :—

HELD—that the claim was consequent on loss of time within the meaning of the clause in the policy, and that the defendants were not liable.

Bensaude v. *Thames and Mersey Marine Insurance Co.* ([1897] A. C. 609 ; 66 L. J. Q. B. 666 ; 46 W. R. 78 ; 2 Com. Cas. 238 ; 77 L. T. 282 ; 8 Asp. M. C. 315—H. L. (E.)) followed.

TURNBULL, MARTIN & CO. *v.* HULL UNDER-[WRITERS' ASSOCIATION, [1900] 2 Q. B. 402 ; 69 L. J. Q. B. 588 ; 82 L. T. 818 ; 16 T. L. R. 359 ; 5 Com. Cas. 248 ; 9 Asp. M. C. 93—Mathew, J.

107. *Advances — "Free of all Average" Security of Freight—Distance Freight payable—Partial Loss.*]—The plaintiffs advanced money for disbursements to the captain of an Italian ship at Pensacola, who signed and handed them a document in these terms : "Ten days after arrival at Southampton . . . I promise to pay £760 . . . for the payment of which I hereby

Marine—*Continued.*

pledge my vessel and freight, and my consignees at the port of destination are hereby directed to pay [this] amount from . . . freight received." The plaintiffs then effected an insurance with the defendants against perils of the sea upon "advances valued at £775," from Pensacola to Southampton, and expressed to be "free of all average." Through perils of the sea the ship became a constructive total loss at the Azores, but cargo was salved, upon which the captain by Italian law received £790 distance freight.

HELD—that the pledge of the freight was not conditional on the arrival of the ship at the port of destination; that there had not been a total loss of the freight, and consequently the underwriters were not liable.

Judgment of Bigham, J. ((1900) 16 T. L. R. 481; 5 Com. Cas. 332) affirmed.

PRICE *v.* MARITIME INSURANCE CO., [1901] 2 [K. B. 412; 70 L. J. K. B. 780; 49 W. R. 645; 85 L. T. 101; 17 T. L. R. 559; 6 Com. Cas. 168; 9 Asp. M. C. 213—C. A.

108. *Lump Chartered Freight—Cesser Clause—Lien for Bill of Lading Freight—No Lien on Cargo for Chartered Freight—Policy against Perils of Sea—Loss by Perils of Sea of Part of Cargo—Loss of Chartered Freight.*]—A ship was chartered for a voyage at a lump freight of £3,000. The charter-party provided that bills of lading were to be signed "at any rate of freight the charterers may require . . . charterers' liability to cease upon shipment of the cargo (provided said cargo is worth the freight, dead freight, and demurrage on arrival at port of discharge), but vessel to have a lien thereon for recovery of all freight, dead freight, demurrage, and all other charges whatsoever." The shipowners insured the chartered freight against sea perils by a policy expressed to be on "freight chartered or as if chartered" valued at £3,000. The master signed bills of lading, which entitled the consignees to delivery on payment of the freight mentioned in the bills of lading, but which did not by their terms preserve to the shipowners their lien for chartered freight. Part of the cargo was lost by perils of the sea. The portion saved was, on arrival at the port of discharge, worth the charter-party freight and charges. The freight payable under the bills of lading on the portion saved was less than £3,000. The plaintiffs claimed the difference between the freight received under these bills of lading and the lump sum freight as a loss under the policy.

HELD—that the freight insured had not been lost by any of the perils insured against, and that the freight which had been lost by those perils was not the freight insured.

Judgment of C. A. ((1899) 2 Q. B. 178; 68 L. J. Q. B. 811; 47 W. R. 611; 81 L. T. 6; 4 Com. Cas. 239) affirmed.

WILLIAMS & CO. *v.* CANTON INSURANCE OFFICE, [LD., [1901] A. C. 462; 70 L. J. K. B. 962; 85 L. T. 317; 17 T. L. R. 696; 6 Com. Cas. 256—H L. (E.).

109. *Abandonment of Voyage—Cargo salved and carried to Port of Delivery—Total Loss of Freight.*]—A ship was chartered for a voyage from Chittagong with a cargo of jute in bales for delivery at Dundee. The ship, cargo, and chartered freight were insured. When about fifty miles from Dundee the ship went ashore, and the master and crew justifiably abandoned her. Notices of abandonment were given to the underwriters on all three interests, and were all refused in the first instance, but eventually the underwriters on the ship and cargo paid a total loss. The underwriters on all three interests instructed the Salvage Association independently to protect their interests, and the association entered into a salvage contract with a salvage company. A large quantity of the jute was salved, partly in bulk and partly in bales, and was carried to Dundee, where it was sold on behalf of whom it might concern.

HELD—that the jute having been carried to Dundee under the salvage contract, and not under the charter-party, the chartered freight had not been earned, and the underwriters on chartered freight were liable to pay a total loss, and were not entitled to be paid a proportionate part of the proceeds of the sale of the salved cargo as for freight earned.

Decision of Mathew, J. ([1901] 17 T. L. R. 79; 6 Com. Cas. 25) affirmed.

GUTHRIE *v.* NORTH CHINA INSURANCE CO., [(1902) 18 T. L. R. 412; 7 Com. Cas. 130—C. A.

110. *Deck Cargo—Goods carried on Deck without Leave—Inland Voyage on a particular River—Goods damaged by Fire—Liability of Underwriters.*]—The general rule, under which insurers are not liable in respect of goods carried on deck, does not apply to a voyage upon a particular river mentioned in the policy, if it be the usage on such river to carry goods on deck.

Quære—whether it applies to any river voyage.

Goods were insured against all risks from London to a town on the Rhine *viâ* Amsterdam. At the latter place they were transhipped to a river steamer, and carried as deck cargo. Whilst being so carried they were damaged by fire.

HELD—that the underwriters were liable, the policy contemplating a voyage up the Rhine, and it being customary on Rhine steamers to carry goods on deck.

Wright v. *Marwood* ((1881) 7 Q. B. D. 62; 50 L. J. Q. B. 643; 29 W. R. 673; 45 L. T. 297; 4 Asp. M. C. 451—C. A.: dictum of Lord Bramwell) applied.

APOLLINARIS CO. *v.* NORD DEUTSCHE INSURANCE CO., [1901] 1 K. B. 252; 73 L. J. K. B. 62; 52 W. R. 174; 89 L. T. 670; 20 T. L. R. 79; 9 Com. Cas. 91; 9 Asp. M. C. 526—Walton, J.

111. *Separate Policies on Freight and Goods—Own Goods — Shipper's Goods — Forwarding Expenses—Freight payable at Port of Refuge.*]—

Marine—*Continued.*

The plaintiffs, as charterers of the *B.*, were insured by the defendants under two policies. Under the goods policy the plaintiffs were interested in machinery of their own valued at £3,584 : they also had a freight interest in the same machinery, such interest being really £899, but valued in the freight policy at £1,228.

The *B.* had to abandon her voyage on account of a peril insured against, and the plaintiffs expended £2,025 in forwarding the machinery.

HELD—that the plaintiffs could recover this £2,025 to be properly apportioned between the two policies.

Under a separate policy the plaintiffs had insured certain goods on behalf of the owner who had shipped them for the same voyage. By the terms of the bill of lading if the *B.* could not proceed and returned to London (as she did) the freight on the goods was to be payable on their discharge in London. After such discharge they were forwarded to the owner.

HELD—that the plaintiffs could recover the forwarding expenses without making any deduction on account of the freight.

POPHAM AND WILLETT *v.* ST. PETERSBURG [INSURANCE CO., (1905) 10 Com. Cas. 276—Walton, J.

112.—*Policy on Profit on Cargo—"To pay on such Portion as does not reach its Destination"—Abandonment of Voyage — Part of Cargo subsequently forwarded by different Ship.*]—The plaintiffs effected an insurance on profit on cargo per the *Giovanni Albanese*. The policy had a printed clause attached, which, as it stood originally, ran as follows :—"Warranted free from all average and without benefit of salvage; but to pay a loss on such portion as does not reach its destination in the said ship," but the latter words, viz., "in the said ship," had been deleted. The cargo was bought under a contract which stated that it was "expected to arrive per sailer from Fray Bentos, and to discharge at Ayr as per charter-party, August, September, October, 1905, shipment." The contract also contained the following clause :—"In case of non-arrival, this contract to be void, and, should the vessel from any unforeseen circumstances be prevented from delivering the whole of the cargo originally shipped, this contract to be void as regards the undelivered portion." The cargo was loaded in the *Giovanni Albanese* in September, 1905, but in the course of the voyage the vessel became a total loss, and the sellers gave the plaintiffs notice that the cargo would not come forward as it had been abandoned to the underwriters. Part of the cargo, was, however, re-shipped, brought to this country by another vessel, and discharged in March, 1906, but the plaintiffs declined to accept it. In an action on the policy :—

HELD—that there had been no loss of that portion of the cargo which was tendered to the plaintiffs, as it had arrived at its destination within the meaning of the attached clause, although it did not arrive in the original ship, and also that there had not been any such delay as to frustrate the adventure.

WYLLIE AND OTHERS *v.* POVAH, (1907) 23 [T. L. R. 687 ; 12 Com. Cas. 317—Pickford, J.

113. *Value of Goods—Open Cover Slip—Goods "and (or) Freight"—"Invoice Cost* plus *Freight and Insurance and* 10 *per cent."—Loss before Declaration—"Contingency Freight if required at Half Premium."*]—By an open cover the plaintiff insured cargo for twelve months from the River Plate to the United Kingdom or Continent, the cover containing the following clause :—"Invoice cost *plus* freight and insurance and 10 per cent. (in the event of loss before declaration), including contingency freight if required at half premium, but in the event of total loss making the freight unclaimable the insurance to be cancelled and premium returned." The course of business was that upon a declaration being made a policy was issued. Part of the cargo by a particular ship was lost before declaration.

HELD—that, in assessing the sum payable under the policy, the word "freight" in the above clause meant freight which at the time of the loss the assured had paid or had become liable to pay, and not the freight which would have become payable at the destination on the whole cargo if the whole had been delivered.

Decision of Channell, J. (23 T. L. R. 69) affirmed.

KUNG *v.* METHUEN, (1907) 24 T. L. R. 145—[C. A.

(g) General and Particular Average.

114. *Charterers—Total Loss—Commission for getting Charter—Deduction for Hire of Ship.*]—Time charterers of a ship insured the freight against the usual perils. During the currency of the policy the ship was stranded, and there was a total loss of freight. The charterers claimed that in ascertaining the amount recoverable they were entitled (1) to add the commission for getting the charter ; and (2) to deduct two days' hire of the ship, as it would have taken two days to discharge the cargo on board.

HELD—that in the absence of evidence of a practice to include the commission the charterers were not entitled to it, and that the underwriters were not entitled to deduct the two days' hire.

Forbes v. *Aspinall* ((1811) 13 East, 323) discussed.

Whether an assured is owner or charterer, a loss in an open policy on freight must be adjusted on the gross amount of freight.

Palmer v. *Blackburn* ((1822) 1 Bing. 61) applied.

Decision of Channell, J. ([1907] 1 K. B. 259 ; 76 L. J. K. B. 225 ; 23 T. L. R. 137 ; 12 Com. Cas. 142) affirmed.

THE UNITED STATES SHIPPING CO. *v.* THE [EMPRESS ASSURANCE CORPORATION, LD., 24 T. L. R. 45—C. A.

Marine—*Continued.*

115. *Ship disabled on Voyage — Necessary Repairs—Damage to Cargo.*]—A ship rendered unnavigable by an accident in the course of the voyage may, while lying in harbour perfectly water-tight and with her cargo uninjured, be in peril so as to make any unusual act done with her to render her once more navigable, a general average act, and any damage incidental to such act a general average loss.

The *H. G.* was on a voyage from B. A. to London. While leaving B. A. she bumped on the harbour bar. On coming outside the harbour of L. P.—a station at which she was to coal—she became unnavigable owing to her screw going wrong. She was towed into the harbour. A large part of her cargo was perishable, and there was no proper accommodation for stowing it at L. P. The master, in order to repair the screw, tipped her by the head (with cargo still on board) by filling the fore ballast tanks with sea-water, and emptying the stern tanks. Unknown to the captain, one of the pipes through which the fore tanks were filled was fractured, and the sea-water going through it escaped into the cargo. The plaintiffs' goods were injured.

HELD—that, while lying in L. P. harbour, the ship and cargo were in peril; that the master's act in tipping the ship by the head was a general average act; and that the damage to plaintiffs' goods was a general average loss.

MCCALL & CO., LD. *v.* HOULDER & CO., (1897) [8 Asp. M. L. C. 252; 2 Com. Cas. 129; 66 L. J. (Q. B.) 408; 76 L. T. 469; 13 T. L. R. 280—Mathew, J.

116. *Average Statement — Where to be made up.*]—There is no obligation on a shipowner to have a general average statement made up at the ship's port of destination, or at any particular place, so long as it is made up in a reasonable time.

WAVERTREE SAILING SHIP CO., LD. *v.* LOVE, [1897] A. C. 373; 8 Asp. M. L. C. 276; 66 L. J. P. C. 77; 76 L. T. 576; 13 T. L. R. 419.

117. *Contract of Affreightment — Foreign Statement — Belgian Law.*]—A shipowner effected with underwriters a time policy of insurance on his ship containing the following clause: "General average payable according to foreign statement if so made up, or York-Antwerp rules if in accordance with contract of affreightment." The shipowner sub-chartered the ship to third parties, and by the terms of that charter-party it was provided that the ship might carry a deck-load of timber, and that, "in case of average, the same to be settled according to York-Antwerp rules, 1890, except that jettison of deck-cargo (and the freight thereon) for the common safety shall be allowable as general average." The ship sailed for Antwerp, and in the course of the voyage it became necessary for the steamer's safety to jettison part of the deck cargo. The average statement was made up at Antwerp, and included jettisoned deck cargo and freight thereon. The shipowner paid the ship's contribution to general average. In an action by the shipowner to recover from the underwriters the amount of his contribution:—

HELD—that the parties having agreed that general average should be payable according to the foreign statement if so made up, and the terms of the contract of affreightment not being of a special and unusual character, which could not have been contemplated by the parties to the policy of insurance, the underwriters were liable to pay the shipowner the amount of his contribution, notwithstanding that, apart from express agreement, Belgian law would not recognise jettisoned deck cargo and freight thereon as being the subject of a claim for general average.

Decision of Kennedy, J. ([1903] 1 K. B. 109; 72 L. J. K. B. 64; 51 W. R. 318; 87 L. T. 716; 19 T. L. R. 16; 8 Com. Cas. 42; 9 Asp. M. C. 345) affirmed.

DE HART *v.* COMPANIA ANONIMA DE SEGUROS ["AURORA," [1903] 2 K. B. 503; 72 L. J. K. B. 818; 52 W. R. 36; 87 L. T. 154; 19 T. L. R. 642; 8 Com. Cas. 314; 9 Asp. M. C. 454—C. A.

See also Nos. 151, 153, 172.

(h) Insurable Interest.

118. *Insurable Interest—Foreign Ship—Advances by Ship's Agents—Necessaries—Disbursements—Right to arrest Ship—Admiralty Court Act,* 1840 (3 & 4 Vict. *c.* 65), *s.* 6.]—Although an interest to be insurable need not necessarily be a right, legal or equitable, in or charge upon the property or arising out of the ownership of the subject-matter exposed to the risk insured against, and any interest may be insured which is dependent upon the safety of the thing exposed to such risks, still it must in all cases at the time of the loss be an interest, legal or equitable, and not merely an expectation, however probable.

An insurance was effected by the plaintiffs for a voyage on disbursements against the risk of total and constructive total loss of ship only. The plaintiffs had made advances for the ship's disbursements which were "necessaries" within the meaning of sect. 6 of the Admiralty Court Act, 1840. The ship arrived at her destination, but it was admitted that she was a constructive loss in consequence of the damage she had received at sea during the voyage. The plaintiffs, who had a lien on the freight for their advances, received the freight, but it was insufficient to repay them the amount of their advances. They had no lien or charge of any kind upon the ship. The plaintiffs having brought an action on the policy:—

HELD—that in so far as their claim depended upon the fact that they were ordinary unsecured creditors of the shipowners, they had no insurable interest under the policy, but, inasmuch as they had a right under sect. 6 of the Admiralty Court Act, 1840, to proceed *in rem* against the ship for the recovery of the amount owing to them for

Marine—*Continued.*

necessaries, they had to that extent an insurable interest.

MORAN, GALLOWAY & Co. *v.* UZIELLI AND [OTHERS, [1905] 2 K. B. 533; 74 L. J. K. B. 494; 21 T. L. R. 378; 10 Com. Cas. 203; 54 W. R. 250—Walton, J.

See also Nos. 80, 144.

(i) Mortgages and Assignments.

119. *Master Part Owner of Ship—Barratry of Master — Mortgagee of Master's Interest — Mortgagee's Right under Policy.*]—The master and part owner of a ship mortgaged his interest. The ship was insured by the master for the benefit of himself, his co-owners, and the mortgagee. The ship foundered, and it was alleged by the insurers that she was wilfully cast away by the master.

HELD—that the alleged wrongful act of the master was no defence to a claim by the mortgagee upon the policy of insurance.

Decision of Mathew, J. ([1897] 2 Q. B. 42; 8 Asp. M. C. C. 255; 2 Com. Cas. 133; 66 L. J. Q. B. 412; 76 L. T. 326; 13 T. L. R. 290) affirmed.

SMALL *v.* UNITED KINGDOM MUTUAL INSUR-[ANCE CO., [1897] 2 Q. B. 311; 8 Asp. M. L. C. 293; 2 Com. Cas. 267; 66 L. J. Q. B. 736; 76 L. T. 828; 13 T. L. R. 514; 46 W. R. 24—C. A.

120. *Mutual Indemnity Association—Assignment of Sum due under Policy — Condition against Assignment — Right of Assignee to Recover.*]—A policy of marine insurance issued by a mutual indemnity association contained a condition that no assignment by the assured of his interest in any insurance should, as against the association, give any right to an assignee to recover the sum due, unless the assignment was made with the licence of the association. The assured by deed under seal assigned to the plaintiff money due to the assured under the policy, and notice in writing of the assignment was given to the association, but the licence of the association was not obtained. The assured subsequently became bankrupt. His trustee in bankruptcy made no claim to the money, and the bankruptcy was closed and the trustee was discharged. The plaintiff brought an action against the association to recover the money assigned, and applied to the official receiver in bankruptcy, as the representative of the assured, for permission to join him as a plaintiff. Permission was not given, and the official receiver was made a defendant.

HELD—that the condition in the policy prevented the plaintiff from acquiring by the assignment a right to recover from the association the money due under the policy, and that the plaintiff was in no better position by reason of the representative of the assured having been made a party to the action.

LAURIE *v.* WEST HARTLEPOOL THIRDS INDEM-[NITY ASSOCIATION AND DAVID, (1899) 15 T. L. R. 486; 4 Com. Cas. 322—Phillimore, J.

121. *Mutual Society — Ship mortgaged by Member—Failure to comply with Rules—Ship not covered by Insurance—Liability for Calls.*]—A shipowner became a member of a mutual insurance association in respect of a ship which was at the time mortgaged. By the rules of the association members became liable to pay calls to cover losses to ships insured with the association, and by rule 41 a ship which was mortgaged was not to be considered as insured unless the mortgagee guaranteed the payment of all contributions due, or to become due, to the association. By art. 2 of the articles of association every person was deemed to be a member of the association who insured any ship in pursuance of the rules. The association never received any notice of the mortgage, and had no such guarantee as that set out in rule 41.

HELD—that, notwithstanding the non-compliance with rule 41 and the fact that the ship was, in consequence, not covered by insurance, the shipowner was a member of the association, and, as such, was liable to contribute towards the losses.

Decision of Channell, J. (21 T. L. R. 665; 10 Com. Cas. 245) affirmed.

NORTH EASTERN 100 A STEAMSHIP INSURANCE [ASSOCIATION *v.* RED "S" STEAMSHIP CO., LD., (1906) 22 T. L. R. 692; 12 Com. Cas. 26—C. A.

122. *Return of Premium—Transfer of Ship to "New Management"—Ship carrying Contraband of War—Seizure by Belligerent—Condemnation by Prize Court.*]—A time policy on ship contained a clause that "should the vessel be sold or transferred to new management, then unless the underwriters agree in writing to such sale or transfer this policy shall thereupon become cancelled from date of sale or transfer unless the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation clause shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A *pro ratâ* daily return of premiums is to be made." The policy contained a warranty free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations. The ship was, during the currency of the policy, seized by the Japanese during the war with Russia while she was on a voyage to Vladivostock with coal, and was taken to a Japanese port, and there condemned by a prize court. The shipowner claimed a *pro ratâ* return of the premium upon the ground that the ship had by her seizure and condemnation been "transferred to new management" within the meaning of the policy.

HELD that the capture and condemnation of the ship was not a transfer to new management, and that, therefore, the shipowner was not entitled to recover.

Semble, the ship was not lost by "capture" within the meaning of the warranty.

Marine—*Continued.*

Decision of Phillimore, J. (22 T. L. R. 834) affirmed.

Pyman *v.* Martin, (1907) 24 T. L. R. 10—[C. A.

123. *Mortgagee of Policy — Assignment of Policy Moneys to Ship Repairers—Right to Sue—Production of Policy—Payment of Salvage—Authority.*]—During the currency of a time policy of insurance on ship, the underwriters became liable to pay a sum in respect of a "particular average" loss by the perils insured against and also a sum for salvage services rendered. The ship, before the loss, had been mortgaged by the shipowner "together with the policy of insurance" as security for a loan.

After the loss the ship was repaired at the request of the shipowner, who assigned to the ship repairers the moneys payable under the policy as security for the expenses of the repairs, subject to the claim, if any, of the mortgagee.

The shipowner's agent paid the amount due to the salvors, and the underwriters paid the agent that amount. Before this last payment the shipowner was adjudicated bankrupt. The mortgagee took possession of the ship and sold her, leaving due to him a sum exceeding the moneys payable by the underwriters in respect of the damage to the ship. The mortgagee and the ship repairers claimed the money due under the policy in respect of the damage to the ship, and the underwriters paid it into Court. The mortgagee made no claim against the underwriters in respect of the moneys paid for salvage services. The trustee in bankruptcy of the shipowner claimed all the moneys due under the policy.

Held—(1) that, as the ship and the policy were assigned to the mortgagee as security for his debt, the mortgagee was entitled to the policy moneys without being liable to pay for the repairs; (2) that the assignment of the moneys payable under the policy to the ship repairers, though not an assignment of the actual policy, was a valid assignment; (3) that the payment of the salvage money was a voluntary act without the authority of the assured, and the underwriters must pay them over again.

Semble, to enable a plaintiff to succeed in an action on a policy of marine insurance it is not necessary that he should have the policy in his own possession; the production of the policy can be obtained by *subpœna duces tecum*.

Swan and Others *v.* The Maritime Insur-[ance Co. and Croshaw, [1907] 1 K. B. 116; 76 L. J. K. B. 160; 23 T. L. R. 101; 12 Com. Cas. 73—Channell, J.

(j) Practice.

124. *Discovery of Ship's Papers—Action on Policy of Reinsurance.*]—In an action upon a policy of marine insurance upon goods, which is a reinsurance, the usual order for discovery of ship's papers can be made.

China Traders' Insurance Co., Ld. *v.* Royal [Exchange Assurance Corporation, [1898] 2 Q. B. 187; 3 Com. Cas. 189; 67 L. J. Q. B. 736; 78 L. T. 783; 14 T. L. R. 423; 46 W. R. 497; 8 Asp. M. C. 409—C. A.

125. *Discovery—Affidavit of Ship's Papers—Documents in Joint Possession of Plaintiffs and other Persons.*]—In an action of marine insurance the plaintiffs filed an affidavit of ship's papers, and informed the defendant that in addition to the documents mentioned in the schedule to the affidavit, there were certain other material documents which were the joint property of the plaintiffs and other underwriters, and which, for that reason, would not be produced by the plaintiffs. The defendant applied for an order that the plaintiffs should make a further and better affidavit of ship's papers, and that the action should be stayed meanwhile.

Held—that the action must be stayed until the plaintiffs had satisfied the Court that they had applied to the underwriters, and had done all in their power to produce the other documents.

London and Provincial Marine and [General Insurance Co. *v.* Chambers, (1900) 5 Com. Cas. 241—Kennedy, J.

126. *Discovery—Affidavit of Ship's Papers—Sea and Land Transit.*]—By a policy of insurance gold was insured during transit from a mine in the Transvaal, whether in charge of the assured or their employees, or otherwise, to the railway station in Johannesburg, thence by rail to the coast, and thence by steamer to Europe. The period covered by the risk was from the moment the gold was placed in the safe at the mine until delivery to the addressee. The policy was in the form of an ordinary Lloyd's policy, with certain alterations. In an action on the policy the defendant applied for an order that the plaintiffs should make and file an affidavit of ship's papers.

Held—that the defendant was not entitled to an affidavit of ship's papers, but that the plaintiffs must make an affidavit of documents in the ordinary form.

Henderson v. *Underwriting and Agency Association* ([1891] 1 Q. B. 557; 60 L. J. Q. B. 406 39 W. R. 528; 64 L. T. 774—Div. Ct.) followed

Village Main Reef Gold Mining Co. *v.* [Stearns, (1900) 5 Com. Cas. 246—Kennedy, J.

(k) Risk: Nature, Duration, Change, &c.

127. *Reinsurance — Voyage, Termination — "To any Port or Ports, Place or Places, in any Order"—"For Thirty Days in Port after Arrival however Employed."*]—The plaintiffs reinsured a risk with the defendants in a ship "at and from Newcastle (N.S.W.) to any port or ports, place or places, in any order, on the West Coast of South America, and for thirty days in port after arrival however employed, or until sailing

Marine—*Continued.*

on next voyage, whichever may first occur." The ship sailed with a cargo of coals from Newcastle (N.S.W.) to Valparaiso, and there discharged the whole of her cargo. She remained at Valparaiso thirty days, and loaded ballast and sugar for T., another port on the West Coast of South America, at which port she intended to load a cargo for the United Kingdom. While proceeding to T. she was stranded and became a total loss.

HELD, affirming the judgment of Mathew, J., that the loss was covered by the policy.

CROCKER *v.* GENERAL INSURANCE CO. LD., OF [TRIESTE, (1898) 3 Com. Cas. 22 ; 14 T. L. R. 112—C. A.

128. *Reinsurance—"Subject to same Clauses and Conditions as Original Policy"—Marginal Clause in Original Policy—"Including all Risks whatsoever . . . until safely delivered to Consignees"—Goods in Customs Warehouse at Port of Discharge—Termination of Risk.*]—A policy on goods on a voyage from London to a port on the west coast of South America contained a marginal clause as follows : "Including all risks whatsoever by land and water and [or] of inland conveyance and [or] transhipment from the place whence despatched, whilst waiting shipment, and until safely delivered to consignee."

HELD—that the clause, being one which was usually inserted in policies of the kind in question, was incorporated into a policy of reinsurance in the usual form.

The goods in question were by the laws of the port of discharge liable to pay duty, and upon discharge from the vessel they had to be placed in a customs warehouse, where they remained at the order of the consignee subject to certain charges for which the consignee was liable. While there the goods were totally destroyed by fire. At the date of the fire the consignee had been unable, owing to pressure of business at the customs, to obtain actual possession of the goods.

HELD—that placing the goods in the customs warehouse was a delivery to the consignee within the meaning of the marginal clause, and that therefore at the date of the fire the risk had terminated and the loss was not recoverable under the reinsurance policy.

MARTEN *v.* NIPPON SEA AND LAND INSURANCE [CO., (1898) 3 Com. Cas. 164 ; 14 T. L. R. 333 —Bigham, J.

129. *Reinsurance—Time Policies—Original Policies—New Policy—Alteration of Risk—Liability of Reinsurer.*]—An underwriter who had subscribed two time policies on a ship valued therein at £5,600 effected a reinsurance by a time policy, which was expressed to be a policy on the same ship, "being a reinsurance of policy or policies, [*here was a blank space not filled in*] and subject to the same terms, conditions and clauses as original policy or policies, and to pay as may be paid thereon." The first of the original policies (in force at the time of the reinsurance) having expired, the second original policy was cancelled, and the underwriter subscribed a new time policy on the same ship, which was valued therein at £5,000, and differed in other respects from the two original policies.

HELD—that risk undertaken by the new policy was not covered by the reinsurance.

Judgment of Kennedy, J. ([1898] 1 Q. B. 739 ; 67 L. J. Q. B. 330 ; 46 W. R. 380 ; 78 L. T. 496 ; 14 T. L. R. 226 ; 8 Asp. M. C. 380) reversed.

LOWER RHINE AND WURTEMBURG INSURANCE [ASSOCIATION *v.* SEDGWICK, [1899] 1 Q. B. 179 ; 68 L. J. Q. B. 186 ; 47 W. R. 261 ; 80 L. T. 6 : 15 T. L. R. 65 ; 4 Com. Cas. 14 : 8 Asp. M. C. 466—C. A.

130. *Lloyd's Policy on Gold Bullion—Justifiable Deviation—Transit Risk—Assured's Delay—Additional Premium.*]—The plaintiffs, owners of a gold mine at Boodinni, in Central India, effected with the defendants an ordinary Lloyd's policy on a parcel of three bars of gold bullion packed in a small wooden box, "at and from Boodinni to London," in a P. & O. steamer, "including all risks of every description from the mines by escort to railway station at Raichur (forty miles), thence by rail (400 miles) to Bombay, thence to London and until delivered at its destination at assay office and [or] bank, &c., in London." There were stamped in the margin of the policy the following words : "It is agreed to hold assured covered in the event of deviation or change of voyage at a premium to be hereafter arranged." The stationmaster at Raichur improperly declined to receive the box except "at owners' risk." Thereupon one of the plaintiffs' officials took the box with him to Secunderabad—off the ordinary route. It was then put into an office safe of the plaintiffs and locked up. The plaintiffs were then unreasonably long in making their arrangements with the railway. Ultimately the box left Secunderabad, and reached its destination on May 25th, about a month later than it would have done if the transit had followed its ordinary course. On arrival it was found that one of the bars of gold had been abstracted from the box : it had, as a fact, been stolen while the box was in the office of the plaintiffs at Secunderabad.

HELD—that what took place amounted merely to a deviation. The going to Secunderabad was justifiable. The risk there was a transit risk. The unreasonable delay there amounted to a deviation not covered by the premium paid. The deviation clause, however, came into operation, and the underwriters were entitled to a reasonable additional premium, and the underwriters were liable to pay.

HYDERABAD (DECCAN) COMPANY *v.* WIL- [LOUGHBY, [1899] 2 Q. B. 530 ; 68 L. J. Q. B. 862 ; 15 T. L. R. 449 ; 4 Com. Cas. 270—Bigham, J.

131. *Bullion — Seizure by Government of Assured's Country—Subsequent Declaration of War—Insurance of Enemy's Property—Trading*

Marine—*Continued.*

with Enemy—Deviation.]—Gold bullion, the property of a mining company incorporated and registered under the laws of, and carrying on business in, the South African Republic, was insured at Lloyd's to be covered while in transit from the company's mine at Johannesburg until its arrival in the United Kingdom. The policy covered the usual risks of capture and detention. On October 2nd, 1899, the gold while in transit was seized by the Government of the South African Republic. At that date, although it appeared probable that hostilities might shortly break out between the South African Republic and Great Britain, neither Government had abandoned the hope that the question in dispute might be arranged by a peaceful settlement, but on October 9th the Government of the South African Republic issued an ultimatum which the Government of Great Britain treated as a declaration of war, and actual hostilities commenced on October 11th. In an action on the policy to recover a loss by seizure or theft by the Government of the South African Republic, it having been agreed that the case was to be dealt with as if the war was over :—

HELD—that a state of war did not exist on October 2nd; that the declaration of war on October 9th did not, by relation back to October 2nd, constitute the plaintiffs alien enemies at the time of the seizure ; and that the plaintiffs were not, as alien enemies, disentitled to recover.

Semble, a limited company incorporated and registered under the laws of, and carrying on business in, a foreign country may be an alien enemy of Great Britain, although the majority of the shareholders are not subjects of the Government of the country where the company is registered, but are subjects of her Majesty or of other Governments.

Gold bullion insured during transit from a mine in the Transvaal either direct or *viâ* any bank to the United Kingdom was sent to a bank in Johannesburg to be forwarded to its destination, but owing to the fact that seizures of gold were being made at that time by the Government of the South African Republic, it was arranged that the gold should remain at the bank until further communication from the owners of the gold. While at the bank the gold was seized by the Government of the South African Republic.

HELD—that the transit had begun, and that the policy attached, and that leaving the gold at the bank was not a deviation.

DRIEFONTEIN CONSOLIDATED GOLD MINES *v.* [JANSON ; WEST RAND CENTRAL GOLD MINES CO. *v.* DE ROUGEMONT, [1900] 2 Q. B. 339 ; 69 L. J. Q. B. 771 ; 48 W. R. 619 ; 83 L. T. 79 ; 16 T. L. R. 438 ; 5 Com. Cas. 296—Mathew, J.

Affirmed by C. A. and by H. L., see No. 136, *infra*.

132. *Reinsurance—Difference between risk of Voyage as expressed in Slip and in Policy—Policy issued after Loss—Reinsurance and Deviation Clauses—Variation of Rates according to Season.*]—The plaintiffs, having received on July 30th a declaration of a proposed shipment per a named steamship under an open cover issued by them to merchants for all shipments for twelve months from May 11th, effected a reinsurance at Lloyd's with the defendant by a slip dated August 2nd. The slip purported to propose an insurance of £1,500 upon coals, per the vessel in question, from the Tyne to Lulea, at a stated premium and subject to the reinsurance and deviation clauses. The vessel did not sail on the insured voyage until September 25th, and the steamer and cargo became a total loss on or about October 2nd. The plaintiffs' original policy under the cover was issued on September 25th. The reinsurance policy was signed by the defendant on October 5th.

HELD—that as there was a material difference between the risk of the voyage as expressed in the slip and one beginning on September 25th, the reinsurance policy never attached ; and that the reinsurance and deviation clauses did not avail the plaintiffs so as to entitle them to recover.

MARITIME INSURANCE CO. *v.* STEARNS, [1901] [2 K. B. 912 ; 17 T. L. R. 613 ; 6 Com. Cas. 182 ; 71 L. J. K. B. 86 ; 50 W. R. 238—Mathew, J.

133. *War Risks—Policy on Rice against all Risks excluded by the Free of Capture and Seizure Clause—"All Consequences of Hostilities"—Exercise by Captain of Discretion given him by the Bill of Lading—Expenses—Freight.*]—Rice was shipped on board a Spanish vessel for carriage from Liverpool to Cuba under a bill of lading which provided that, if as a consequence of war the captain should deem it prudent not to enter the port of destination, he might deposit the goods at some other port as he might consider convenient, the whole of the freight being in that case considered as earned. The rice was insured against all risks excluded by the free of capture and seizure clause, one of such risks being "all consequences of hostilities." After the vessel had sailed war broke out between Spain and the United States. The captain put back to Liverpool, where freight was paid and charges were incurred, in respect of which a claim was made for a loss under the policy.

HELD—that the loss was not a consequence of hostilities within the meaning of the policy, but was due to the exercise by the captain of the discretion given to him by the bill of lading, and that there had, therefore, been no loss under the policy.

NICKELS *v.* LONDON AND PROVINCIAL MARINE [AND GENERAL INSURANCE CO., (1901) 70 L. J. Q. B. 29 ; 17 T. L. R. 54 ; 6 Com. Cas. 15—Mathew, J.

134. *Gold Products—Commercial Domicil of a British Company—Seizure by Government of Enemy—Subsequent Declaration of War—Enemies' Property—Loss covered by Policy.*]—The subject of one country, surprised by a declaration of war in the country where he has

Marine—*Continued.*

a commercial domicil, ought to have time allowed him to free himself from his commercial engagements and effect a removal of his property.

A company, incorporated and registered under the laws of Natal and having its head office there, owned a gold mine in the Transvaal, where it obtained letters of incorporation so as to enable it to sue and be sued there in its registered name. The company effected an insurance on gold amalgam and other gold products against the usual perils in a Lloyd's policy, including "arrests, restraints, and detainments of all kings, princes, and people." After the outbreak of war between the Transvaal and Great Britain, gold amalgam was seized by the Transvaal Government at the company's mine. On the outbreak of hostilities the mine had been shut down, and there was no indication of any intention to work it during the war. In an action on the policy to recover for a loss by seizure by the Transvaal Government :—

HELD—that the amalgam was not to be regarded at the time of the seizure as enemies' property merely by reason of the commercial domicil of the company when war was declared; that the amalgam was British goods, and was seized by a hostile force; and that the loss was covered by the policy.

NIGEL GOLD MINING CO., LD. *v.* HOADE, [1901] [2 K. B. 849; 70 L. J. K. B. 1006; 50 W. R. 108; 85 L. T. 482; 17 T. L. R. 711—Mathew, J.

135. "*Chartered or Hire Money*"—*Loss of Hire through Ship becoming Inefficient—Loss due to Charterers Discharging Ship from Service and not due to Perils Insured against.*]—The plaintiffs chartered their steamship to the Admiralty for three months certain and thenceforward until the vessel was discharged by the Admiralty from the service. The charter-party provided that, in the event of the vessel becoming incapable from any defect to perform efficiently the service, the Admiralty might make abatement by way of mulct out of the hire. The plaintiffs effected a time policy on "chartered or hire money" to cover loss of hire through breakdown of machinery, rendering the vessel inefficient "for the service." After the expiration of the three months, the vessel being still employed under the charter-party, a defect was discovered in the propeller, in consequence of which the Admiralty discharged the vessel from the service. Repairs were subsequently executed, the time occupied thereon being fifteen days. In an action to recover fifteen days' loss of hire as a loss under the policy,

HELD—that the subject-matter of the insurance was hire payable under a contract; but that the plaintiffs were not entitled to recover a loss under the policy, the loss of hire not being due to perils insured against, but to the exercise by the Admiralty of their right to discharge the vessel from the service.

MANCHESTER LINERS *v.* BRITISH AND FOREIGN [MARINE INSURANCE CO., (1902) 86 L. T. 148; 18 T. L. R. 183; 7 Com. Cas. 26; 9 Asp. M. C. 266—Walton, J.

136. *Bullion — Seizure by Government of Assured's Country—Expected War—Subsequent Declaration of War — Insurance on Enemy's Property — Trading with Enemy — Public Policy.*]—Gold bullion, the property of a mining company incorporated and registered under the laws of, and carrying on business in, the South African Republic, was insured at Lloyd's to be covered while in transit from the company's mine at Johannesburg until its arrival in the United Kingdom. The perils insured against included "arrests, restraints, and detainments of all kings, princes, and people." On October 2nd, 1899, the gold, while in transit, was seized by the Government of the South African Republic. At that date war was anticipated between Great Britain and the South African Republic, but hopes of a peaceful settlement were still entertained. On October 11th war actually broke out. In an action on the policy to recover a loss by seizure or theft by the Government of the South African Republic, it having been agreed that the case was to be dealt with as if the war was over.

HELD—that the plaintiffs were entitled to recover.

Judgment of C. A. ([1901] 2 K. B. 419; 70 L. J. K. B. 881; 49 W. R. 660; 85 L. T. 104; 17 T. L. R. 604; 6 Com. Cas. 198) affirmed.

JANSON *v.* DRIEFONTEIN CONSOLIDATED MINES, [LD., [1902] A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372; 18 T. L. R. 796; 7 Com. Cas. 268 —H. L. (E.)]

And see No. 131, *supra.*

137. "*Arrests, Restraints and Detainments of Princes and People*"—*Operation of ordinary Municipal Law—Goods "Warranted Free of Seizure, Capture, and Detention"—Interpretation of Lloyd's Policy.*]—Where, in a Lloyd's policy of marine insurance, the risks insured against are described in the usual way in the body of the policy, and include "arrests, restraints and detainments of princes and people," the operation of an ordinary municipal law, affecting or preventing the delivery of the insured goods (in this instance live cattle) at their destination is a "restraint of people" within the meaning of the policy, and the insurers would be liable, if the policy did not contain an f. c. s. clause. Such clause, however, operates to exclude their liability for the "arrests, restraints and detainments" mentioned in the body of the policy, although it is couched in slightly different words, *i.e.*, "warranted free of capture, seizure, or detention."

Cory v. *Burr* ((1883) 8 App. Cas. 393; 52 L. J. Q. B. 657; 31 W. R. 894; 49 L. T. 78) followed.

Decision of Bigham, J. ([1902] 2 K. B. 694; 71 L. J. K. B. 551; 50 W. R. 474; 88 L. T. 370; 18 T. L. R. 518; 7 Com. Cas. 151) affirmed on different grounds.

MILLER *v.* LAW ACCIDENT INSURANCE CO., [1903] 1 K. B. 712; 72 L. J. K. B. 428; 51 W. R. 420; 88 L. T. 370; 19 T. L. R. 331; 8 Com. Cas. 161; 9 Asp. M. C. 386—C. A.

Marine—*Continued.*

138. *Goods covered while "temporarily" placed on Quay and until Delivered to Export Vessel or at Wharf or Warehouse within the Port — Goods placed in Transit Sheds—Loss by Fire—Held Covered.*]—By a marine policy some jute consigned to Dundee was insured against all risks, "including all risk of craft to wharf or export vessel at port of discharge, and, in the event of the goods being temporarily . . . while there, and until delivered to the export vessel or at any wharf or warehouse within the limits of the port."

The vessel arrived on April 14th, and in accordance with the practice of the court, some of the jute was landed and placed in some transit sheds on the quay for the purpose of being weighed. On the 17th, while the consignee was still trying to sell the jute, and had not determined upon its ultimate destination, a fire occurred in the sheds.

HELD—that the jute in the sheds was covered by the policy.

Decision of Kennedy, J., affirmed.

WESTMINSTER FIRE OFFICE *v.* RELIANCE [MARINE INSURANCE CO., (1903) 19 T. L. R. 668—C.A.

139. *Character of Risk Covered—Omission of Negligence Clause—Shipowner's Liability under Contract of Carriage—Suing and Labouring Clause—Applicability of.*]—An insurance was effected to protect the plaintiffs as owners of the steamship *Carinthia* against "liability of any kind to owners of mules [and] [or] cargo up to £20,000, owing to the omission of the negligence clause in contract [and] [or] charter-party [and] [or] bill of lading" on a voyage from New Orleans to any ports in South Africa.

The *Carinthia* sailed from New Orleans on May 11th, 1900, with about 1,500 mules on board, which were shipped under a contract made between the plaintiffs and the Admiralty Director of Transports for the conveyance of the mules from New Orleans to Cape Town. The contract contained no negligence clause—that is to say, no clause exempting the plaintiffs from liability for loss of the mules by the negligence of their servants. On May 15th, through the negligence of the plaintiffs' servants navigating the vessel, she stranded near Gravois Point in Hayti. Efforts were made to tow the vessel off the rocks, but were unsuccessful, and she eventually broke up. Between 900 and 1,000 of the mules were saved and sent on to Cape Town. The expenses in respect of which the action was brought were incurred in the attempt made to tow the vessel off the rocks, and in saving the mules which were saved, and attempting to save those which were lost. These expenses were claimed as suing and labouring expenses under the policy incurred to avert and reduce the amount of the loss and not as a direct loss under the policy.

HELD—that the suing and labouring clause in the policy was inapplicable to the insurance actually effected, and was no part of the contract, and that the plaintiffs could not recover in the action.

Decision of Walton, J. ([1902] 2 K. B. 624; 71 L. J. K. B. 968; 87 L. T. 400; 18 T. L. R. 825; 9 Asp. 342) affirmed.

CUNARD STEAMSHIP CO., LD. *v.* MARTEN, [1903] 2 K. B. 511; 72 L. J. K. B. 754; 52 W. R. 39; 89 L. T. 152; 19 T. L. R. 634; 9 Asp. M. C. 452; 9 Com. Cas. 9—C. A.

140. *"Thirty Days in Port after Arrival" Calendar Days.*]—A ship was insured by an ordinary Lloyd's policy, in the body of which the risk was described in writing as being for a voyage from Portland, Oregon, to Algoa Bay, "and for thirty days in port after arrival." The policy contained the usual printed clause describing the risk of running until the vessel "hath moored at anchor twenty-four hours in good safety; but these words were struck out, and the words "as above" were written over them, thus incorporating the earlier words above written. The ship arrived at Algoa Bay on August 2nd, and was safely moored at 11.30 a.m. on that day. She was lost by a peril insured against at 4.30 p.m. on September 1st.

HELD—that the "thirty days" were not calendar days, but periods of twenty-four hours each, beginning at the time when the ship was safely moored; and that, therefore, the thirty days had expired five hours before the ship was lost, and the underwriters were not liable.

Decision of Bigham, J. ((1903) 51 W. R. 527; 89 L. T. 179; 19 T. L. R. 417; 8 Com. Cas. 204) affirmed.

CORNFOOT *v.* ROYAL EXCHANGE ASSURANCE [CORPORATION, [1904] 1 K. B. 40; 52 W. R. 49; 20 T. L. R. 34; 89 L. T. 490; 73 L. J. K. B. 22; 9 Com. Cas. 80; 9 Asp. M. C. 418—C. A.

141. *"Seizure"—Foreign Government commandeering Gold of its own Subjects.*]—In October, 1899, the Government of the South African Republic, in the exercise of its constitutional rights, commandeered certain gold consigned to England by a company registered under the laws of the Republic.

The gold in question had been insured against "arrests, restraints and detainments of all kings, princes and people" during transit, but subject to a warranty of "free of capture, seizure and detention, whether before or after declaration of war."

HELD—that there had been a "seizure" within the meaning of the warranty, and that the underwriters were not liable on the policy.

Decision of C. A. ([1902] 2 K. B. 489; 71 L. J. K. B. 942; 51 W. R. 105; 86 L. T. 858; 18 T. L. R. 732; 7 Com. Cas. 219) affirmed.

ROBINSON GOLD MINING CO. AND OTHERS *v.* [ALLIANCE INSURANCE CO., [1904] A. C. 359; 73 L. J. K. B. 898; 91 L. T. 202; 20 T. L. R. 645; 53 W. R. 160; 9 Com. Cas. 301—H. L. (E.).

142. *Warranty—Free of Capture and Seizure —Animal—"Mortality".*]—A bull was insured on a voyage from New York to Buenos Ayres

Marine—*Continued.*

and for ten days after arrival. The risks insured against included "mortality, jettison, and washing overboard." There was a clause "warranted free of capture, seizure, or detention." On arrival at Buenos Ayres the bull was found to be suffering from foot and mouth disease, and in accordance with Argentine law the bull was not allowed to be landed, and the Argentine officials ordered it to be slaughtered on board ship. In an action on the policy:

HELD—that "mortality" in the policy did not include the death of the bull caused by the action of the Argentine officials; and further, that the loss, which was due to the ordinary municipal law, came within the clause "warranted free from capture and seizure."

ST. PAUL FIRE AND MARINE INSURANCE CO. [*v.* MORICE AND OTHERS, (1906) 22 T. L. R. 449; 11 Com. Cas. 153—Kennedy, J.

143. "*All Risks by Land and Water*"—*Added Clauses relating to Special Risks*—*Construction of Policy.*]—A policy of marine insurance in the usual form had a number of special clauses attached referring to particular risks, one of which concluded "and all risks by land and water by any conveyance until safely delivered . . ."

HELD—that the generality of these words could not be cut down merely because there were special clauses referring to particular risks, *e.g.*, robbery, damage by insects, &c., and that they covered damage due to (1) extraordinary delay, involving abnormal exposure to damp, and (2) accidental wetting and injury by worms.

SCHLOSS BROS. *v.* STEVENS, [1906] 2 K. B. 665; [75 L. J. K. B. 927; 22 T. L. R. 774; 11 Com. Cas. 270; 96 L. T. 205—Walton, J.

See also Nos. 91, 159.

(I) Seaworthiness.

144. *Insurable Interest*—*Future Commission and Brokerage*—"*Disbursement.*"]—A ship while on a voyage to Algoa Bay grounded on a reef outside the bay, and sustained damage. She was taken into the harbour, the intention being to repair her sufficiently for a voyage to Cape Town, where she would be properly repaired. Before the temporary repairs were executed she became a total loss in the harbour, the loss not being due to perils of the sea, but to the injuries which the ship had previously sustained. The plaintiffs, after the ship grounded, effected an insurance of "disbursements" per the ship at and from Algoa Bay to Cape Town. The interests intended to be covered were the commission and brokerage which the managing owners of the ship, and the plaintiffs, as insurance brokers for the managing owners, respectively, expected that they would continue to earn.

HELD—that the ship was never seaworthy for any stage of the insured voyage, and the risk on the policy never attached; that the plaintiffs and the managing owners had no insurable interest.

Semble, the term "disbursements" is properly used in a policy of marine insurance to describe any interest which is outside the ordinary interests of hull, machinery, cargo, and freight.

BUCHANAN & CO. *v.* FABER, (1899) 4 Com. Cas. [223—Bigham, J.

145. *Cargo*—*Exclusion by express, pertinent and apposite Words*—*Approval by Lloyd's Agents' Surveyor*—*Ventilation*—*Cattlemen.*]—A policy of marine insurance upon a shipment of cattle contained the clause, "Fittings and condition of cattle to be approved by Lloyd's agents' surveyor": and also the clause "Each animal to be deemed a separate insurance." The ship was, in fact, unfit for the carriage of the cattle by reason of insufficient ventilation; the number of cattlemen on board was also insufficient for attendance on the number of cattle.

HELD—that the express warranty as to the fittings did not exclude the implied condition of seaworthiness; that the clause, "Each animal to be deemed a separate insurance," did not involve a separate warranty of seaworthiness in respect of the place in which each animal was shipped; that the insufficient number of the cattlemen was a breach of the warranty of seaworthiness.

SLEIGH *v.* TYSER, [1900] 2 Q. B. 333; 69 L. J. [Q. B. 626; 82 L. T. 804; 16 T. L. R. 404; 5 Com. Cas. 271; 9 Asp. M. C. 97—Bigham, J.

146. *Presumption of Unseaworthiness*—*No known Cause of Catastrophe*—*Facts material to Inquiry*—*Balance of Evidence.*]—An insurance company had an action brought against them to recover the amount of four policies of insurance, and they pleaded unseaworthiness.

HELD—that the company had the great advantage of the undoubted fact that the vessel capsized and sank in less than twenty-four hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe; and there was no doubt that if nothing more were known, they would be entitled to succeed in the action. If nothing more were known, unseaworthiness at the time of sailing would be the natural inference to draw; there would be a presumption of unseaworthiness which a jury ought to be directed to act upon and which a Court ought to act upon if unassisted by a jury. But if, as in this case, other facts material to the inquiry as to the seaworthiness of the ship are proved, those facts must also be considered; and they must be weighed against the unaccountable loss of the ship so soon after sailing, and unless the balance of the evidence warrants the conclusion that the ship was unseaworthy when she sailed, such unseaworthiness cannot be properly treated as established, and the defence founded upon it must fail, as it did in this case.

Pickup v. *Thames and Mersey Marine Insurance Co.* ((1878) 3 Q. B. D. 594; 47 L. J. Q. B. 749; 26 W. R. 689; 39 L. T. 341—C. A.) and *Anderson* v. *Morice* ((1875) L. R. 10 C. P. 609;

Marine —*Continued.*

44 L. J. C. P. 341 ; 24 W. R. 30 ; 32 L. T. (N.S.) 355—Ex. Cham.) approved.

AJUM GOOLAM HOSSEN & Co. *v.* UNION MARINE [INSURANCE Co., HAJEE CASSIM JOOSUB *v.* AJUM GOOLAM HOSSEN & Co., [1901] A. C. 362 ; 70 L. J. P. C. 34 ; 84 L. T. 366 ; 17 T. L. R. 376 ; 9 Asp. M. C. 167—P. C.

147. *Policy on Insulation Apparatus—Leakage of Ship caused by Panting—Absence of Panting Beams.*]—An action was brought on a policy of marine insurance for voyages out and home between England and Australia, on the insulation of a steamship which was intended to bring home frozen meat and miscellaneous cargo. The insulation was required for refrigeration ; it consisted of timber casing lined with charcoal and cooled by currents of cold air. For the efficiency of this part of the apparatus it was absolutely necessary that the charcoal should be kept dry.

HELD—that the vessel was so constructed that there was danger of panting, and that the leakage which injured the insulation apparatus was caused thereby, and that the absence of panting beams rendered the vessel unseaworthy.

LUND *v.* THAMES AND MERSEY MARINE INSUR- [ANCE CO. LD., (1901) 17 T. L. R. 566—Mathew, J.

See also No. 172.

(m) Subrogation.

148. *Seizure of Gold by Transvaal Government—Underwriters making good the Loss—Subsequent Payment by Government to Assured on account of Loss—Gift—Right of Underwriters.*]—Gold which had been insured, was seized by the Transvaal Government shortly before the outbreak of the South African War. The underwriters paid the value of the gold.

Subsequently the same Government paid to the owners a sum of money as a gift in reduction of their loss.

HELD—that the underwriters were entitled to the money, with interest from the date when the Court ordered it to be invested.

Randal v. *Cockran* ((1747) 1 Ves. Sen. 98) applied.

STEARNS *v.* VILLAGE MAIN REEF GOLD MINING [CO. LD., (1905) 21 T. L. R. 236 ; 10 Com. Cas. 89—C. A.

149. *Reinsurance — Enforcement of Right diminishing Insurer's Loss — Deduction by Insurer of Costs of enforcing Right.*]—The plaintiffs reinsured the defendants in respect of two vessels—*The Riverside* and *The Zebina Goudy*. The defendants had given an open cover slip to B. & Co., under which the latter could declare interest by a number of vessels, but were not at liberty to declare interests by vessels belonging to a firm of T. and Co. The shipments by the two named vessels belonged to T. & Co., and were put forward by B. & Co. and accepted, and losses in respect of them settled, by the defendants without knowing that they were T. & Co.'s shipments. The defendants then claimed and were paid by the plaintiffs the losses on these two vessels. Subsequently, on discovering the facts, the defendants sued B. & Co., claiming (*inter alia*) damages for having been induced to pay losses on the two vessels by fraudulent representations of someone in B. & Co.'s employment ; and the defendants recovered from B. & Co. in that action the amount they had paid on the two ships. The plaintiffs thereupon claimed to be repaid by the defendants the sum paid to them upon the reinsurance of shipments on the two vessels.

HELD—that the plaintiffs were entitled to recover, inasmuch as the money received by the defendants as damages in their action against B. & Co. was received by reason of the enforcement of a right which diminished the defendant's loss.

Dicta of Brett, L.J. and Bowen, L.J., in *Castellain* v. *Preston* ((1883) 11 Q. B. D. 380 ; 52 L. J. Q. B. 366 ; 49 L. T. 29 ; 31 W. R. 559—C. A.) applied.

HELD, further, that the defendants were entitled to deduct from the plaintiffs' claim the costs properly attributable to the recovery of the damages from B. & Co.

Hatch, Mansfield & Co. v. *Weingott* ((1905) 22 T. L. R. 366—Jelf, J.) followed.

ASSICURAZONI GENERALI DE TRIESTE *v.* EM- [PRESS ASSURANCE CORPORATION, LD., [1907] 2 K. B. 814 ; 76 L. J. K. B. 980 ; 23 T. L. R. 700—Pickford, J.

(n) Time Policies and Valued Policies.

150. *Re-insurance—Time Policy—"Subject to the same Clauses and Conditions as the Original Policy" — Continuation Clause—"Should the Vessel be at Sea or Abroad on the Expiration of this Policy"—Usual Clause—Policy for a Period exceeding Twelve Months—Null and Void.*]—A policy of re-insurance on a ship, expressed to be for and during the space of twelve months, commencing October 18th, 1898, and ending October 18th, 1899, contained the clause, "being a re-insurance subject to the same clauses and conditions as the original policy, and to pay as may be paid thereon." The original policy was for the same period as the re-insurance policy, and contained the following clause :—"Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until the arrival at her port of final destination . . . at a *pro rata* daily premium." After October 18th, 1899, the ship was lost while on a voyage to her port of final destination. In an action on the re-insurance policy :—

HELD—that the continuation clause in the original policy was a usual clause, and that the re-insurance policy was not invalidated by reason of the non-disclosure of the fact that the original policy contained the clause ; but that the re-insurance policy being for a period exceeding twelve months was null and void.

CHARLESWORTH *v.* FABER, (1900) 5 Com. Cas. [408—Bigham, J.

Marine—*Continued.*

151. *Time Policy on Ship—Particular Average Loss—Repairs—Pledge of Ship for Repairs—Subsequent Total Loss—Liability of Assured—Liability of Underwriters.*]—A ship was insured by the shipowners with the defendant company under a time policy. During the continuance of the policy the vessel, by reason of perils insured against in the policy, suffered damage to her machinery and cylinders on her voyage out to Savannah. A claim put forward by the plaintiffs, the shipowners, against the defendant company for a particular average loss was paid on account to the shipowners. The damage was repaired at Savannah, and the cost of the repairs was paid for by the charterers of the ship at Savannah, and they obtained from the master a promissory note for the amount, purporting to pledge the ship and her freight, and payable three days after her arrival at Liverpool. The charterers effected insurances to cover the amount secured. The vessel was totally lost on her voyage home, and the defendant company settled a total loss under the policy sued on. The plaintiffs sought to recover the balance of their claim in respect of the particular average loss. The defendant company counter-claimed for the return of the sum already paid by them.

HELD—that the plaintiffs had sustained and would sustain no loss in fact, and never became liable for the cost of the repairs at Savannah; and that the defendant company were entitled to a return of the sum already paid by them, as it was paid under a mistake of fact.

THE DORA FORSTER, [1900] P. 241; 69 [L. J. P. 85; 16 T. L. R. 380; 49 W. R. 271—Barnes, J.

152. *Time Policy—Interpretation—"The whole currency of this Policy."*]—A policy on the plaintiff's ship from March 13th, 1899, to March 13th, 1900, provided for the return of a part of the premium, "should the vessel be employed in the Eastern trade during the whole currency of this policy." The ship was employed in the Eastern trade from March 13th, 1899, until July 23rd, 1899, when she was lost.

HELD—that the ship had been employed in the Eastern trade during the whole currency of the policy, and that the plaintiffs were entitled to have the part of the premium returned to them.

GORSEDD STEAMSHIP CO., LD. *v.* FORBES, [(1900) 16 T. L. R. 566; 5 Com. Cas. 413—Bigham, J.

153. *Valued Policy — Ship — Salvage and General Average assessed on Real Value—Liability of Underwriters.*]—The plaintiffs insured for £33,000 their ship, which was valued at £33,000 in the policy. During the currency of the policy salvage services were rendered to the ship, and general average expenses were incurred. In a salvage action the ship was valued at £40,000, and this value was also taken in adjusting the ship's contribution in general average.

HELD—that the plaintiffs were only entitled to recover under the policy 33-40ths of the amount due from the ship for salvage and in general average.

Judgment of C. A. ([1901] 2 K. B. 896; 70 L. J. K. B. 1018; 50 W. R. 35; 85 L. T. 389; 17 T. L. R. 765; 6 Com. Cas. 298) affirmed.

STEAMSHIP "BALMORAL" CO., LD. *v.* MARTEN, [1902] A. C. 511; 71 L. J. K. B. 819; 87 L. T. 247; 18 T. L. R. 802; 7 Com. Cas. 292; 9 Asp. 321—H. L. (E.).

154. *Time Policy for Twelve Months—Continuation Clause—Validity—"Any Time exceeding Twelve Months"—Stamp Act*, 1891 (54 & 55 Vict. *c.* 39), *ss.* 92, 93.]—The Stamp Act, 1891, s. 93, provides that—"(1) a contract for sea insurance . . . shall not be valid unless the same is expressed in a policy of sea insurance; (2) no policy of sea insurance made for time shall be made for any time exceeding twelve months; (3) a policy of insurance shall not be valid unless it . . . is made for a period not exceeding the twelve months."

Where a policy of marine insurance expressed to be for and during a space of twelve months contains a clause providing that, if the ship is at sea or abroad on the expiration of the policy, it is agreed to hold her covered until arrival at the port of final destination, the policy is one for a period exceeding twelve months, is invalid within the statute, and is inadmissible in evidence in an action to recover a loss which occurred upon a homeward voyage after the expiration of the twelve months. Under the policy the defendants agreed to be bound in all things by the jurisdiction and decision of the English law Courts.

HELD—that the clause excluded the operation of any other law than the English law with reference to the policy.

Judgment of Bigham J. ([1901] 2 K. B. 567; 70 L. J. K. B. 874; 50 W. R. 25; 85 L. T. 241; 17 T. L. R. 599; 6 Com. Cas. 189; 9 Asp. M. C. 233) affirmed.

ROYAL EXCHANGE ASSURANCE CORPORATION [*v.* SJOFORSAKRONS AKTIEBOLAGET VEGA, [1902] 2 K. B. 384; 71 L. J. K. B. 739; 50 W. R. 694; 87 L. T. 356; 18 T. L. R. 714; 5 Com. Cas. 205; 9 Asp. 326—C. A.

See also No. 129.

(o) Total Loss and Constructive Total Loss.

155. *Marine Policy covering War risks—Capture—Restoration after Writ and before Trial—Total or partial Loss.*]—In an action upon a marine policy of insurance anything happening to turn a total loss into partial loss after the issue of the writ will not affect the rights of the insured.

The plaintiffs' steamship *D.* was insured with the defendants on a valued policy covering war risks. She was captured by an Italian cruiser for carrying contraband of war to Abyssinia, then at war with Italy. After notice of abandonment and issue of writ claiming as for a total loss, but before trial of the action, the *D.* was brought

Marine—*Continued.*

before a prize court at Rome, and condemned as lawful prize, but as the war was then over she was not confiscated, but handed over to the plaintiffs, who received her by an arrangement with the defendants for the benefit of all interested.

HELD—that the restoration of the ship did not prevent the plaintiffs from recovering in the action as for a total loss.

RUYS *v.* ROYAL EXCHANGE ASSURANCE CO., [1897] 2 Q. B. 135, 8 Asp. M. L. C. 294 ; 2 Com. Cas. 201 ; 66 L. J. Q. B. 534 ; 77 L. T. 23 ; 13 T. L. R. 444—Collins, J.

156. *Transhipment of Goods — Construction —Intention.*]—The plaintiff sued the defendants for a total loss of goods under a marine policy dated August 23rd, 1897. The policy was in the ordinary Lloyd's form and contained, *inter alia*, the following terms :—"At and from London to any ports and for places in Australia upon any kind of goods and merchandise in the good ship or vessel called the P. O. and Orient steamers, beginning the adventure upon the said goods from the loading thereof aboard the said ship, and shall so continue and endure . . . until the said goods and merchandise whatsoever shall be arrived at as above, and until the same be there discharged and safely landed." There was also a marginal clause in the policy. "To pay partial loss arising from transhipment, including all risk of craft or otherwise to and from the vessel. The plaintiffs shipped goods to the value of £300 by this P. O. steamer *Arcadia* consigned to Brisbane under a bill of lading which contained the following clause : "To be delivered at the port of Brisbane, or as near thereunto as the local steamer can safely get. For transhipment into local steamer at Sydney." "The Company are to be at liberty to carry the said goods to their port of destination of the above or other steamer or steamers or ships either belonging to the Company or to other persons proceeding either directly or indirectly to such port." The goods were duly declared on the policy. They arrived safely at Sydney and were then transhipped on to a coasting steamer for Brisbane. This coasting steamer was not owned by the P. and O. or Orient Companies and was unclassed by Lloyd's. The goods became a total loss on the voyage from Sydney to Brisbane. The Court held that this loss was covered by the policy and that the defendants were liable.

NEALE *v.* ROSE, (1898) 14 T. L. R. 506, [Bigham, J.

157. *Valued Policy—Constructive total Loss—Ship subsequently repaired.*] — Where there is a constructive total loss of a ship by perils of the sea, its underwriters cannot, after notice of abandonment, by incurring an expenditure to put the ship in such a condition that the further expenditure necessary to fit her for sea will be less than her value when repaired, make themselves liable for a partial loss only.

The test as to whether a ship has become a constructive total loss is the same in English and in Scotch law, though the laws may differ as to the date when the test is to be applied.

"BLAIRMORE" (SAILING SHIP) CO., LTD. *v.* [MACREDIE, [1898] A. C. 593 ; 3 Com. Cas. 241 ; 67 L. J. (P. C.) 96 ; 79 L. T. 217 ; 35 Sc. L. R. 956 ; 14 T. L. R. 513 ; 8 Asp. M. C. 429—H. L. (Sc).

158. *Constructive Total Loss—Abandonment—Refusal to Accept—Sunken Vessel—Tug employed to watch—Negligence — Damage to Another Vessel — Liability of Underwriters — Joint Liability.*

The defendants and other underwriters insured the plaintiffs' steamship *A.* against total loss, and to the extent of three-quarters against damages which the plaintiffs might have to pay for collisions with other vessels. The *A.* was sunk in a river and in fact was a constructive total loss. Notice of abandonment was given and acceptance thereof refused. The plaintiffs and the defendants agreed, without prejudice to their rights, to take joint action to salve the property. The master of the *A.* employed a tug to watch the wreck and warn other vessels. Owing to the negligence of the crew of the tug the steamship *S.* came into collision with the *A.*, and both vessels sustained damage. In an action brought, in the names of the plaintiffs, by and for the benefit of the defendants, against the *S.*, the owners of the *S.* counterclaimed and recovered judgment for the whole of their damages and costs. The underwriters paid three-quarters of the damages and costs to the owners of the *S.*

HELD—that the underwriters were jointly liable to indemnify the plaintiffs against the remaining one-quarter of the damages and costs of the S., the liability not arising under the policy but upon the contract of idemnity.

SUART AND SS. "ALLEGHANY," OF LONDON, [LTD. *v.* MERCHANTS' MARINE INSURANCE CO., (1898) 3 Com. Cas. 312—Bigham, J.

159. *Damage to Cargo by Perils of the Sea—Proximate Cause—Total Loss—Notice of Abandonment.*]—The plaintiff effected a policy of insurance with the defendant company in the sum of £250 on a cargo of potatoes to be carried by sea from Annalong, in the county of Down, to Southampton, such insurance to be free from particular average. The loading, which commenced on January 27th, 1897, was completed on February 18th, 1897. There was evidence that the cargo would sprout if kept in the hold for three weeks, even though unwet. From adverse weather the vessel carrying the cargo had to put into several intermediate ports. At St. Tudwell's Roads, which she reached on March 11th, she met a gale which caused her to ship water. The vessel arrived at Pwllheli, North Wales, on March 18th ; the cargo was examined and found to be sprouting and heated. The ship, from the storm, required some repairs, which could have been executed in a short time, and the defendants requested the captain to proceed with the voyage, which he refused to do. A negotiation took place for the sale of the

Marine—*Continued.*

cargo, but this the Court held did not constitute an admission of liability for a total loss. Offers of £100 and £110 were made for the cargo, and refused. Ultimately the captain, who claimed to retain the cargo against freight, sold the potatoes at Pwllheli for £55 ; the purchaser making a large profit on resale. Formal notice of abandonment was given after the sale, but it was admitted that such notice was too late.

HELD—(1) that the damage to the potatoes was not exclusively and proximately caused by perils of the sea ; (2) that even if the damage was so caused, there was no evidence of a total loss, actual or constructive ; (3) that even if the potatoes, if carried to Southampton, would have been a total loss, notice of abandonment under the circumstances, was necessary.

Roux v. *Salvador* ((1836) 3 Bing. (N.C.) 266 ; 4 Scott, I ; 2 Hodges, 209) distinguished.

CUNNINGHAM *v.* MARITIME INSURANCE CO., [1899] 2 Ir. R. 257—Q. B.

160. *Constructive Total Loss — Evidence — Value of Wreck—Admissibility.*]—In an action on a policy of marine insurance on ship, the question being whether or not the vessel was a constructive total loss, evidence as to the value of the wreck was tendered.

HELD—that the evidence was admissible.

BEAVER LINE ASSOCIATED STEAMERS *v.* [LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE CO., (1900) 5 Com. Cas. 269—Phillimore, J.

161. *Constructive Total Loss—If Stranded for Six Months, and during such Period it has been found Impracticable to Save Her.*]—A policy of insurance on a ship subject to a rule that : "If any ship insured in the company has been stranded or sunk and remained in such position for a period of . . . six months . . . and during such period it has been found impracticable to save her, the ship shall be held to be a constructive total loss as from noon of the day following the date of the accident, and the insured member may abandon her to the company." The ship while in port was swept away by a hurricane and rush of water, and deposited in a damaged condition six miles from the sea in shallow water. It was admitted that she could be saved, but not until a railway bridge, which had been repaired after the hurricane, was converted by the railway company into a drawbridge as it had originally been. The ship lay there for over six months.

HELD—that the ship, having remained a stranded ship, notwithstanding that all practicable attempts had been made during the six months to save her, was a constructive total loss, and the underwriters must pay.

Sunderland Steamship Co. v. *North of England Iron Steamship Insurance Association* ((1894) 11 T. L. R. 106) followed.

ROWLAND AND MARWOOD STEAMSHIP CO. *v.* [MARITIME INSURANCE CO., (1901) 17 T. L. R. 516 ; 6 Com. Cas. 160—Bigham, J.

162. *Disbursements—Free from all Average—Voyage Out and Home—Expectation of Profit on Homeward Voyage—Ship not a Total Loss, Actual or Constructive.*]—The plaintiff's ship was chartered to take a cargo to the west coast of South America ; it was the intention of the plaintiff to obtain a cargo there for the homeward voyage. The plaintiff effected policies on hull, chartered freight, and "disbursements," [and] [or] advances, warranted free from all average, valued at £3,000." On the outward voyage fire broke out in the cargo, and some damage was done to the ship and to part of the cargo, but the ship was not a total loss, actual or constructive. The plaintiff, acting reasonably, abandoned the voyage, and brought the ship home to be repaired. The disbursements included outlay, before the ship started, on provisions, stores, outfit, port-dues, and insurance.

HELD—that the plaintiff was not entitled to recover a total loss under the policy, which was free from all average.

Judgment of Mathew, J. ((1900) 17 T. L. R. 8 ; 6 Com. Cas. 5) affirmed.

LAWTHER *v.* BLACK, (1901) 17 T. L. R. 597 ; 6 [Com. Cas. 196—C. A.

163. *Re-insurance—Constructive Total Loss—Insured Value to be taken as Repaired Value—"To pay as may be paid thereon"—Liability of Re-insurers—Proof of Liability of Insured.*]—The plaintiffs were underwriters of a vessel against all risks, the vessel being valued in the policy at £16,000. Attached to the policy was a printed memorandum containing certain clauses called the Institute Time Clauses, one of which was as follows : "The insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss." The plaintiffs had taken risks on many other vessels in respect of which they had issued other policies. The plaintiffs effected a policy of re-insurance with the defendants "against the risk of total [and] [or] constructive total loss only, warranted free of all average [and] [or] salvage charges being a re-insurance applying to policy or policies, and to pay as may be paid thereon." The Institute Time Clauses were printed upon the re-insurance policy, but many of them were struck out, including the clause which stipulated that the insured value was to be taken to be the repaired value in ascertaining whether the vessel was a constructive total loss. The vessel became a constructive total loss if the ordinary rules were applied to ascertaining the fact, but if the repaired value was to be taken at £16,000 and not at its true figure, she was not a constructive total loss. The plaintiffs sued the defendants for a constructive total loss.

HELD—that the plaintiffs had not paid as for a constructive total loss ; that in fact they had made only a payment for a large partial loss ; that even if they had paid as for a constructive total loss, inasmuch as they were not liable to pay for a constructive total loss they could not recover ; and that the words "to pay as may be paid" meant only to pay as the re-assured may have been compellable to pay.

Marine—*Continued.*

Chippendale v. *Holt* ((1895) 65 L. J. Q. B. 104 ; 44 W. R. 128 ; 73 L. T. 472 ; 8 Asp. M. C. 78 ; 1 Com. Cas. 197—Mathew, J.) followed.

MARTEN *v.* STEAMSHIP OWNERS' UNDER-[WRITING ASSOCIATION, (1902) 71 L. J. K. B. 718 ; 50 W. R. 587 ; 87 L. T. 208 ; 18 T. L. R. 613 ; 7 Com. Cas. 195 ; 9 Asp. 339—Bigham, J.

164. *Valuation Clauses — Insurance against Total Loss—Constructive Total Loss—Value of Wreck.*]—Where a vessel, which is wrecked, is insured against total loss under a policy containing a valuation clause, the owner is entitled, in deciding whether to abandon her, to calculate the cost of repairing her in such a way as to restore her to the same condition as she was in when the valuation clause was agreed to. And as the test is, whether a "prudent uninsured owner" would repair as a matter of business, the value of the wreck for breaking up purposes ought to be taken into account.

WILD ROSE STEAMSHIP CO. *v.* JUPE AND [OTHERS, (1903) 19 T. L. R. 289—Walton, J.

[This case must now be considered in the light of the judgments of the C. A. in *Angel* v. *Merchants' Marine Insurance Co., Ld.*, No. 165, *infra*.]

165. *Valuation Clause — Constructive Total Loss — "Repaired Value" agreed — Cost of Repair—Whether Value of Wreck to be added.*]—By a time policy on a ship she was valued at £23,000, and it was agreed that this sum should be taken as the "repaired value" for determining questions of constructive total loss. The ship was wrecked, and the owner gave notice of abandonment, which the underwriters refused to accept; ultimately, however, by the consent and for the benefit of all parties, she was brought home by a salvage company. The judge found as a fact that £22,559 was the outlay necessary to reinstate her, but the owner claimed to add to this £7,000 as her value as a wreck while lying on the rocks ; if he could do so, he would recover as for a total loss.

HELD—that the Court would not disturb the decision of the judge, who considered that there was no satisfactory evidence before him as to the value of the vessel as a wreck : the point having only been taken late in the trial.

Moreover, per Stirling and Mathew, L.JJ. (Vaughan Williams, L.J., doubting, if not actually dissenting), in deciding whether a vessel is a constructive total loss, the value of unrepaired wreck ought not, generally speaking, to be taken into account at all.

Decision of Bigham, J. affirmed.

Dictum in *Young* v. *Turing* ((1841) 2 Man. & G. p. 601 ; 58 R. R. 477, 484) not followed.

ANGEL *v.* MERCHANTS' MARINE INSURANCE [CO., [1903] 1 K. B. 811 ; 72 L. J. K. B. 498 ; 51 W. R. 530 ; 88 L. T. 717 ; 19 T. L. R. 395 ; 8 Com. Cas. 179; 9 Asp. M. C. 106—C. A.

166. "*Suing and Labouring*"—*Policy against Total Loss — Notice of Abandonment — Underwriters salving Ship—No Claim against Owner for their Expenses.*]—The defendants had underwritten a marine policy against total, or constructive total, loss only. The ship was stranded, and the owner gave notice of abandonment ; and the underwriters, under a "no cure, no pay" contract, had her brought safe into port.

Upon a claim by the owner, judgment was given for the underwriters on the ground that there had been no constructive total loss ; but upon their counterclaim for their expenses of salving the vessel :—

HELD—that they could not recover ; their interest in the ship precluded any claim for salvage under maritime law, and they could not recover upon an implied promise to pay, for the owner could claim back the amount under the "suing and labouring" clause.

CROUAN *v.* STANIER, (1903) 52 W. R. 75 ; 19 [T. L. R. 664 ; [1904] 1 K. B. 87 ; 73 L. J. K. B. 102 ; 9 Com. Cas. 27—Kennedy, J.

167. *Re-insurance against Total, or Constructive Total, Loss—"To pay as may be paid thereon" —No Notice of Abandonment—Amount of Claim greater than Vessel's Value—Liability of Re-insurers—"No Claim for Salvage charges"—Suing and Labouring Clause not deleted.*]—A vessel was insured against partial or total loss ; and the insurers re-insured against total loss "to pay as may be paid" on the original policy. The vessel was stranded, and might have been abandoned as a constructive total loss, but the owners elected to float and repair her at a cost exceeding her insured, but not her real, value ; and the plaintiffs, the insurers, had to pay £107 per cent. on their policy, and now sought to recover from the reinsurers as for a constructive total loss.

HELD—that, notice of abandonment not having been given, the re-insurers could not be called on to pay as for a "constructive total loss."

The policy contained an added clause in writing : "No claim . . . for salvage charges" ; but the printed suing and labouring clause was not deleted.

HELD—that the written clause was meant to exclude the suing and labouring clause, which must be regarded as struck out, and the re-insurers were not liable.

Uzielli v. *Boston Marine Insurance Co.* ((1884) 15 Q. B. D. 11 ; 54 L. J. Q. B. 142 ; 60 L. T. 787) discussed.

WESTERN ASSURANCE CO. OF TORONTO *v.* POOLE [1903] 1 K. B. 376 ; 72 L. J. K. B. 195 ; 88 L. T. 362 ; 9 Asp. M. C. 390 ; 8 Com. Cas. 108 —Bigham, J.

168. "*Repaired Value*"—*Insured Value to be taken as Repaired Value for determining the question of Constructive Total Loss.*]—Where a Lloyd's policy provides that the insured value of a vessel is to be taken as the repaired value in ascertaining whether she has become a constructive total loss, the meaning is that the vessel is

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not merely to be made seaworthy nor is she to be reconstructed, but, so far as repairs can effect it, she is to be made of the same classification and as nearly as possible the thing that was valued.

North Atlantic Steamship Co., Ld., *v.* Burr, [(1904) 20 T. L. R. 266; 9 Com. Cas. 164—Kennedy, J.

169. *Constructive Total Loss—Policy on Cattle — Prohibition on Landing — "Restraints of Princes and People"—Slaughter of Cattle at Sea — Notice of Abandonment — Suing and Labouring Clause—Particular Average Loss—Inability to land Cattle at any other Port—Loss of Advanced Freight—Insurance Premiums and Shipping Charges paid.*] — Cattle were insured on a voyage from Liverpoool to Buenos Ayres against the usual marine risks, including restraints of princes and people, and also against all risks of mortality and injury from any cause whatever. On arrival at Buenos Ayres the cattle were not allowed to be landed by order of the Argentine Government on account of certain other cattle on board suffering from cattle disease. The cattle insured were taken to sea and slaughtered, and in doing so the assured acted as a prudent uninsured owner would have done. No notice of abandonment was given to the underwriters.

Held—that, as, in the circumstances, it was not impossible that the difficulty of landing the cattle might have been got over, the loss was not an absolute one, but was a constructive total loss, and the underwriters were not liable for the loss in the absence of a notice of abandonment.

Mansell & Co. *v.* Hoade, (1904) 20 T. L. R. [150—Walton, J.

170. *Total Loss—Capture—Time Policy on Disbursements—Perils of the Seas—Warranted Free of Capture, Seizure, and Detention, and Consequence of Hostilities—Neutral Ship carrying Contraband of War—Damage by Collision with Ice causing Leaks—Capture by Belligerent before making Port of Refuge—Beaching of Vessel — Subsequent Condemnation by Prize Court — Divesting of Property — Liability of Underwriters.*]—A vessel carrying contraband of war and bound for V. was insured against perils of the seas on a time policy for disbursements in respect to total loss only.

The policy contained the clauses:—"Warranted free from all average, being against the risk of total loss only. A total loss or constructive total loss paid by underwriters on hull and machinery to constitute a total loss under this policy." "Warranted free from capture, seizure, and detention, and the consequence of hostilities. . . ."

The effect of the policy as agreed was that, although the policy was a policy for disbursements and in respect of a total loss only, the point was the same as whether the ship was totally lost. The vessel, by reason of leaks caused by collision with ice, gave up going directly to V., and made for a port of refuge.

The vessel, which had a good chance of reaching the port of refuge, was stopped by belligerents, who put a prize crew on board, and ordered the vessel to proceed to Y., where a prize court was sitting.

On the voyage to Y., by reason of the leaks caused by the collision with ice becoming worse, the vessel was beached and became a total loss. The vessel was subsequently condemned by the prize court.

In an action against underwriters to recover as for a total loss by peril of the seas:—

Held—that the underwriters were not liable under the policy. Mere capture without condemnation by the prize court did not divest the property in the ship from the shipowner. Where there was such condemnation, the property in the ship passed as from the time of capture. The loss was a total loss by capture, and the owner, having no further interest, could not lose the vessel again.

Semble, that the shipwreck was not a loss in consequence of hostilities within the meaning of the warranty.

Andersen *v.* Marten, [1907] 2 K. B. 248; 76 [L. J. K. B. 674; 97 L. T. 375; 23 T. L. R. 534; 12 Com. Cas. 309—Channell, J.

171. *Total Loss—Valued Policy on Ship—Sum Insured less than stated Value—Ship sunk by negligence of another Ship—Division of Amount recovered from Ship in fault.*]—A ship was insured for £1,000, her value being stated in the policy as £1,350. During the currency of the policy the ship was sunk by the fault of another ship, and the underwriters paid to the owners £1,000. Subsequently the owners brought an action against the ship in default, and liability being admitted, the claim was referred to the registrar, who assessed the value of the insured ship at £1,000. This sum was paid into Court. The owners of the insured ship contended that, as they were their own insurers for £350, they were entitled to $\frac{350}{1350}$ths of the £1,000.

Held—that this contention was correct.

Decision of Deane, J. (22 T. L. R. 475) affirmed.

The Commonwealth (or The Welsh Girl), [1907] P. 216; 76 L. J. P. 106; 23 T. L. R. 420—C. A

See also No. 82.

(p) Warranty.

172. *Implied Warranty of Seaworthiness—"Round Voyage" — Insufficient Coal — Spars Burnt—"Loss through Negligence of Master"—"Held covered in case of any Breach of Warranty at Premium to be arranged."*]—So far as coaling is concerned, the implied warranty of seaworthiness is an undertaking that the ship shall be sufficiently coaled for the whole voyage, either at the starting point or (if that be impossible) at convenient ports *en route*.

The master of the plaintiffs' vessel omitted by negligence to take on board sufficient coal at an intermediate port on a "round" voyage, and had to use spars, &c., as fuel. The plaintiffs claimed the value of the spars from the underwriters.

Marine—*Continued.*

The policy contained, amongst other clauses, the following:—(1) "To cover loss through negligence of master"; (2) "Held covered in case of any breach of warranty . . . at a premium to be hereafter arranged."

HELD—(1) That the implied warranty of seaworthiness was broken by the vessel leaving an intermediate port with insufficient coal to reach her next destination;

(2) That the damage was not proximately due to the master's negligence, within the negligence clause, but to a voluntary act;

(3) That the warranty clause applied, but that the underwriters, on being informed of the nature of the breach of warranty, might reasonably have asked a premium equal to the amount claimed, and therefore there must be judgment for the defendants;

And, also (*obiter*), that the loss claimed was a general average loss, and not one within the "suing and labouring" clause.

The Vortigern ([1899] P. 140; 47 W. R. 437; 68 L. J. P. 49; 80 L. T. 382; 15 T. L. R. 259; 8 Asp. M. C. 523) followed.

Decision of Bigham, J. ([1903] 1 K. B. 367; 72 L. J. K. B. 59; 51 W. R. 447; 88 L. T. 207; 19 T. L. R. 107; 8 Com. Cas. 78) affirmed.

GREENOCK STEAMSHIP CO. *v.* MARITIME [INSURANCE CO., LD., [1903] 2 K. B. 657; 72 L. J. K. B 868; 89 L. T. 200; 19 T. L. R. 680; 9 Asp. 364; 52 W. R. 186; 9 Com. Cas. 41; 9 Asp. M. C. 463—C. A.

173. "*Not to proceed East of Singapore*"—*Voyage to a Port East of Singapore—Vessel Lost before Singapore reached.*]—A time policy of marine insurance contained the following warranty: "Warranted not to proceed east of Singapore." The vessel was chartered to carry coals from Cardiff to a port east of Singapore. While on her voyage she was wrecked off the Tunis coast and lost.

HELD—that the loss was covered by the policy, as at the time of the loss there had been no breach of the warranty.

Colledge v. *Harty* ((1857) 6 Ex. 205, and *Simon, Israel & Co.* v. *Sedgwick*, [1893] 1 Q. B. 303; 62 L. J. Q. B. 163; 41 W. R. 163; 67 L. T. 785; 7 Asp. M. C. 215—C. A.) distinguished.

SIMPSON STEAMSHIP CO., LD. *v.* PREMIER [UNDERWRITING ASSOCIATION, LD., (1905) 53 W. R. 512; 92 L. T. 730; 21 T. L. R. 485; 10 Com. Cas. 198; 10 Asp. M. C. 127. —Bigham, J.

INTEREST.

See BANKRUPTCY; CONTRACTS; MONEY.

INTERNATIONAL LAW.

And see ALIENS, 6.

Annexation—Liabilities of Conquered State—Creditor's Right against Conquerors—Municipal Courts.]—There is no principle of international law by which a conquering State becomes liable (apart from express stipulation) to discharge the outstanding liabilities of a State conquered and annexed by it.

Before the outbreak of the South African war a company's gold won from a mine in the Transvaal was seized by the Government of that country. On a petition of right:—

HELD—that the suppliants had no right which could be enforced against the Crown in any municipal Court.

WEST RAND CENTRAL GOLD MINING CO., LD. [*v.* THE KING, [1905] 2 K. B. 391; 74 L. J. K. B. 753; 53 W. R. 660; 93 L. T. 207; 21 T. L. R. 562—Sup. Ct.

INTERPLEADER.

And see BANKRUPTCY, 236; BILLS OF SALE COURT, 39, 43; COUNTY COURTS; EXECUTION.

1. *Appeal—Summary Decision of Judge on Point of Law—No Appeal—R. S. C., Ord. 57, rr. 9, 11.*]—Where in interpleader proceedings a judge decides the question as being one of law under Ord. 57, r. 9, without directing the trial of an issue, or directing a special case to be stated, his decision is not subject to appeal, even by leave.

In re Tarn ([1893] 2 Ch. 280; 62 L. J. Ch. 564; 41 W. R. 397; 68 L. T. 311—C. A.) followed.

VAN LAUN & CO. *v.* BARING BROTHERS & CO., [LD.—LEWISON, CLAIMANT, [1903] 2 K. B. 277; 72 L. J. K. B. 756; 52 W. R. 59; 89 L. T. 120—C. A.

2. *Appeal—Summary Decision of Judge—Decision to deal with matter in summary manner—Value of Subject-matter exceeding £50—Ord. 57, r. 8.*]—Upon an interpleader summons at Chambers, where the value of the subject-matter in dispute exceeded £50, the Master decided to dispose of the claim in a summary manner, and adjourned the summons for the production of evidence. The judge affirmed the decision of the Master, but gave leave to appeal.

HELD—that the decision of the judge that the matter should be dealt with summarily was a summary decision within Ord. 57, r. 8, from which no appeal lay, though the value of the subject-matter in dispute exceeded £50.

HARBOTTLE *v.* ROBERTS—PEEL, CLAIMANT, [1905] 1 K. B. 572; 74 L. J. K. B. 310; 53 W. R. 291; 92 L. T. 723; 21 T. L. R. 273—C. A.

3. *Bailee*—Jus tertii—*Estoppel—R. S. C., Ord. 57, rr. 1, 2.*]—A bailee who is estopped from setting up the *jus tertii* may nevertheless be entitled to relief by way of interpleader.

Dicta in *Attenborough* v. *St. Katharine's*

Dock Co. ((1878), 3 C. P. D. 450 ; 47 L. J. C. P. 763 ; 26 W. R. 583 ; 38 L. T. 404) followed.

EX PARTE MERSEY DOCKS AND HARBOUR [BOARD, [1899] 1 Q. B. 546 ; 68 L. J. Q. B. 540 ; 47 W. R. 306 ; 80 L. T. 143 ; 15 T. L. R. 199—C. A.

4. *Form of Issue—Goods Seized by Sheriff—Claim by Third Person—Part of Goods sold by Order—Money paid into Court.*]—A sheriff under writs of *fi. fa.* seized all the goods in a debtor's house. X. claimed all the goods. All the creditors except T. abandoned their executions, and on the interpleader summons the sheriff was ordered to sell sufficient goods to satisfy T.'s execution and to pay the proceeds into Court. He did so, and a quantity of goods remained unsold.

HELD—that the proper form of issue between X. and T. was whether the goods seized and sold by the sheriff, or some part thereof, were the property of X. as against T.

TEBB *v.* POWELL—POWELL, CLAIMANT, (1905) [93 L. T. 468—C. A.

5. *Goods taken in Execution—Claim—Payment into Court by Claimant of Value of Goods—Withdrawal of Sheriff — Seizure by Second Execution Creditor—Claim by same Claimant—Order to Pay again into Court Value of Goods.*]—Goods taken in execution were claimed by a third person, and an interpleader order was made that, upon payment into Court by the claimant of the value of the goods, the sheriff should withdraw. Payment into Court was made, and the sheriff withdrew. The goods were then seized by another execution creditor, and the same claim was again made.

HELD—that, upon the second execution, the interpleader order should direct the sheriff to withdraw only upon payment into Court by the claimant of the full value of the goods, that being less than the amount of the judgment.

KOTCHIE *v.* GOLDEN SOVEREIGNS, LD., [1898] [2 Q. B. 164 ; 67 L. J. Q. B. 722 ; 78 L. T. 409 ; 46 W. R. 616—C. A.

6. *Goods seized in Execution—Claim to Goods under an absolute Bill of Sale—Power to order Sale—R. S. C., Ord. 57, r. 12.*]—There is power in interpleader proceedings for the Court to order a sale of the goods seized in execution, when a claim is made to the goods under an absolute bill of sale. The power to do so is not confined to the cases which are now dealt with by Ord. 57, r. 12.

PAQUIN, LD. *v.* ROBINSON. (1901) 85 L. T. 5—[C. A.

7. *Goods taken in Execution — Claim by Holder of Bill of Sale—Order for Sale—Jurisdiction—Ord. 57, r. 12—Bankruptcy Act*, 1890 (53 & 54 Vict. *c.* 71), *s.* 11.]—Ord. 57, r. 12, was not intended to deprive a secured creditor of his security, and the jurisdiction conferred thereby ought not to be exercised against the grantee of a bill of sale unless there is a reasonable ground for holding that the sale will produce more than sufficient to answer the just claims of the grantee, so as to leave a surplus available for the execution creditor.

Forster v. *Clowser* ((1897) 2 Q. B. 362) considered.

Decision of Ridley, J. reversed.

Semble, that sect. 11 of the Bankruptcy Act, 1890, only puts an end to an execution at the option of the trustee in bankruptcy, and if he chooses to assert his rights under that section the execution creditor has none ; but that if the trustee, instead of asserting his rights, supports the execution creditor, sect. 11 does not invalidate the execution.

STERN *v.* TEGNER, [1898] 1 Q. B. 37 ; 66 L. J. [Q. B. 859 ; 77 L. T. 347 ; 4 Mans. 328 ; 46 W. R. 82—C. A.

8. *Summons—Leave to Issue and to Serve out of Jurisdiction.*]—The Court has power to, and will in a proper case, give leave to issue and serve an interpleader summons out of the jurisdiction, although no writ has been sued out against the applicant in relation to the subject-matter of the proposed interpleader proceedings.

CITY OF DUBLIN STEAM PACKET CO. *v.* COOPER [AND OTHERS, [1899] 2 Ir. R. 381—Q. B.

INTERPRETATION OF DOCUMENTS.

See DEEDS AND DOCUMENTS.

INTERPRETATION OF STATUTES.

See STATUTES.

INTERPRETATION OF WILLS.

See WILLS.

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INTOXICATING LIQUORS.

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And see Landlord and Tenant, Nos. 155–170.

I. APPLICATIONS FOR NEW LICENCES.

1. *Application—Error in Notice.*]—Where there is a clerical error in a notice of intended application for a new licence, the licensing justices may overlook it. Accordingly, where an application was intended to be made, and was in fact made, for an *off* beer and cider licence, and all the notices, save the notice served on the superintendent of police, spoke of an off beer and cider licence, while the notice served on the superintendent of police spoke of an *on* beer and cider licence, and it appeared that the superintendent of police was not misled, the justices had, notwithstanding the discrepancy, jurisdiction to entertain the application, and in their discretion to grant an off licence.

Ex parte Clayton, (1899) 63 J. P. 788—Div. [Ct.

2. *Application for Grant subject to future consideration of Plans—Hearing of Application adjourned—Right of Person to appear in opposition for the first time at the Adjourned Meeting.*]—Upon an application for a provisional licence, the licensing justices announced that they were inclined to grant the licence if certain alterations were made in the plans of the proposed building, and that they wished to take time to consider the question of monopoly value; they accordingly adjourned the general annual licensing meeting for a month. At the adjourned meeting certain persons appeared for the first time and asked to be heard in opposition to the grant of the licence. The justices refused to hear them.

Held—that as the justices had really decided at the earlier meeting to grant the licence, their refusal to allow the question to be re-opened was right.

Ex parte Fearn and Boucher, (1905) 69 [J. P. 177—C. A.

And see No. 8, *infra*.

3. *Confirming Authority—Disqualification of Justice—Holding Shares in Brewery—Forgetfulness—Penalty—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 60.]—A justice of the peace who held some shares in a brewery which carried on business in the licensing district sat as a justice on the confirming authority on the hearing of an application to confirm the grant of a new licence, forgetting that he held the shares, was ordered to pay a penalty of £10 and costs for acting while disqualified under sect. 60 of the Licensing Act, 1872.

Attorney-General *v.* Ball, (1902) 66 J. P. [553—Phillimore, J.

4. *Confirming Authority—Disqualification of Justice—Real likelihood of Bias—Agreement between Corporation and Applicant for Licence—Member of Corporation sitting at Licensing Sessions*—Certiorari—*Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *ss.* 38, 43.]—An agreement was entered into between the corporation of a borough, which had purchased a licensed house for a street improvement, and a firm of brewers, whereby the latter agreed that if they obtained a new licence for a public-house in another street they would pay the corporation £10,000, and the corporation agreed that they would thereupon close the licensed house they had purchased and would not apply for a renewal of the licence, the £10,000 to be repaid if the High Court should revoke the grant of the licence. Certain members of the corporation, who had taken an active part in negotiating the agreement, sat as justices both upon the licensing committee and at the confirming meeting when the new licence was granted. Upon an application for a writ of *certiorari* to bring up the order of the justices confirming the grant of the licence for the purpose of quashing it:—

Held—that there was a real likelihood of bias in the members of the corporation who had taken an active part in negotiating the agreement and who sat as justices, and that a writ of *certiorari* would lie to bring up the order of the confirming authority for the purpose of quashing it.

Reg. v. *Manchester Justices* ([1899] 1 Q. B. 571; 68 L. J. Q. B. 358; 63 J. P. 360; 47 W. R. 410; 80 L. T. 531—Div. Ct., No. 9, *infra*) approved of.

Decision of Div. Ct. (65 J. P. 584; 84 L. T. 591; 17 T. L. R. 484) reversed.

Rex *v.* Sunderland JJ. [1901] 2 K. B. 357; [70 L. J. K. B. 946; 65 J. P. 598; 85 L. T. 183; 17 T. L. R. 551—C. A.

5. *Confirming Authority—Disqualification of Justice—Real likelihood of Bias—Justice holding Shares in Brewery Company—Offer to give up Site of old Licensed Premises to Corporation—Justices also Members of Town Council—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *ss.* 38, 60.]—An application was made to the licensing committee of the borough of Tamworth for the removal of a licence to new premises. A suggestion was made at the hearing before the licensing committee that if the transfer was granted

Applications for New Licences—*Continued.*

another licence would be surrendered and that part of the site of the old premises would be given up to the corporation for the purpose of a public improvement by widening the roadway. Three of the licensing committee were members of the town council, and one of the committee had a pecuniary interest in a brewery company carrying on business in the neighbourhood. The committee granted the transfer. The transfer was confirmed by the confirming authority, which included the four justices above mentioned, but the offer as to the giving up of part of the site of the old licensed premises was withdrawn.

HELD—that there was not in the circumstances a real likelihood that there would be a bias on the part of the justices who were members of the corporation, and that the transfer of the licence was valid.

The test laid down in *Rex* v. *Sunderland Justices* ([1901] 2 K. B. 357; 70 L. J. K. B. 946; 65 J. P. 598; 85 L. T. 183; 17 T. L. R. 555—C. A., *supra*) applied.

HELD, also, that the transfer was not invalid by reason of proviso (3) to sect. 60 of the Licensing Act, 1872, though the justice holding brewery shares had adjudicated.

REX *v.* TEMPEST AND OTHERS, (1902) 66 J. P. [472; 86 L. T. 585—Div. Ct.

6. *Confirming Authority—Sitting as Court—Jurisdiction — Certiorari—"Real Resident Holder and Occupier"—Sleeping on Premises—Beerhouse Act*, 1840 (3 & 4 Vict. *c.* 61), *s.* 1.]—The confirming authority who sit to confirm licences under the provisions of the Licensing Acts sit as a Court, and therefore if they confirm a licence granted to a person who is not legally qualified to hold it, or a licence granted by justices without jurisdiction to do so, a writ of *certiorari* will lie to bring up their order to be quashed.

Reg. v. *Sharman* ([1898] 1 Q. B. 578; 67 L. J. Q. B. 460; 62 J. P. 296; 46 W. R. 367; 78 L. T. 320—Div. Ct.) distinguished.

The licensing justices have no power to grant a certificate, under sect. 2 of the Beerhouse Act, 1840, for a licence to sell beer or cider by retail, unless the applicant sleeps upon the premises in respect of which he applies to be licensed.

Reg. v. *Allmey* ((1871), 35 J. P. 534) approved.

REG. *v.* MANCHESTER JJ. [1899] 1 Q. B. [571; 68 L. J. Q. B. 358; 63 J. P. 360; 47 W. R. 410; 80 L. T. 531—Div. Ct.

7. *Grant of Licence on Money Payment*—Certiorari—Mandamus.]—A licence may not be granted upon the condition that the licensee pays a sum of money to be devoted by the justices for public purposes.

Upon the grant of such a licence a *mandamus* will lie, on the application of the objectors, for the justices to hear and determine according to law.

A *certiorari* to quash the grant cannot go against a licensing meeting.

REG. *v.* BOWMAN, EX PARTE PATTON, [1898] 1 [Q. B. 663; 63 J. P. 731; 67 L. J. Q. B. 463; 78 L. T. 230; 14 T. L. R. 303—Div. Ct.

8. *Monopoly Value—Right of Public to be heard on Question—Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 4, *sub-s.* 2.]—*Quære*, whether members of the public have any right to be heard when justices are considering the monopoly value to be placed upon a licence under sect. 4, sub-sect. 2 of the Licensing Act, 1904.

EX PARTE FEARN AND BOUCHER, (1905) 69 [J. P. 177—C. A.

And see No. 2, *supra*.

9. *Monopoly Value—Report of Surveyor—Evidence not on Oath—Order of Confirming Authority—Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 4.]—Upon an application for a new on-licence, the licensing justices made a grant fixing the monopoly value at £2,250. The confirming authority, upon the report of their valuer, not upon oath, fixed the monopoly value at £5,000, and made an order that the licence should be confirmed, and that the conditions attached to the licence under sect. 4 of the Licensing Act, 1904, should, with the consent of the licensing justices, be varied by fixing the monopoly value at £5,000. The licensing justices refused to consent; and thereupon the applicant applied for a *mandamus* to the confirming authority to deliver a certificate of confirmation of the licence, or for a *mandamus* to hear and determine the application for confirmation. The Divisional Court held that the meaning of the order of the confirming authority was that the confirmation should be conditional upon the licensing justices consenting to the monopoly value being increased to £5,000, and they refused a *mandamus* to deliver a certificate of confirmation; but they held that the confirming authority were not entitled to act upon the report of their valuer not upon oath; and they granted a *mandamus* to hear and determine the application. The applicant appealed upon the first point.

HELD—that the confirmation was conditional upon the consent of the licensing justices to the increase of monopoly value.

REX *v.* JACKSON AND OTHERS, (1907) 71 J. P. 25; [96 L. T. 77; 23 T. L. R. 18, 128—Div. Ct. and C. A.

10. *Objector to—Oath by—Fees to Justices' Clerk—Justices' Clerks Act*, 1877 (40 & 41 Vict. *c.* 43), *s.* 8—*Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 15.]—On the grant of a licence the only fees payable to the clerk of the licensing justices are those set out in sect. 15 of the Alehouse Act, 1828, and sect. 36 of the Licensing Act, 1872.

Therefore, there is no liability on a person opposing the grant of a new licence at a general annual licensing meeting, to whom, before giving evidence, an oath is administered, to pay any fee to the clerk to the licensing justices, and this is so even where a local authority has made a table of Court fees, approved by the Secretary

Applications for New Licences—*Continued.*

of State under sect. 8 of the Justices' Clerks Act, 1877, which includes the following : "Oath —Every oath, affirmation or solemn declaration not otherwise charged, 1*s.*"

WHITTUCK *v.* WITHY, [1907] 2 K. B. 526 ; 76 [L. J. K. B. 773 ; 71 J. P. 317 ; 96 L. T. 912 ; 23 T. L. R. 458—Div. Ct.

11. *Objection—Right of Person to object without being sworn—Jurisdiction of Justices to require Objector to be sworn—Discretion of Justices* — Certiorari — Mandamus.] — On the hearing of an application for a new licence to justices sitting at the general annual licensing meeting, several witnesses were called in favour of and against the granting of the licence, all of whom were sworn and gave their evidence on oath. A resident in the parish then came forward and claimed to make statements in opposition to the granting of the licence, but the justices refused to hear his evidence unless he were sworn. He refused to be sworn, and the justices refused to hear him and granted the provisional licence, which was afterwards confirmed by the confirming committee.

Upon an application for a *certiorari* to quash the provisional licence, or for a *mandamus* to the justices to hear and determine :—

HELD—that *certiorari* was not applicable, on the ground that the justices were not sitting as a court of summary jurisdiction, but were sitting merely for administrative purposes, and that therefore the licence was not a judicial order in respect of which *certiorari* would lie, and on the ground that the applicant had not shown that he was a party aggrieved.

HELD, also (discharging the rule for the *mandamus*), that the justices had a discretion to impose the obligation of an oath upon persons wishing to give evidence, and in the exercise of that discretion they had a right to refuse to hear the objector unless he were sworn.

REX *v.* SHARMAN, EX PARTE DENTON, [1898] 1 [Q. B. 578 ; 62 J. P. 296 ; 67 L. J. Q. B. 460 ; 78 L. T. 320 ; 14 T. L. R. 269 ; 46 W. R. 367 —Div. Ct.

12. *Provisional Licence—Confirmation—Opposition to Confirmation—Rules of Practice imposing Conditions upon Person opposing Confirmation of Grant—Validity of Rules—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *ss.* 37 and 43.]—Sect. 43 of the Licensing Act, 1872, provides that any person who appears before the licensing justices and opposes the grant of a new licence, and no other person, may appear and oppose the confirmation of the grant by the confirming authority, and the section gives the justices of the county in quarter sessions power to make rules as to the proceedings to be adopted for confirmation of new licences.

Under this section a court of quarter sessions made a rule that every person intending to oppose the confirmation of any provisional licence should, within seven days after the grant of such provisional licence, give notice to the applicant and to the clerk of the peace of his intention to oppose the confirmation :—

HELD—that this rule imposed upon the statutory right of the person who had opposed before the licensing justices to oppose before the confirming authority, an additional condition which the statute had not imposed, and that the rule was therefore *ultra vires* and bad.

REG. *v.* LONDON JJ., EX PARTE NEEDES, [1898] 2 [Q. B. 340 ; 62 J. P. 422 ; 67 L. J. Q. B. 618 ; 79 L. T. 156 ; 14 T. L. R. 384 ; 46 W. R. 428 —Div. Ct.

13. *Provisional Licence—Premises in course of Construction—Grant for Seven Years from Date of Final Order after Completion—Jurisdiction of Justices—Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 22 ; *Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 4 (3).]—On February 27th, 1905, justices granted a provisional licence to premises under construction, such licence to be in force for seven years from the date of the declaration by the justices under sect. 22 of the Licensing Act, 1874, that the proposed house had been completed in accordance with the approved plans. On May 17th application was made to the county licensing committee for the confirmation of the licence, but was not entertained on the merits on the ground that it was bad on the face of it, and that it appeared to be a licence for a longer term than seven years.

HELD—that such licence was not void under the Licensing Act, 1904, sect. 4 (3), as being for a longer term than seven years, because a provisional licence is not operative as a licence till the house has been completed and the final order made.

REX *v.* JOHNSTONE AND OTHERS, EX PARTE [COBBOLD, [1906] 1 K. B. 228 ; 75 L. J. K. B. 229 ; 70 J. P. 118 ; 54 W. R. 347 ; 94 L. T. 377 ; 22 T. L. R. 226—Div. Ct.

II. RENEWAL OF LICENCES.

(a) Jurisdiction and Procedure.

And see MAGISTRATES, No. 6.

14. *Appeal—Appearance of Justices—Employment of Justices' Clerk as Solicitor—County Solicitor not employed—Jurisdiction of Quarter Sessions as to Costs—Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 29—*Licensing Act*, 1902 (2 Edw. 7, *c.* 28), *s.* 20.]—The licensing justices in a county where there was a county solicitor paid by salary whose duty it was to represent the justices in all judicial business, including the defence of appeals from their decisions under the Licensing Acts, employed their own clerk as their solicitor in two appeals brought against their refusal to renew two licences. One appeal was successful and the other was dismissed. The quarter sessions expressed the opinion that the licensing justices had acted wrongly in disregarding the general practice to employ the county solicitor, as there were no special circumstances to justify them in departing from it. They held that the extra costs incurred by such a course had not been properly incurred, and, in granting the justices

Renewal of Licences—*Continued.*

their costs on both appeals, disallowed the personal profit charges of the solicitor.

HELD—that the quarter sessions had no jurisdiction to make such an order, and that a *mandamus* must issue to them to hear and determine the application according to law, and that the orders already made must be quashed on *certiorari*.

REX *v.* WEST RIDING JJ., [1904] 1 K. B. 545; 73 [L. J. K. B. 224; 68 J. P. 167; 52 W. R. 540; 90 L. T. 381; 20 T. L. R. 211—Div. Ct.

15. *Appeal—Costs—Taxation out of Sessions Consent—Licensing Act*, 1902 (2 Edw. 7, *c.* 28), *s.* 20.]—Five licensing appeals from the same licensing division were heard at the same quarter sessions and were dismissed. No express consent was given to tax the respondent justices' costs out of sessions. Subsequently the solicitors for the several appellants and the respondent justices met at the office of the clerk of the peace for the purpose of proceeding to the taxation of the several bills of costs. Before the taxation began it was agreed by all the parties present, including the clerk of the peace, that the items which were common to all the respondents' bills should be apportioned against the several appellants. One bill was taxed on this basis. It was then objected on behalf of W., one of the appellants, that there was no consent to tax out of sessions the bill against W.

HELD—that there was evidence of conduct from which consent to tax out of sessions might be implied.

Quære, whether sect. 20 of the Licensing Act, 1902, applies to the taxation of costs between an unsuccessful appellant and respondent justices.

REX *v.* CUMBERLAND JJ., (1904) 68 J. P. 153—[Div. Ct.

16. *Appeal to Quarter Sessions—Costs of Licensing Justices—Payment by Treasurer of County Fund—County Borough not having a Court of Quarter Sessions—"Place"—Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *ss.* 29, 37—*Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 32.]—By the Alehouse Act, 1828, s. 29, the costs of justices are, in the event of a reversal of their decision, to be paid by the treasurer of "the county or place in and for which such justices whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment"; and by sect. 37, "county or place" was defined as including amongst other things "town corporate." There had been a series of decisions showing that "place" meant a place having a separate court of quarter sessions.

The city of Coventry had a separate commission of the peace, but had not had a Court of quarter sessions since 1842, when the Court was abolished by 5 & 6 Vict. c. 110. By the Local Government Act, 1888, Coventry was made a county borough. It was not subject to be rated to the county rate. It paid many contributions from its borough fund to the county fund for certain matters of common expenditure, but it was for general financial purposes separate from the county.

HELD—that, Coventry not having a Court of quarter sessions, and being liable to contribute to quarter sessions expenses, was not a "place" within the meaning of sect. 29 of the Alehouse Act, 1828; that although the Act of 1888 had made very extensive alterations in the relations of boroughs to counties, it had not clearly provided that the liability to the costs of certain justices of Coventry as unsuccessful respondents to an appeal to the quarter sessions against their refusal to renew the licence of a public-house should be transferred from the county of Warwick; and further that, as the city had to contribute to similar costs from other parts of the county, it was only just to assume that the liability was intended to remain with the county of Warwick.

REX *v.* WARWICKSHIRE JJ., [1902] 2 K. B. [101; 71 L. J. K. B. 505; 66 J. P. 549; 86 L. T. 568; 18 T. L. R. 492—Div. Ct.

17. *Application for Renewal — Filling-up Form of Application—Non-attendance.*]—In the division in which the appellant held a licence, persons who wished to obtain renewals had to attend, or be represented, at the general annual licensing meeting. The appellant did not attend, nor was he represented. He had, however, previously filled up, and returned to the clerk to the licensing justices, a form with reference to his licence. This form had been sent to all licensed persons in the division by the clerk to the justices in order that he might, from the returns made thereon, make up the register of licences and comply with the requirements of sect. 36 of the Licensing Act, 1872.

HELD—that this was an application for renewal by the appellant.

CARMAN *v.* ST. MARGARET'S JJ., (1900) 64 [J. P. 488—London Quarter Sessions—W. R. McConnell and other Justices.

18. *Alteration of Premises—Conditional Renewal — Appeal — Jurisdiction of Recorder—Appeal against Order of Borough Justices—Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 27—*Licensing Act*, 1902 (2 Edw. 7, *c.* 28), *s.* 11, *sub-s.* 4.]—The owner of a fully-licensed public-house in the city of Bath applied to the borough justices at the annual licensing sessions for the renewal of the licence. The justices granted the renewal of the licence subject to certain alterations to be made in the licensed premises under the powers conferred on them by the Licensing Act, 1902, s. 11, sub-s. 4. The owner appealed to the quarter sessions for the city of Bath, and the recorder refused to entertain the appeal. Upon a rule *nisi* for a *mandamus* that the recorder should hear and determine it:—

HELD (Kennedy, J., *dissentiente*)—that the appeal lay to the recorder under sect. 27 of the Alehouse Act, 1828, and not to the quarter sessions for the county.

REX *v.* RECORDER OF BATH, [1904] 2 K. B. 570; [73 L. J. K. B. 848; 68 J. P. 438; 91 L. T. 383; 20 T. L. R. 526; 53 W. R. 252—Div. Ct

Renewal of Licences—*Continued.*

19. *Alteration of Premises—Ordered as Condition of Renewal—Closing of Back Entrance—"Part of Premises where Intoxicating Liquor is Sold or Consumed"—Power of Licensing Justices—Licensing Act*, 1902 (2 Edw. 7, *c.* 28), *s.* 11 (4).]—Upon an application for the renewal of a licence, the licensing justices ordered that a back entrance leading to a passage on the licensed premises should be closed. It was proved that no intoxicating liquor was sold at or near the back entrance or in the passage, and no evidence was given that any intoxicating liquors were consumed at the back entrance or in the passage, but it was admitted that there was nothing to prevent such consumption.

HELD—that the licensing justices had jurisdiction, under sect. 11 (4) of the Licensing Act, 1902, to order the closing of the entrance, although it was not in that part of the premises where intoxicating liquor was sold or consumed.

Decision of the Div. Ct. (67 J. P. 409; 51 W. R. 695; 19 T. L. R. 611) affirmed.

BUSHELL *v.* HAMMOND, [1904] 2 K. B. 563; 73 [L. J. K. B. 1005; 68 J. P. 370; 52 W. R. 453; 91 L. T. 1; 20 T. L. R. 413—C. A.

20. *Alteration of Premises — Order for, on Application for Renewal—Keeping a Side Door Locked—Structural Alteration—Jurisdiction of Justices—Licensing Act*, 1902 (2 Edw. 7, *c.* 28), *s.* 11 (4).]—Upon an application for the renewal of a licence, the licensing justices made an order in the case of a licensed house which had entrances into two streets, back and front, that one of the entrance doors to the bottle and jug department of the premises should be nailed up, and that the entrance door to the public bar in the same street should be kept locked and not used except for the private use of the licence-holder and his household.

HELD—that the locking of the door was not a structural alteration, and that the justices had no jurisdiction to make such order under sect. 11 (4) of the Licensing Act, 1902.

Bushell v. *Hammond* ([1904] 2 K. B. 563; 73 L. J. K. B. 1005; 68 J. P. 370; 52 W. R. 453; 91 L. T. 1; 20 T. L. R. 413—C. A., No. 19, *supra*) distinguished.

Decision of Div. Ct. (70 J. P. 157; 94 L. T. 407; 22 T. L. R. 231) reversed.

SMITH *v.* PORTSMOUTH JJ., [1906] 2 K. B. 229; [75 L. J. K. B. 851; 70 J. P. 497; 54 W. R. 598; 95 L. T. 5; 22 T. L. R. 650—C. A.

21. *Alteration of Premises—Substantially New Premises — Refusal to Renew on Ground that House is not Necessary—Wine and Beerhouse Act*, 1869 (32 & 33 Vict. *c.* 27), *s.* 8.]—Where, on an application for the renewal of the licence in respect of a beerhouse licensed before and continuously since the 1st of May, 1869, the licensing justices determine as a fact that, in consequence of alterations completed since the last renewal of the licence, the premises are substantially different from the premises theretofore licensed, they have a discretion to refuse the renewal on the ground that the house is not necessary, having regard to the requirements of the neighbourhood.

Judgment of Div. Ct. (63 J. P. 583) affirmed.

REG. *v.* SHEFFIELD JJ., (1899) 63 J. P. 595—[C. A.

22. *Alterations—Undertaking by Applicant to make alterations—Breach — Evidence of Bad Character.*]—If an applicant for a licence undertakes to effect alterations, and fails (after receiving a licence) to perform his undertaking, the fact may on a subsequent occasion be regarded as evidence of bad character.

R. *v.* DUBLIN JJ., [1903] 2 Ir. R. 429—K. B.

23. *Annual Value of Premises — Premises Licensed before* 1872—*Short Break in Continuity of Licence—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 45.]—A beerhouse, which was first licensed in 1868, was licensed continuously until 1886, when the renewal was refused. The licensee yielded up possession of the house on October 8th to a new tenant, who had not then obtained a transfer of the licence. The licence having expired on October 10th, the new tenant on October 12th obtained a transfer of the licence under the Alehouse Act, 1828, s. 14, and the licence was continuously renewed until September, 1900, when the renewal was refused on the ground that the annual value of the house did not amount to £30, as required by sect. 45 of the Licensing Act, 1872. The annual value of the house exceeded £15.

HELD—that, as the house was licensed at the time of the passing of the Licensing Act, 1872, the requirements of sect. 45 of that Act as to value did not apply to it; and that the break in 1886 made no difference.

Decision of C. A. (*diss.* Cozens-Hardy, L.J.) ([1902] 2 K. B. 467; 71 L. J. K. B. 811; 66 J. P. 644; 51 W. R. 38; 87 L. T. 345; 18 T. L. R. 721) reversed.

Decision of Div. Ct. ([1901] 2 K. B. 740; 70 L. J. K. B. 616; 65 J. P. 583; 49 W. R. 559; 84 L. T. 656; 17 T. L. R. 486) restored.

IGOE *v.* SHANN AND OTHERS, [1903] A. C. 320; [72 L. J. K. B. 693; 67 J. P. 333; 89 L. T. 105; 19 T. L. R. 598; 52 W. R. 111—H. L. (E.).

24. *Beerhouse—No Beer Sold for many Years — Privileged House — Jurisdiction to Refuse Renewal—Wine and Beerhouse Act*, 1869 (32 & 33 Vict. *c.* 27), *ss.* 8, 19.]—A beerhouse was licensed prior to May, 1869, and remained continuously licensed down to 1898, but no beer had been sold in the house for many years. A new tenant, who had become the occupier of the premises, and who intended to carry on the business of the beerhouse, but to whom a transfer of the licence had been refused, applied at the annual licensing meeting for a renewal of the licence.

HELD—that the justices had no jurisdiction to refuse the renewal on the ground that no beer

Renewal of Licences—*Continued.*

had been sold in the house or that the house was not required by the neighbourhood, but that they were limited by sect. 19 of the Wine and Beer-house Act, 1869, to the four grounds specified in sect. 8 of that Act.

MACKRELL *v.* BRENTFORD JJ., [1900] 2 Q. B. [387; 69 L. J. Q. B. 748; 64 J. P. 663; 48 W. R. 648; 83 L. T. 31; 16 T. L. R. 439—Div. Ct.

25. *Evidence—House not Required in Locality—Appeal—Ordnance Map Showing Number of Public-houses in Immediate Vicinity—No Notice to Other Houses—Population Thick—Neighbourhood Troublesome to Police—Sufficiency of Evidence—Judicial Discretion.*]—Licensing justices objected to, and then refused, the renewal of a licence to a fully-licensed public-house. The only ground of objection in the notice of objection was "that the said licence is not required in the locality and neighbourhood." The tenant and owners of the public-house appealed to quarter sessions, which upheld the decision of the justices. At the hearing a marked ordnance survey map was produced which showed that there was a very large number of both fully-licensed houses and beerhouses in the immediate vicinity of the public-house in question. Evidence was also given that no notice of objection had been served upon any of these houses except on the house in question, either prior or subsequent to the annual licensing meeting; that the neighbourhood was thickly populated; that the house had been fully licensed ten years, and during that period the character of the neighbourhood had not altered, except that the population had increased. Evidence was also given that the neighbourhood was a troublesome one to the police. No further evidence was adduced by the respondents. On appeal to the High Court it was

HELD—that there was no evidence upon which the Court of quarter sessions could properly come to the conclusion that the public-house was not required for the neighbourhood and locality.

Per Kennedy, J., dissenting—there was some evidence on which the Court could act.

RAVEN AND ANOTHER *v.* SOUTHAMPTON JJ., [1904] 1 K. B. 430; 73 L. J. K. B. 282; 68 J. P. 68; 52 W. R. 574; 90 L. T. 94; 20 T. L. R. 146—Div. Ct.

26. *Evidence—House not Required—Notice to Licensee—Evidence of Differentiation between House and House—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 42—*Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 26—*Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 1 (2).]—Where on an application for renewal the justices of a licensing district are forming their opinion as to whether the renewal of an on-licence requires consideration on a ground other than that on which the renewal of an existing on-licence can be refused by them, namely, that the licensed house is not required for the needs of the neighbourhood, and as to whether they shall refer the matter to quarter sessions with their report thereon under sect. 1 (2) of the Licensing Act, 1904:—

HELD (1)—that both on principle and the licensing legislation previous to 1904 notice must be given to the licensee of the house under consideration and an opportunity afforded him of attending, tendering evidence and cross-examining the witnesses.

(2) That the justices' opinion must be based on evidence on oath.

(3) That it is not necessary in every case that the licensing justices should have detailed evidence with regard to the differentiation between public-house and public-house, such as the majority of the Court thought necessary in *Raven* v. *Southampton JJ.* Evidence of the character of the district, the locality of the house under consideration and of the neighbouring public-houses, and the number of public-houses in the district, would be sufficient to justify the justices in making a report to quarter sessions.

(4) That the justices are not bound to exclude their own knowledge of the locality upon such questions as the character of the neighbourhood, the amount of population, and the habits of the inhabitants.

Raven v. *Southampton JJ.* ([1904] 1 K. B. 430; 73 L. J. K. B. 282; 68 J. P. 68; 52 W. R. 574; 90 L. T. 94; 20 T. L. R. 146—Div. Ct., *supra*) discussed.

REX *v.* TOLHURST AND OTHERS; R. *v.* COX AND [OTHERS, [1905] 2 K. B. 478; 74 L. J. K. B. 652; 69 J. P. 308; 53 W. R. 619; 93 L. T. 76; 21 T. L. R. 553—Div. Ct.

27. *Evidence—House not Required—Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 1.]—An objection to the renewal of an on-licence stated that a fully-licensed house was not required at the place where the licensed house was situated, and that having regard to the character and necessities of the neighbourhood and the number of licensed houses, the licence was unnecessary. The licensing justices referred the matter to quarter sessions under sect. 1, sub-sect. 2, of the Licensing Act, 1904, and the quarter sessions, after hearing evidence as to the condition of the house and its business, and that the public would not suffer any inconvenience if it were closed, refused the renewal.

HELD—that, assuming that the quarter sessions, when acting under sect. 1, sub-sect. 2, of the Act, were sitting as a Court in a judicial capacity, there was evidence upon which they could refuse the renewal of the licence, there being evidence to show that the licensed house objected to was the superfluous house.

REX *v.* DRINKWATER AND OTHERS, EX PARTE [CONWAY, (1905) 22 T. L. R. 12—C. A.

28. *Evidence—House not Required—Evidence of Differentiation from Licensed Houses in the Neighbourhood—Licensing Act*, 1904 (4 Edw. 7, *c.* 23).]—The justices of a county borough referred the licence of a beerhouse to the whole body of justices acting in and for the borough as the

Renewal of Licences—*Continued.*

compensation authority. The compensation authority had before them evidence showing that the takings of the beerhouse were small, that the rooms of the beerhouse were small, that there were fifteen other licensed houses within a radius of 200 yards, and that the rateable value was smaller than the rateable value of other houses in the neighbourhood.

HELD—that there was evidence before the compensation authority of differentiation from the other licensed houses in the neighbourhood upon which they were entitled to extinguish the licence.

REX *v.* JOHNSON AND OTHERS, (1907) 71 J. P. [59—Div. Ct.

For other cases as to differentiation *see under* (b) Compensation on Refusal.

29. *Grant of Provisional Licence—Qualification of Applicant for Licence—Person "Keeping or being About to Keep" an Inn—"Real Resident Holder and Occupier" of Beerhouse—Bias on Part of Justices—Licence Preserved for Purposes of Compensation—Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 1—*Beerhouse Act*, 1840 (3 & 4 Vict. *c.* 61), *s.* 1—*Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 1.]—Licensing justices have a discretion to grant a licence for the sale of intoxicating liquor to any person whom they consider a fit and proper person, and such a licence is not void under sect. 1 of the Alehouse Act, 1828, if granted to a person who is not "keeping or about to keep" an inn, alehouse, or victualling house.

A beerhouse licence is not void under sect. 1 of the Beerhouse Act, 1840, if granted to a person who is not the real resident.

The corporation of Leeds acquired, for the purposes of demolishing them, certain licensed houses under an Act confirming a scheme for clearing an unsanitary area under the Housing of the Working Classes Act, 1890. The licensing justices entered into an arrangement with the corporation whereby the licensing justices undertook to refer the licences in question to the compensation authority under the Licensing Act, 1904. The corporation thereupon closed the houses and put scavengers into them as caretakers. At the general annual licensing meeting the scavengers applied for the renewal of the licences, and objection was made on behalf of certain brewers to the renewal of the licences on the ground, in the case of alehouses, that the applicants were not "persons keeping or about to keep" inns within the meaning of sect. 1 of the Alehouse Act, 1828, and, in the case of beerhouses, that they were not the "real resident holders and occupiers" of the houses within the meaning of sect. 1 of the Beerhouse Act, 1840. The licensing justices themselves objected to the renewals on the ground that the licences were not required. The licensing justices overruled the brewers' objections, and, acting upon their own objections, renewed the licences provisionally, and referred them to the compensation authority.

HELD—that the licences granted were not void; and that the licensing justices had power, if they thought fit, in the exercise of their honest discretion, to refer the licences to the compensation authority, and that as they had acted honestly in this case, no objection could be taken to what they had done.

Decision of C. A. (*sub nom. R.* v. *Woodhouse, Ex parte Ryder*) ([1906] 2 K. B. 501; 75 L. J. K. B. 745; 70 J. P. 485; 95 L. T. 367; 22 T. L. R. 603) reversed.

LEEDS CORPORATION *v.* RYDER AND OTHERS, [1907] A. C. 420; 76 L. J. K. B. 1032; 71 J. P. 484; 97 L. T. 261; 23 T. L. R. 721—H. L. (E.).

30. *Imposing Conditions—Legality—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 48, *sub-s.* 1.]—A restaurant was attached to a hall used for theatrical and other entertainments. The licensing justices were willing to renew a licence for the restaurant for the sale on and off the premises of intoxicating liquors on the following conditions, viz.:—(1) The buffet was only to be used when entertainments were going on, or as a *bonâ fide* restaurant; (2) ladies were not to be served after 9 p.m. unless they had been present at an entertainment; (3) entrance to a bar in the basement was to be from the buffet on the ground floor only and not from the street.

HELD—that the licensing justices had no power to attach such conditions to a licence.

STEPHENS AND OTHERS *v.* BRENTFORD LICENSING JJ., (1901) 65 J. P. 345—Middlesex Quarter Sessions.

31. *Imposing Conditions—Conditions Endorsed on Licence—Refusal to Deliver Licence till Undertaking Given*—Mandamus—*Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *ss.* 1, 9.]—Upon an application for the renewal of an on-licence, to which none of the grounds of refusal specified in sect. 1 (1) of the Licensing Act, 1904, apply, the licensing committee have no power to require as a condition of renewal that the licensee shall give an undertaking as to the management of the business.

Decision of Div. Ct. (69 J. P. 185; 53 W. R. 377; 21 T. L. R. 366) reversed.

REX *v.* DODDS AND OTHERS, [1905] 2 K. B. 40; 74 [L. J. K. B. 599; 69 J. P. 210; 53 W. R. 559; 93 L. T. 319; 21 T. L. R. 391—C. A.

32. *Imposing Conditions — Jurisdiction of Justices — Refusal of Renewal* — Mandamus — *Appeal—Wine and Beerhouse Act*, 1869 (32 & 33 Vict. *c.* 27), *s.* 8—*Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 9 (2).]—The registered owners and tenant of a licensed house applied for a *mandamus* to the justices to hear and determine an application by the tenant for a renewal of a licence, and, in the alternative, to issue to the tenant the licence without requiring him to enter into any undertaking. The house in question had been licensed continuously as a beerhouse before and since May 1st, 1869. At the meeting the justices required as a condition of the renewal of the licence an undertaking that no intoxicating liquor should be sold except for cash.

Renewal of Licences—*Continued.*

The tenant and owner refused to give such undertaking.

HELD—that as the house had been continuously licensed since 1869, the justices had no jurisdiction to impose such a condition or to refuse the renewal except upon one of the four grounds set out in the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 8.

REX *v.* GRIMWADE AND OTHERS, [1905] 2 K. B. [50 (n.); 69 J. P. 184; 53 W. R. 377; 21 T. L. R. 366—Div. Ct.

33. *Notice of Objection — Sufficiency of — General Annual Licensing Meeting — Head Constable's Report — Renewal withheld till Adjourned Meeting—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 42.]—At the general annual licensing meeting of a division in which a certain beerhouse was situated, a report made by the head constable of the division was read, in which he asked that the renewal of the licence of the beerhouse should be withheld until the adjourned meeting. No notice of opposition to the licence had been served on the licence-holder prior to the meeting, nor had he had notice to attend at the meeting. The justices thereupon adjourned the granting of the licence, and gave notice to the licence-holder to attend at the adjourned meeting.

HELD—that an objection was made within the meaning of sect. 42 (2) of the Licensing Act, 1872, and that the justices had jurisdiction to consider the objection of the head constable at the adjourned meeting.

HAWKINS AND OTHERS *v.* BRIDGWATER [JJ., [[1900] 2 Q. B. 382; 69 L. J. Q. B. 663; 64 J. P. 631; 48 W. R. 587; 82 L. T. 847; 16 L. T. 404—Div. Ct.

34. *Notice of Objection — Subsequent Transfer —No Notice of Objection Served on Transferee— Application by Transferee for Renewal — Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 42.]—The licence of a public-house was held at the date of the general annual licensing meeting by one R., and no notice of objection having been served upon him, objection to the renewal was made by the respondent justices in open court under sect. 42 of the Licensing Act, 1872, and the application was adjourned to the adjourned meeting.

A notice of objection to the renewal was then served on R. by direction of the respondents. R. afterwards quitted the premises, and a temporary authority to sell was, under sect. 1 of the Licensing Act, 1842, granted to the appellant, L., who thenceforward carried on the business on the premises under the temporary authority and the licence. At the adjourned meeting a transfer or grant of the licence for the remainder of the licensing year was made to L. under sect. 14 of the Alehouse Act, 1828, and after such grant he there and then applied for its renewal to him. No notice of objection had been served upon L., but the respondent justices heard evidence in support of the objection served on R., and refused to renew the licence.

On appeal to quarter sessions the appeal was dismissed.

HELD—reversing the decision of quarter sessions, that either a notice of objection ought to have been served on the appellant L., or the justices should have proceeded by objection taken in open court and by subsequent adjournment; that the notice served on R. was of no effect as regards L., and that the licence must be renewed.

BLENCOWE & CO., LD., AND OTHERS *v.* [STAFFORDSHIRE JJ., (1907) 71 J. P. 210; 96 L. T. 817—Div. Ct.

35. *No Objection—Adjournment of Application — Objection Taken by Justices — Refusal of Renewal*—Mandamus—*Form of—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 42.]—At a licensing meeting no notice of any objection to the renewal of the applicant's licence was given and no objection was made, but the justices adjourned the consideration of the renewal of certain licences, including the appellant's, to a future day. No notice to attend on such day was served upon the applicant, and no notice of objection was given him. The justices refused the renewal.

HELD—that in such case the justices would have no jurisdiction except to renew the licence, but that a *mandamus* could only go to them to hear and determine the case according to law, and not to order them to grant the renewal.

REX *v.* KINGSTON JJ., (1902) 66 J. P. 547; 86 L. T. [589; 18 T. L. R. 477—Div. Ct.

36. *No Objection served before date of General Meeting—Objection taken by Justices in Court — Adjournment — Notice of Objection — Notice by Justices to attend — Sufficiency of Notices — Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 42.] —The applicant for renewal of a licence attended on the day fixed for the general annual licensing meeting and applied for the renewal. No notice to attend or notice of objection had been served upon the applicant prior to that day, but at the meeting an objection was taken by the justices themselves, who thereupon adjourned the case, and more than seven days before the date of the adjourned meeting a written notice to attend by the authority, and on behalf of the justices, was served upon the applicant, and a written notice of objection was served by objectors stating the grounds of objection, which included the objection taken by the justices, but this notice of objection did not purport to be served by the authority of the justices.

The licensing justices heard the objections and refused to renew the licence.

HELD—that it was competent for the licensing justices, under sect. 42, sub-sect. 2, of the Licensing Act, 1872, to raise an objection themselves at the licensing meeting and then adjourn the case; that the notices served were sufficient under the section, and that the justices had jurisdiction at the adjourned meeting to refuse the renewal.

BAXTER *v.* LECHE, (1898) 62 J. P. 630; 79 L. T. [138; 14 T. L. R. 352—Div. Ct.

Renewal of Licences—*Continued.*

37. *Objection—Grounds of—Rates Unpaid by Previous Tenant—Evidence—Refusal to Renew.*]—The tenant of a public-house omitted, upon giving up possession, to pay the quarter's rate then due. A new tenant went into occupation of the premises, and at the following adjourned general annual licensing meeting, the renewal of his licence was objected to by the borough council, on the ground that he had neglected or omitted to pay or cause to be paid the aforesaid rate due to the borough council. The justices refused to renew the licence.

HELD—that the Court of quarter sessions were bound by the notice of objection and could not hear any evidence against the renewal not coming within the grounds of objection stated in such notice.

HELD, further, that the non-payment of the rate due from a previous tenant was not sufficient reason for the refusal of the licence.

FEIST *v.* TOWER JJ., (1904) 69 J. P. 264—[Qr. Sess.

38. *Objection—Licensing Justices being Objectors—Bias of Justices—Granting or Refusing Licence not a "lis"—Objector not a "Party"—Receiving Representations not on Oath—Justices' Discretion*—Mandamus—*Alehouse Act*, 1828 (9 Geo. 4, *c.* 61)—*Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 42—*Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 26.]—In the granting or refusing of renewals of licences the justices do not sit as a Court; the transaction itself is in no sense a "lis" to which there are parties. The objector is not a "party;" his function is merely to inform the mind of the tribunal to enable it rightly to exercise its discretion whether to grant the privilege of a licence or not.

In February, 1901, a letter was addressed by the clerk of the peace of the county to the clerk of the Farnham justices informing him that the attention of the county licensing committee had been called to the large number of licences existing in the parish of Farnham and Farnham Royal, pointing out that the proportion was largely in excess of any other parish in the county, and stating that it was the opinion of the committee—that is, the confirming committee—that steps should be taken whereby the licences of a substantial number of such houses should be discontinued, and inviting the justices to consider this question at their next annual licensing meeting. The justices appointed a committee to consider the question. Upon a report of this committee, it appeared (*inter alia*) that they were of opinion that the only fair and satisfactory way of dealing with the question was to cause objections to be served on all the owners of licensed houses, so that the case of each of them might be formally inquired into, and for this purpose authority was given to the justices' clerk to object to such renewals on the general ground that the houses were not required, and also on special grounds set out in the notice. The general annual licensing meeting was adjourned, and instructions were given to the deputy clerk to serve formal notice in forty-four cases, requiring the licensees to attend in person and state the grounds of objection.

When the cases came on for hearing, at the adjourned meeting, evidence on oath was in each case given in support of the objections, and questions were put by the chairman based on the facts collected by the committee. A copy of the report itself was placed by the justices in the hands of counsel for the applicants. The justices refused nine of the applications.

HELD—that, in respect of the applications, the justices, not being a judicial body, could receive representations not on oath; that the justices could make or cause to be made an objection, provided they adjourned for the purpose of hearing it, and caused the necessary notice to be served requiring attendance upon a future day; that the standard to be applied in considering the question of bias must be one which admits the right of the justices to be at one and the same time objectors and judges, in the sense in which they were judges in such matter; that the justices simply took the only or the best available course to enable matters vital to the exercise of their discretion to be formllay and fairly considered openly before them; that they were within their rights in doing what they did, and were not debarred from sitting and deciding upon the question of renewals; that there was nothing to invalidate the justices' decision; and that a *mandamus* must be refused.

Decision of Div. Ct. ((1902) 50 W. R. 573; 18 T. L. R. 614) affirmed.

REX *v.* HOWARD, [1902] 2 K. B. 363; 71 L. J. K. B. [754; 66 J. P. 579; 51 W. R. 21: 86 L. T. 839; 18 T. L. R. 690—C. A.

39. *Off Licence—Restricted Licence—Refusal to renew—Legality of Endorsement of Restriction on Beer Licence.*]—An occupier of premises having been granted an "off licence" to sell beer, wine, and spirits, with the condition endorsed on the licence that the beer should be sold in bottles and casks only, he, nevertheless, erected a beer engine and sold draught beer. That fact having been brought to the notice of the licensing justices, they refused to renew the licence on the ground that he had evaded the conditions upon which the licence was granted. The Court of quarter sessions expressed the opinion that the action of the licensing justices was legal, and dismissed the appeal with regard to the beer licence, but allowed the renewal of the wine and spirit licence.

TAIT *v.* NEWINGTON JJ., (1901) 65 J. P. 296—[London Quarter Sessions, McConnell, K.C.

40. *Refusal — Appeal — Licensing Justices appearing on Appeal—Power of Quarter Sessions to order Licensing Justices to pay successful Appellant's Costs—Indemnity Order—Costs of certiorari and* mandamus—*Alehouse Act*, 1828 (9 Geo. 4, *c.* 61). *ss.* 27, 29.]—The Court of quarter sessions, on an appeal from the refusal of licensing justices to renew a licence, have no power under sect. 27 of the Alehouse Act, 1828, or otherwise, to order the

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licensing justices who appear before them and oppose the renewal, to pay the appellant's costs when the appeal is allowed, as in such a case the licensing justices are not "litigant parties" to the appeal against whom an order for costs can be made.

Where the quarter sessions have ordered the licensing justices to pay the costs of the appeal, and have refused an application for an indemnity order under sect. 29 of the Act, and the licensing justices have obtained writs of *certiorari* to quash the order and *mandamus* to hear the application for an indemnity order, the licensing justices are entitled to have the costs of the *certiorari* and *mandamus* included in the indemnity order.

Rule for a *certiorari*.

R. *v.* Staffordshire JJ. and Longhurst, [1898] 2 Q. B. 231 ; 62 J. P. 741 ; 67 L. J. Q. B. 931 ; 79 L. T. 142 ; 14 T. L. R. 450—Div. Ct.

41. *Refusal — Appeal to Quarter Sessions — Appeal Dismissed — Costs of Justices — Right to Indemnity Costs* — Mandamus—*Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 29.]—Licensing justices refused to renew a licence. The applicants appealed to quarter sessions and served notices of appeal upon the licensing justices, who appeared on the hearing by counsel, by whom witnesses were called and the Court was addressed in opposition to the renewal of the licence. The appeal was dismissed, but the Court refused to entertain an application for an order for the payment of the justices' costs by the applicants.

Held—that sect. 29 of the Alehouse Act, 1828, made it imperative that the Court of quarter sessions should, upon the appeal being dismissed, entertain an application by the licensing justices for an order that the appellants should pay to the justices such sum by way of costs as would, in the opinion of the Court, be sufficient to indemnify such justices from all costs and charges to which they had been put in consequence of being served with notice of the appeal.

Reg. v. *London Justices* ([1895] 1 Q. B. 616 ; 64 L. J. M. C. 100 ; 59 J. P. 820 ; 43 W. R. 387 ; 72 L. T. 211 ; 14 R. 246—C. A.) not followed.

Reg. *v.* Worcestershire JJ., [1900] 2 Q. B. [576 ; 69 L. J. Q. B. 826 ; 64 J. P. 707 ; 49 W. R. 89 ; 83 L. T. 272—C. A.

42. *Refusal — Appeal to Quarter Sessions — Non-appearance of Licensing Justices — Right of Objector to be heard — Appellant's Proof — Procedure — Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 42—*Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 27.] —The licensing justices in considering the question of the renewal of a licence came to the conclusion that it was not a proper case for a renewal. Notices of appeal were served on the justices and the objector. When the appeal came on to be heard at quarter sessions it was ruled that an objector had a *locus standi*. He was not, however, afterwards called. The licensing justices did not appear. The appellant's counsel confined himself to proving his notices. The Court, without hearing any evidence on behalf of the respondents, or in opposition to the renewal of the licence, dismissed the appeal and refused to renew the licence.

Held—that the quarter sessions were not entitled to refuse to grant such renewal without any evidence whatever being given as to why such renewal should not be granted.

Ruddick v. *Liverpool JJ.* ((1876) 42 J. P. 406) followed.

Decision of Div. Ct. ([1900] 2 Q. B. 5 ; 69 L. J. Q. B. 346 ; 64 J. P. 453 ; 16 T. L. R. 190) reversed.

Evans *v.* Conway JJ., [1900] 2 Q. B. 224 ; 69 [L. J. Q. B. 636 ; 64 J. P. 467 ; 48 W. R. 577 ; 82 L. T. 704 ; 16 T. L. R. 425—C. A.

43. *Report by Justices of Licensing District — Consideration of Question of Renewal by County Licensing Committee — Evidence of Matters outside Report — Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s* 1 (2).]—Where the justices of a licensing district refer to quarter sessions the question of the renewal of an existing on-licence under sect. 1 (2) of the Licensing Act, 1904, the evidence which quarter sessions are entitled to take into consideration in deciding the question of renewal need not be confined to evidence of the matters contained in the report.

Decision of Div. Ct. ([1907] 2 K. B. 340 ; 76 L. J. K. B. 718 ; 71 J. P. 242 ; 96 L. T. 701 ; 23 T. L. R. 474) affirmed.

Howe *v.* Newington JJ., [1908] 1 K. B. 260 ; [77 L. J. K. B. 263 ; 24 T. L. R. 174 ; 72 J. P. 12 ; 98 L. T. 79—C. A.

44. *Sale on or off the Premises — Certificate as to "the peaceable and orderly manner in which such house has been conducted in the past year" — Spirits (Ireland) Act*, 1854 (17 & 18 Vict. *c.* 89), *s.* 11—*Obligation to Supply reasonable Refreshment to all comers.*]—D. & Co., large distillers and wholesale and general family wine and spirit merchants, held for many years an ordinary retail licence for consumption of spirits "on or off the premises" in respect of their place of business in Belfast. Upon their application in 1899 to the justices of petty sessions for a renewal of this licence, objection was made by the officer of police that the premises had not been "conducted" as licensed premises in the past year. Save that some six half-glasses of whisky had been sold and consumed thereon, there was no evidence of any trade as publicans being carried on by the applicants of supplying the public with intoxicating liquor for consumption *on* the premises, but there was evidence that a large trade was done in sending out and delivering from time to time to customers spirits in quantities between two gallons and two quarts—a trade not covered either by applicants' wholesale licence : Spirits Act, 1880 (43 & 44 Vict. c. 24, ss. 102, 104) ; or their licence as spirit grocers : Spirits (Ireland) Act, 1845 (8 & 9 Vict. c. 64, s. 1).

Held, on application for a *certiorari* to quash the grant of a certificate by the justices—that, the premises not having been conducted as

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licensed premises for the consumption of intoxicating liquors *on the premises* during the preceding year, it was not competent to the sessions to grant a certificate as to the peaceable and orderly manner in which the same had been conducted, *as licensed premises*, in that period.

Reg. v. *Recorder of Dublin* ((1885) 16 L. R. Ir. 424) and *Reg.* v. *Armagh Justices* ([1897] 2 Ir. R. 57) applied.

Quære, as to the liability of a licensed publican to supply reasonable refreshment.

Reg. *v.* Antrim JJ., [1900] 2 I. R. 492—[Q. B. Div.

45. *Transfer Opposed—Renewal Opposed on same Grounds—No Estoppel—Wine and Beerhouse Act*, 1869 (32 & 33 Vict. *c.* 27), *ss.* 8, 19.]—The appellant applied to transfer sessions for the transfer to him of the licence of a certain beerhouse. The police opposed the transfer on one of the grounds set out in sect. 8 of the Wine and Beerhouse Act, 1867, namely that the house was of a disorderly character, and they produced in proof the certificate of a conviction of the previous tenant for permitting betting on the premises. The transfer was granted. At brewster sessions the same applicant applied for a renewal, and the police opposed the renewal on the same ground. The renewal was refused.

Held—that the justices at brewster sessions were not estopped from refusing the renewal because the ground on which it was opposed was the same as that on which the transfer had been opposed at transfer sessions. Appeal dismissed.

Smith *v.* Shann, [1898] 2 Q. B. 347; 67 L. J. [Q. B. 819; 79 L. T. 77; 14 T. L. R. 443—Div. Ct.

46. *Unfitness of Applicant—Absence of Objection—Justices acting on their own Knowledge.*]—An applicant for the renewal of a publican's licence appeared at the annual licensing sessions in a drunken and riotous state, and had that same day, and before the same bench, pleaded guilty to several charges of drunkenness and disorderly conduct.

Held—that the justices were at liberty to act (though no objection was raised) on their own knowledge of his character so derived, and to refuse the application.

Reg. *v.* Carlow JJ., [1902] 2 I. R. 142—[Q. B. Div.

(b) Compensation on Refusal.

47. *Appeal from Compensation Authority in County Borough to Quarter Sessions of the County—Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 27—*Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *ss.* 1 (1), 5, 8.]—No appeal lies to the quarter sessions of the county from the whole body of justices acting in and for a county borough sitting as a compensation authority under the Licensing Act, 1904.

R. *v.* Southampton JJ., Ex parte Fuller [and Donkin, [1906] 1 K. B. 505; 75 L. J. K. B. 322; 70 J. P. 137; 54 W. R. 530; 94 L. T. 442; 22 T. L. R. 345—Div. Ct.

48. *Compensation—Assessment of—Principles to be Adopted—Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 2.]—The Court laid down and explained the principles to be applied in determining the amount of compensation to be paid in the case of reported licences. In such a case the tribunal must ascertain the price of the licensed premises in the open market, then add to that the depreciation, if any, of the trade fixtures caused by the renewal being refused, and must deduct from that sum the price which the premises would fetch in the open market if unlicensed. In order to ascertain the price of the licensed premises in the open market, if the premises are let at a rack-rent, the rack-rent should be capitalised; if the premises are owned by a brewer and let to a tenant as a tied house at less than a rack-rent, the rent payable and the profits derived from the sale of liquor on the premises form the basis of the valuation. To arrive at the profits from the sale of liquor evidence of the amount and quality of the liquors supplied to the house over a fair period of time is admissible as well as evidence of the position and structural condition of the premises and the character of the district. The evidence as to profits must not include facts of a personal or special character, but only such as are normal and ordinary. The annual profits and the annual rent must be capitalised, but the number of years' purchase to be adopted will vary with the character of the premises, the circumstances of the locality, the prospects of business, the general state of the liquor trade, and the competition in the market for a similar class of property. In the valuation nothing should be included in respect of the tenant's interest in the licensed premises.

In re Ashby's Cobham Brewery Co., [1905] [2 K. B. 754; 75 L. J. K. B. 983; 70 J. P. 372; 95 L. T. 260; 22 T. L. R. 725—Kennedy, J.

49. *Compensation — Claims to — Right of Lessees and Mortgagees—Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 2.]—A brewery company by a trust deed conveyed (*inter alia*) a licensed house, of which they were the lessees, to trustees for debenture-holders as security for the repayment of the debentures. The charge created was a floating charge, and the trustees were to permit the company to hold the premises and to receive the rents and profits thereof, and to carry on thereon any business authorised by the memorandum of association until the security should become enforceable, and in that event the trustees might enter and take possession of the premises and receive the rents and profits thereof. The renewal of the licence was subsequently refused, and in respect thereof compensation was awarded to the company under sect. 2 of the Licensing Act, 1904.

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HELD—that the trustees, as mortgagees, were entitled to receive the compensation money, but that, as the security was not yet enforceable, the money must be invested and the interest thereon paid to the company.

LAW GUARANTEE AND TRUST SOCIETY, LD. *v.* [MITCHAM AND CHEAM BREWERY CO., [1906] 2 Ch. 98; 75 L. J. Ch. 556; 54 W. R. 551; 94 L. T. 809; 22 T. L. R. 499—Kekewich, J.

50. *Compensation—Claims to—Company—Trustees for Debenture Holders—Right to Receive Compensation Money—Reinvestment in Other Licensed Premises.*]—A brewery company mortgaged their properties to trustees for debenture-holders. By clause 20 of the trust deed, at any time before the security became enforceable the trustees might, if in their opinion the stock-holders would not be prejudiced thereby, upon the application and at the expense of the company (*inter alia*), settle, adjust, refer to arbitration, compromise and arrange all accounts, reckonings, controversies, questions, claims and demands whatsoever, open, unsettled, or pending with any person or persons in relation to the mortgaged premises, and also generally act in relation to the mortgaged premises in such manner as the trustees might think expedient in the interest of the stock-holders. By clause 21 the trustees were to hold all net capital monies arising under clause 20 upon trust (*inter alia*), to lay out the same, if they should think fit, in the purchase of other property convenient for the purposes of the company, including freehold, leasehold, and copyhold hereditaments, but so that they should become subject to all the trusts, powers, and provisions of the deed. Clause 25 was the usual trust investment clause.

The security not having become enforceable, a compensation authority approved the payment of £2,813 compensation money to the company in respect of the licence of one of the mortgaged beerhouses referred to and refused by them. The trustees did not appear before the compensation authority as "parties interested," but concurred in an arrangement that the company should appear.

It was agreed on the hearing of an originating summons taken out by the trustees against the company that on the authority of *Law Guarantee Society, Ld.* v. *Mitcham and Cheam Brewery Co., Ld.* ([1906] 2 Ch. 98, 104; 75 L. J. Ch. 556; 54 W. R. 551; 94 L. T. 809; 22 T. L. R. 449—Kekewich, J., *supra*), the £2,813 compensation money must be paid over to the trustees. It was:—

HELD—that the question of compensation was a "controversy" in relation to the licensed premises, and that the £2,813 compensation monies were capital monies arising under clause 20, and could under clause 21 be invested by the trustees in the purchase of other licensed premises.

NOAKES *v.* NOAKES & CO., LD., [1907] 1 Ch. 64; [76 L. J. Ch. 151; 71 J. P. 130; 95 L. T. 606; 23 T. L. R. 16; 14 Manson, 28—Neville, J.

51. The debenture trust deed of a brewery company provided that until the security became enforceable the trustees might sell and convert or concur in selling and converting the property included in the deed, and should hold the capital monies arising therefrom upon trust to lay the same out (*inter alia*) in the purchase of other licensed premises suitable for the company's business.

HELD—that compensation money paid under the provisions of the Licensing Act, 1904, was capital money and might be laid out by the trustees in the purchase of other licensed premises.

Law Guarantee and Trust Society v. *Mitcham and Cheam Brewery Co.* ([1906] 2 Ch. 98; 75 L. J. Ch. 556; 54 W. R. 551; 94 L. T. 809; 22 T. L. R. 449—Kekewich, J., No. 49, *supra*) explained.

Noakes v. *Noakes & Co.* (*supra*) approved.

DAWSON *v.* BRAIME'S TADCASTER BREWERIES, [LD., [1907] 2 Ch. 359; 76 L. J. Ch. 588; 97 L. T. 83; 14 Manson, 254—Kekewich, J.

52. *Compensation—Division of—Lessor and Lessee who is a Brewer—No Covenant to Maintain Licence—Basis of Apportionment—Reference of Apportionment to County Court—Appeal—Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 2 (1), (2), (3).]—Where the question of the division of an amount of compensation between the parties interested in a licence, which has been refused under sect. 2 (1) of the Licensing Act, 1904, is referred to a county court judge under sect. 2 (3) of that Act, an appeal from his decision on a point of law lies to the High Court.

In dividing such a sum between the lessees for a term and the reversioner, regard must be had to the contractual relations between the parties. If there is nothing in the lease or in the character of the property demised which will lead to the value of the property being lessened when the reversion accrues—if there is nothing to waste the property—the division will be according to the extent and duration of the respective interests—proportions determined by actuarial calculation.

Accordingly, where the persons interested, amongst whom such a sum of £603 is to be apportioned, are the lessors, the lessees at a peppercorn rent for a term of seventy-five years, of which twenty were unexpired when the licence was extinguished, and the licensee, a tenant of the lessees (who by agreement was to receive £75 to be paid rateably by the two other parties) of an *ante*-1869 beerhouse; and where the lessees are under no covenant to maintain the licence, but are under covenant to keep the premises in repair, this sum must be apportioned to give the lessees the present value of an annuity for twenty years and the lessors the present value of the deferred capital, the interest on which would produce that annuity, calculated at the rate in this country for money foreborne, where there is no risk—in this case agreed at 4 per cent.—and the amounts will be, after deduction

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of the £75, to the lessees £287 4*s.* and to the lessors £240 16*s.*

LIVERPOOL CORPORATION *v.* PETER WALKER & SON, LD., (1907) 71 J. P. 524—Div. Ct.

53. *Compensation Charge—Exemption from Chargeability at maximum Rate—Hotel—Portion of Premises of greater Annual Value than £25 set apart and used as a Public-house—Used for Purpose to which Holding a Licence is Auxiliary—Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *Sched.* 1—*Inland Revenue Act*, 1880 (43 & 44 Vict. *c.* 20), *s.* 43.]—Where a portion of the premises of an ordinary large hotel is set apart and used as a public-house, and the annual value of such portion is more than £25, so that sect. 3 of the Inland Revenue Act, 1880, does not apply to it, the hotel cannot be exempted from chargeability to the Compensation Fund under the Licensing Act, 1904, at the maximum rate. Such an hotel does not come within the words "used . . . . for any other purpose to which the holding of a licence is merely auxiliary" in the note to the first schedule to the Act.

R. *v.* CARTER AND OTHERS, [1907] 1 K. B. 298; [76 L. J. K. B. 137; 71 J. P. 60; 95 L. T. 910; 23 T. L. R. 25—Div. Ct.

54. *Compensation Charge—Licence Referred to Quarter Sessions—Licence Not Renewed—Right to Recover Payment—Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 1.]—A licence which has been referred to quarter sessions under sect. 1 of the Licensing Act, 1904, and which has, therefore, been provisionally renewed, is not an "existing on-licence renewed" unless quarter sessions decide not to refuse the renewal of it, and hence no charge is payable in respect of such licence to the compensation fund.

MALKIN *v.* REX, [1906] 2 K. B. 886; 75 L. J. K. B. [884; 70 J. P. 506; 95 L. T. 448; 22 T. L. R. 807—Walton, J.

55. *Compensation Charge—Period for which Paid—Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 3.]—The compensation charge imposed "in each year" by quarter sessions on all existing on-licences under sect. 3 of the Licensing Act, 1904, is paid in respect of the year dating from April 5th.

HORTON *v.* PENN, [1907] 1 K. B. 561; 76 [L. J. K. B. 340; 71 J. P. 115; 96 L. T. 228; 23 T. L. R. 290—Div. Ct.

56. *County Borough—"Whole body of Justices"—Minority of Justices present—Refusal to Renew—Jurisdiction—Licensing Rules*, 1904, *r.* 2—*Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *ss.* 1, 5, *sub-s.* 2, 8.]—Where the compensation authority in a county borough, to whom the question of the renewal of an on-licence is referred under sect. 1, sub-sect. 2, of the Licensing Act, 1904, consists of the whole body of justices acting in and for the borough, there having been no delegation by the latter of their powers in that respect to a committee under sect. 5, sub-sect. 2, of the Act, in the absence of any rule made by the Secretary of State under sect. 6, a minority of the whole body of justices who are not disqualified have no jurisdiction to deal with the matter. A majority at least of the justices who are not disqualified must be present and act. *Sed quære*, whether a majority is sufficient.

THE KING *v.* LEEDS JJ., EX PARTE BINNS, [(1906) 70 J. P. 517; 23 T. L. R. 48—Div. Ct.

57. *Disqualification of Justice—Justice sitting as Licensing Justice—Same Justice sitting as Member of Licensing Committee of Quarter Sessions—Licensing Act*, 1904 (4 Edw. 7, *c.* 23).]—The holders of a licence applied to the licensing justices of a borough for a renewal of their licence. The licensing justices referred the question of the renewal of the licence to the quarter sessions for the county. One B., a justice, presided at the licensing meeting for the borough, and he was also one of the sitting justices when the case came on before the licensing committee of quarter sessions, leaving the Court with them when they retired to consider their decision, but he had taken no part in instructing counsel who appeared for the licensing justices.

HELD—that the fact that the justice sat with the licensing justices of the borough did not preclude him from sitting as a member of the licensing committee to consider reports from such borough justices.

REX *v.* CHESHIRE JJ., [1905] 1 K. B. 362; 75 [L. J. K. B. 230; 70 J. P. 172; 54 W. R. 482; 94 L. T. 412; 22 T. L. R. 238—Div. Ct.

58. *Procedure — Evidence — Differentiation between Houses — Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 1.] — The renewal of an "existing on-licence" was objected to on the grounds that a fully licensed house was not required at the place where the premises were situated, that, having regard to the character and necessities of the neighbourhood and number of licensed premises in the immediate vicinity, the licence was unnecessary, and that in the interests of the public the renewal of the licence was not desirable. The licensing justices referred the matter to the compensation authority under sect. 1 (2) of the Licensing Act, 1904.

The compensation authority having heard evidence as to the number of licensed houses in the neighbourhood, and also as to the structural condition of the house in question, its convenience for police supervision, and the class of trade carried on there, refused to renew the licence, subject to the payment of compensation under the Act.

HELD—(1) that (assuming the compensation authority were acting in a judicial capacity) there was evidence upon which they could come to the conclusion, not only that there were too many licensed houses in the neighbourhood, but also that the licence in question was the one that should be refused; and (2) that for the purpose of deciding which of a number of licences should be refused, the compensation

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authority are entitled to hear evidence upon matters other than those stated as the grounds of objection to the renewal of the licence before the licensing justices.

REX *v.* DRINKWATER AND OTHERS, EX PARTE [CONWAY, (1906) 70 J. P. 1; 22 T. L. R. 12—C. A.

59. *Procedure — Evidence — Admissibility of Report—No evidence to Differentiate from other Licensed Houses in the District—Evidence on which Justices Entitled to Act—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 42—*Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 1—*Licensing Rules*, *No.* 37.]—The question of the renewal of a licence for a house, the property of the appellants, was referred by the licensing justices to quarter sessions. At the hearing before quarter sessions no evidence was given to distinguish such house from others in the neighbourhood, but quarter sessions had before them the report of the licensing justices, which stated the number and names of the licensed houses within 151 yards of the house in question; that the house was one of the smallest, and that the number of licensed houses in the area being excessive, it was recommended that the renewal of the appellants' licence ought to be refused.

HELD—that, the report not being on oath, there was no evidence distinguishing the house in question from the other houses, and the quarter sessions had no jurisdiction to refuse the renewal.

DARTFORD BREWERY CO. *v.* LONDON QUARTER [SESSIONS, [1906] 1 K. B. 695; 75 L. J. K. B. 597; 70 J. P. 197; 94 L. T. 782; 22 T. L. R. 491—Div. Ct.

For other cases on Differentiation *see under* (a) Jurisdiction and Procedure

60. *Procedure — Evidence — Delegation by Licensing Justices to Committees — Report of Committees—Resolution to Refer Question of Renewal to Quarter Sessions — Report made to Quarter Sessions — Admissibility of Cross-examination as to Houses in the Neighbourhood—Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 1.]—The appellants were the tenants and owners of a beerhouse continuously licensed since 1869. The respondents were the licensing justices for the district within which the beerhouse was situate. At the annual licensing meeting the appellants applied for a renewal; but the justices referred the matter to the quarter sessions, together with their report thereon. In that report they stated that they had appointed committees who had visited and made inquiries concerning the licensed houses in the district and made reports to them, which they had adopted, and notices had been served on certain licensees, including the appellants, that the renewal would be opposed on the ground that the licence was not required and that the number of licensed houses in the neighbourhood was excessive. At the general annual licensing meeting the justices heard police evidence with regard to each particular house and the other houses contiguous thereto. At quarter sessions the appellants' counsel contended that the report was not made according to law upon the ground that the licensing justices had no jurisdiction to delegate their duties to committees, and that the justices had accepted the reports of such committees without setting them out in their report to quarter sessions and the appellants had no opportunity of meeting the same. Further, the appellants' counsel desired to cross-examine the police witnesses at quarter sessions as to the conduct of licensed houses contiguous to the appellants' house and similar thereto, the licensees of which had been convicted of offences against the licensing laws, but which had not been referred to quarter sessions, and this proposed cross-examination was not allowed.

HELD—(1) that as it appeared (though it was not stated in the case) that all the facts contained in the reports of the committees were reported to quarter sessions, there was no objection to the report on the ground urged by the appellants, but (2) that the questions sought to be put in cross-examination before the quarter sessions were admissible.

MORGAN *v.* AYLESFORD (KENT) JJ., [1906] 1 [K. B. 437; 75 L. J. K. B. 266; 70 J. P. 155; 94 L. T. 483; 22 T. L. R. 229—Div. Ct.

61. *Procedure—Power of Authority to state a Special Case—Licensing Act*, 1904 (4 Edw. 7, *c.* 23).]—The committee of quarter sessions, sitting as the compensation authority, at their principal meeting under the Licensing Act, 1904, have power to state a special case for the consideration of the King's Bench Division.

REX *v.* SOUTHAMPTON JJ., EX PARTE CARDY, [1906] 1 K. B. 446; 75 L. J. K. B. 295; 70 J. P. 175; 54 W. R. 484; 94 L. T. 437; 22 T. L. R. 236—Div. Ct.

III. TRANSFERS AND REMOVALS.

62. *Appeal against Refusal to Transfer—Costs of Successful Appeal* — Certiorari — *Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *ss.* 27, 29.]—On the licensing justices refusing to transfer a licence there was an appeal to quarter sessions which was allowed.

The quarter sessions further ordered the justices to pay the appellants' costs and the treasurer of the County Council of London to refund such funds to the justices, and also the solicitor and client costs of the justices themselves.

HELD—that there was no jurisdiction under sects. 27 and 29 of the Alehouse Act, 1828, to make the order.

REG. *v.* LONDON JJ., EX PARTE LONDON COUNTY [COUNCIL, (1898) 62 J. P. 517; 78 L. T. 559; 46 W. R. 558—Div. Ct.

63. *Decease of Tenant—Grant of Licence to New Tenant of House so becoming Unoccupied—The Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 14.]—In August, 1896, a full licence was granted to M. E. for the M. Inn, D. In November, 1896, she died intestate, and the landlord took possession

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of the premises. The appellant was admitted into possession of the premises by the landlord. A beer merchant realised all the effects on the premises and applied the proceeds to pay a debt owing to him, and the licence was handed over to the appellant for a consideration.

On February 24th, 1897, an application was made at petty sessions on behalf of the appellant for the transfer of the grant of a licence under 9 Geo. 4, c. 61, s. 14, until the expiration of the current licensing year, but that was refused.

The appellant then appealed to quarter sessions, but the Court held that they had no power to hear the case because it did not come within 9 Geo. 4, c. 61, s. 14.

By sect. 14 of that Act, if any person duly licensed under the Act shall die, and in certain other contingencies whereby the licensed premises become unoccupied, the justices shall have power to grant a licence to the heirs or administrators of the person so dying, or to the tenant or occupier of a house having become so unoccupied.

HELD—that a case such as the present came within the Act, and the justices at quarter sessions had jurisdiction to hear it.

DAVIES *v.* EVANS, (1898) 62 J. P. 120; 77 [L. T. 688; 14 T. L. R. 163—Div. Ct.

64. *Jurisdiction* — Mandamus — Certiorari — *Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *ss.* 4, 14.]—Justices cannot transfer a licence, under the Alehouse Act, 1828, held by a person who has never occupied the premises in respect of which the licence was granted, and where no liquors have been sold in pursuance of such licence.

In such a case, although a writ of *certiorari* cannot issue to justices sitting in licensing matters on the authority of *Reg.* v. *Sharman* (78 L. T. Rep. 320), a writ of *mandamus* can go ordering them to hear and determine according to law.

REG. *v.* COTHAM, [1898] 1 Q. B. 802; 62 J. P. [435; 67 L. J. Q. B. 632; 78 L. T. 468; 14 T. L. R. 367; 46 W. R. 512—Div. Ct.

65. *Jurisdiction — Transfer of Licence on Condition no Liquor Sold on the Premises—Subsequent Application for Transfer of Licence —Inn "theretofore kept"—Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *ss.* 4, 14.]—A licence-holder became bankrupt, and W. applied for a transfer of the licence to himself. The day before the application was made W. received the key of the premises, put furniture in the house, and gave orders as to painting, &c. The licensing justices refused the application for the transfer to W. He appealed to quarter sessions, who decided that he was not a fit and proper person to hold the licence, but nevertheless granted it to him on the understanding that he would not sell liquors under it and would apply for a transfer of it to another person at the earliest opportunity. W. never resided in the house, but he let rooms to certain clubs who held their meetings there: he abided by the condition not to sell intoxicating liquors under the licence, and applied for a transfer to one S., who had agreed to take the house, and entered into possession. The justices decided that they had no jurisdiction on the ground that W. had not "theretofore kept" the house as an inn. The quarter sessions, on appeal, reversed the decision of the justices, and granted the transfer.

HELD—that the quarter sessions were entitled to hold that W. had kept the premises as an inn.

R. v. *Cotham* ([1898] 1 Q. B. 802; 67 L. J. Q. B. 632; 62 J. P. 435; 46 W. R. 512; 78 L. T. 468—Div. Ct., *supra*) considered.

WILSON *v.* CREWE JJ., [1905] 1 K. B. 491; 74 [L. J. K. B. 394; 69 J. P. 111; 53 W. R. 382; 92 L. T. 164; 21 T. L. R. 233—Div. Ct.

66. *Jurisdiction — Off-Licence — Grocer — Licence Granted on Condition to give up same upon Licensee Leaving—Application for Transfer—Beerhouse Act*, 1830 (11 Geo. 4 & 1 Will. 4, *c.* 67).]—An off-licence was granted to the occupier of a grocer's shop upon the condition that the licence should be given up upon the applicant leaving or ceasing to carry on the grocery business upon the premises. The licensee sold his business, and the purchaser applied to the licensing justices for a transfer of the licence to him. The justices refused to grant the transfer, on the ground that they were debarred from so doing by the condition upon which the licence was granted.

HELD—that the condition was not an absolute bar to the transfer of the licence, but only a matter to be taken into consideration by the justices when considering whether or no in their discretion they would grant the transfer.

GEE *v.* OLDHAM JJ., (1902) 66 J. P. 341; [50 W. R. 394; 86 L. T. 389; 18 T. L. R. 348 —Div. Ct.

67. *Licensed Premises—Demolition for Public Purpose—Transfer to New Premises—"Person whose house shall be pulled down"—Intoxicating Liquor Licensing Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 14.]—The only person entitled to apply, under sect. 14 of the Intoxicating Liquor Licensing Act, 1828, for the transfer to new premises of the licence of premises pulled down or about to be pulled down for a public purpose is the person who, at the time when the premises were pulled down or about to be pulled down, was the person who kept and was duly licensed under the Act to keep such premises as an inn.

REG. *v.* YORKSHIRE WEST RIDING JJ., EX [PARTE SHAW, [1898] 1 Q. B. 503; 62 J. P. 197; 67 L. J. Q. B. 279; 78 L. T. 47; 14 T. L. R. 89; 46 W. R. 334—Div. Ct.

68. *Licensed House about to be pulled down for Public Purposes—Transfer of Licence—Notices —Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 14—*Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 40.]—A licensed house, called the "Rope and Anchor," had been pulled down to widen a street, and an application had been made by the holder of the licence at a special sessions, under sect. 14 of the Alehouse Act, 1828 (9 Geo. 4, c. 61), for a grant of the transfer of the licence

Transfers and Removals—*Continued.*

to the new premises in a new road, which had not theretofore been licensed. The justices were informed that the proper notices had been given, and as no opposition was offered, they granted the transfer at a special sessions for licensing purposes. A rule *nisi* was obtained for a *mandamus* to the justices to hear and determine the case according to law, on the ground that the notices were insufficient, and did not comply with sect. 40 of the Licensing Act, 1872.

HELD, by the Div. Ct., [1899] 2 Q. B. 455; 68 L. J. Q. B. 715; 63 J. P. 564; 15 T. L. R. 358—that the same notices as required by the Licensing Act, 1872, in the case of an application for a new licence, must be given upon an application under the Alehouse Act, 1828.

HELD, by C. A. — that the notices were good, as sect. 40 of the Licensing Act, 1872, had not expressly or impliedly repealed sect. 14 of the Alehouse Act, 1828.

REG. *v.* NICHOLSON, [1899] 2 Q. B. 455; 68 [L. J. Q. B. 1034; 63 J. P. 564; 48 W. R. 52; 81 L. T. 257; 15 T. L. R. 509; 64 J. P. 388—C. A.

69. *Removal — Conditional New Licence — Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 50.]—The appellant was the holder of an off-licence of a public-house, and duly applied for a renewal at the general annual licensing meeting, and this was granted. He also duly applied for and obtained a new licence of an adjoining house, on the condition of giving up the licence of which he had just obtained the renewal.

HELD—that the justices had not exceeded their jurisdiction, as this was not a removal of a licence, and therefore sect. 50 of the Licensing Act, 1872, requiring notice to the owner of the premises, had no application.

Decisions of the Q. B. D. and C. A. (*sub nom. Reg. v. Thornton, Ex parte E. Lacon & Co., Ld.*, [1897] 2 Q. B. 308; 66 L. J. Q. B. 774; 61 J. P. 470; 77 L. T. 26; [1898] 1 Q. B. 334; 67 L. J. Q. B. 249; 62 J. P. 196; 46 W. R. 241; 78 L. T. 95; 14 T. L. R. 170) reversed.

"Removal" signifies that a licence shall be transplanted from one set of premises and serve as a privilege and protection to another set of premises—it may be to a set of premises in a different licensing district—per Lord Watson.

LACEBY *v.* LACON & CO., [1899] A. C. 222; 68 [L. J. Q. B. 480; 63 J. P. 371; 47 W. R. 497; 80 L. T. 473; 15 T. L. R. 283—H. L. (E.).

70. *Removal—Existing On-Licence—Application for Removal of—Power or Duty of Justices to Impose Conditions as to Money Payment—Monopoly Value—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 50—*Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 22—*Licensing Act*, 1904 (4 Edw. 7), *s.* 4 (2).]—On an application for an order sanctioning the provisional removal of an on-licence under sect. 50 of the Licensing Act, 1872, and sect. 22 of the Licensing Act, 1874, licensing justices have no power or duty to impose conditions under sect. 4 (2) of the Licensing Act, 1904, and the words in that subsection "on the grant of a new on-licence" do not include a grant sanctioning such a removal.

Semble, however, licensing justices when considering whether to grant or refuse an application for an order sanctioning such a removal, may and perhaps ought to consider whether such a removal would deprive the public of the monopoly value which would be secured to them, if a new on-licence had to be obtained under the provisions of sect. 4 (2) of the Licensing Act, 1904.

REX *v.* DRINKWATER AND OTHERS, [1905] 2 [K. B. 469; 74 L. J. K. B. 722; 69 J. P. 300; 54 W. R. 95; 93 L. T. 165; 21 T. L. R. 514—Div. Ct.

71. *Removal—New Tenant—Expiration of Licence before old Tenant's Removal—Power to Grant Licence at Special Sessions to new Tenant—Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 14.]—The holder of the licence for an "*ante* 1869" beerhouse was refused a renewal thereof on March 19th owing to a conviction; he remained in the house pending an appeal, which was eventually dismissed on April 18th, but in the meantime (on April 5th) the licence expired; after the failure of his appeal he left the house, and the new tenant applied for a licence under sect. 14 of the Alehouse Act, 1828, which provides that, "if any person so licensed . . . shall remove . . ." the justices at special sessions may grant a licence to a new tenant.

HELD—that, as the licence expired before the old tenant's removal, there was no removal of a person "so licensed," and that the justices had no power under sect. 14 to grant a licence to the new tenant.

Simpkin v. *Birmingham JJ.* ((1872) L. R. 7 Q. B. 482; 41 L. J. M. C. 102; 20 W. R. 702; 26 L. T. 620) followed.

R. v. *Liverpool JJ.* ((1883) 11 Q. B. D. 638; 52 L. J. M. C. 114; 47 J. P. 596; 32 W. R. 20; 49 L. T. 244—C. A.) distinguished.

REX *v.* LONDON JJ., EX PARTE REED, [1903] 2 [K. B. 19; 72 L. J. K. B. 647; 67 J. P. 277; 51 W. R. 629; 88 L. T. 673; 19 T. L. R. 444—C. A.

72. *Sale of Beer—Off-Licence—Transfer—Objection by Former Tenant that he had lost Money in the Business.*]—A former tenant of "beer off-licence" premises having lost money in the business objected to the transfer of the licence to a new tenant, and the licensing justices refused the application. Appeal to Court of quarter sessions allowed.

HILLS AND OTHERS *v.* NEWINGTON JJ., [(1901) 65 J. P. 297—London Quarter Sessions, W. R. McConnell, K.C.

IV. OFFENCES.

(a) Refusing to Leave Licensed Premises.

73. *Alehouse—Customer refusing to leave when requested—Right of Owner to eject him—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 18.]—The

Offences—*Continued.*

respondent, who was not a traveller, entered the appellant's licensed premises—not being an inn—he having been on several previous occasions ejected by the appellant from the premises for using offensive language and behaving in a disorderly manner, and he was known to be one of a disorderly gang. The respondent was half drunk when he entered and threatened to fight the appellant, who asked him to leave, but the respondent refused to leave. The appellant went to eject him, and the respondent kicked him in the face. The magistrate refused to convict the respondent of an assault on the ground that the appellant had no right to eject the respondent for refusing to leave when requested.

HELD—that the occupier of an alehouse had the right to request a person to leave if he did not wish him to remain on the premises.

SEALY *v.* TANDY, (1901) 85 L. T. 459; 18 T. L. R. [38; [1902] 1 K. B. 296; 71 L. J. K. B. 41; 66 J. P. 19; 50 W. R. 347—Div. Ct.

74. *Refusal to quit licensed Premises—Person not drunken, violent, quarrelsome, or disorderly—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 18.]—A person cannot be convicted under sect. 18 of the Licensing Act, 1872, for refusing to quit licensed premises, if he is not drunken, violent, quarrelsome, or disorderly, although he may have been requested by the landlord to leave.

DALLIMORE *v.* TUTTON, (1898) 62 J. P. 423; 78 [L. T. 469; 19 Cox, C. C. 31—Div. Ct.

(b) Sale by Unlicensed Person.

75. *Abandonment of Licence — Evidence — Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 3.]—The appellant was the licence holder of the Royal Hotel, Ince-in-Makerfield, the property being owned by his father. From August 23rd to November 4th, 1901, the appellant resided at the Royal Hotel, and carried on the licensed business there. On the latter date, he had a quarrel with his father and left the district. The father, with the assistance of a manager, carried on the business till April 25th, 1902, when he was summoned and convicted of selling intoxicating liquors by retail without being duly licensed thereto. On May 30th, 1902, the appellant gave notice that he desired to transfer the licence to one Clarke, the manager. The justices refused to grant a transfer, and the appellant thereupon re-took possession of the premises, and on June 8th, the appellant was summoned for selling intoxicating liquor without being duly licensed thereto and convicted, the justices being of opinion that he had abandoned his licence.

HELD—that the conviction could not stand, as the appellant was a person duly licensed under the Licensing Act, 1872.

LAWRENCE *v.* O'HARA, (1903) 67 J. P. 369—[Div. Ct.

76. *Application Pending for Transfer—Offence of Trifling Nature—Jurisdiction of Justices—Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *s.* 16.]—A respondent was summoned for unlawfully selling intoxicating liquor on October 15th, 1904, and other days, contrary to the Licensing Act, 1872, s. 3. He had on October 15th, 1904, entered into possession as tenant of a licensed house without previously having obtained any authority from the justices, and on October 24th, proper notice having been given, the late tenant applied to the licensing justices and obtained a transfer of his licence to the respondent. The licensing justices of that division only sat once a month, and there were no Petty Sessions at which application for a temporary transfer of the licence could have been made between September 26th and October 24th, 1904. The justices found that in cases of transfers of licensed premises taking place on days on which no Petty Sessions were held, it was the practice in that, as in other divisions, to apply for the temporary transfer at the next available Petty Sessions.

HELD—that such offence was not of a trifling nature, and could not be dismissed as such by the justices under sect. 16 of the Summary Jurisdiction Act, 1879.

BARNARD *v.* BARTON AND OTHERS, [1906] 1 [K. B. 357; 75 L. J. K. B. 326; 69 J. P. 281; 92 L. T. 859—Div. Ct.

77. *Club—Company carrying on a Club—Sale of Liquors and Tobacco—Some Shareholders not Members of the Club—Licence.*]—The proprietor of an ordinary proprietary club, where the refreshments and liquors sold to the members are the property of the proprietor, and where the proprietor gets the profit from such sales, cannot sell intoxicating liquors to the members of the club without having the necessary licences.

A limited company, incorporated under the Companies Acts, carried on the business of a club. Most of the shareholders of the company were members of the club, but there were a few outside shareholders who were not members. The refreshments and liquors were the property of the company, and the profits (if any) from the sale of such refreshments went to the company, and not to the club.

HELD—that the company, being a legal entity distinct from the club, and being composed of different members, could not sell intoxicating liquors or tobacco to members of the club without the requisite licences.

NATIONAL SPORTING CLUB, LD. *v.* COPE, (1900) [64 J. P. 310; 48 W. R. 446; 82 L. T. 352; 16 T. L. R. 158—Div. Ct.

78. *Licensed Person in Control—Real Seller Unlicensed—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 3.]—The respondent, who was not a licensed person, contracted to supply intoxicating liquor at an exhibition, and by arrangement with him a licensed person obtained an occasional licence for the sale of intoxicating liquor at the exhibition. Beer sent to the exhibition by order of the respondent, and paid for by him, was sold there by barmaids who were paid by the respondent. The licensed

Offences—*Continued.*

person was in control of the bar and the serving staff, but was not remunerated for his services in any way. The proceeds were put in the till and afterwards taken away by an employee of the respondent.

HELD—that proof of these facts was proof of an offence by the respondent against sect. 3 of the Licensing Act, 1872, as he was the real seller, and he was therefore selling by an agent intoxicating liquor which he was not licensed to sell.

DUNNING *v.* OWEN, [1907] 2 K. B. 237 ; 76 [L. J. K. B. 796 ; 71 J. P. 383 ; 97 L. T. 241 ; 23 T. L. R. 494—Div. Ct.

79. *Sale by Innocent Servant of Unlicensed Master—House of Commons Bar—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 3.]—An attendant at a refreshment bar situate within the precincts of the House of Commons, acting under the orders of the kitchen committee of that House, whose servant he was, supplied a person (not a member of the House) with intoxicating liquor, and received the price on behalf of the kitchen committee.

HELD—that he, being a servant selling liquor the property of his master, had not committed the offence under sect. 3 of the Licensing Act, 1872, of selling intoxicating liquor without being duly licensed.

Semble, the Houses of Parliament are not exempt from the provisions of the Licensing Act, 1872, so as to enable liquor legally to be sold there without a licence.

WILLIAMSON *v.* NORRIS, [1899] 1 Q. B. 7 ; 68 [L. J. Q. B. 31 ; 62 J. P. 790 ; 47 W. R. 94 ; 79 L. T. 415 ; 15 T. L. R. 18 ; 19 Cox, C. C. 203—Div. Ct.

80. *Sale by Unlicensed Persons through a Dummy Licensed Person residing on the Licensed Premises—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 3.]—The respondents were summoned for selling intoxicating liquor without a licence. It appeared that a licence had been granted to the respondent N. The respondents D. and his wife, however, found the capital of the business, and were in control of the premises and served behind the bar, and the beer was sent by the brewers to them. N. resided on the premises but was never behind the bar, and was treated as a servant or dependant. The magistrate stopped the case at the close of the evidence for the prosecution, and held that he could not convict, as there was an existing licence, and the licensee was resident.

HELD—that an offence would be committed if unlicensed persons were to sell their own liquor under the cloak of the licence of a person whose liquor they were not selling, and that such persons could not protect themselves by showing that a dummy licensee was resident on the premises where the liquor was sold, and that the case must therefore be remitted to the magistrate to be further heard and determined by him.

PECKOVER *v.* DEFRIES AND OTHERS, (1907) [71 J. P. 38 ; 95 L. T. 883 ; 23 T. L. R. 20—Div. Ct.

(c) Sale at Unlicensed Place.

81. *Order given to Traveller—Appropriation—Sale at Unlicensed Place—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 3.]—The respondent carried on business as a brewer and held both a wholesale licence and a retail licence in respect of his premises in Lancaster, enabling him to sell beer for consumption off the premises. On July 10th the respondent's traveller called at a house in Halton and obtained an order for six bottles of beer, and entered the order in a memorandum book he had with him. Nothing more was done at the house, and the goods were delivered by the respondent's cart on July 14th; the bottles were not marked in any way indicating any appropriation, and were taken from a box made to contain a dozen bottles, but which only contained six. There was no label or address on the box, and the beer was paid for on delivery at Halton. The respondent himself entered all orders given to his travellers into a private general order-book, and said he accepted or rejected each order as he thought fit, and entered them into the general delivery book.

HELD (allowing the appeal)—that there was no sale or appropriation of the beer at the licensed premises, but the sale took place in Halton.

COCHER *v.* MCMULLEN, (1900) 64 J. P. 245 ; [81 L. T. 784—Div. Ct.

82. *Order given to Traveller—Appropriation of Goods to meet the Order—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 3.]—A traveller, employed by the holder of a retail off-licence, took an order from a customer in the course of his rounds ; he handed the order to his master, who placed in a box the twelve bottles required to fulfil the order, and also a slip of paper bearing the customer's name. The traveller delivered the goods in the course of his next round, and received payment for them.

HELD—that the "sale" within the meaning of the Licensing Acts took place on the licensed premises, and that the licence-holder had been wrongly convicted of selling at a place not covered by his licence — viz., the customer's house.

WALKER *v.* WALKER, (1904) 67 J. P. 452 ; 20 [Cox, C. C. 594—Div. Ct.

83. *Appropriation of Goods sold—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 3.]—One R., a carter, in the employment of G. W. & Co., a firm of brewers, was in the habit in the course of such employment of delivering to a Mrs. H. a quantity of beer every fortnight in pursuance of a verbal standing order given at her house to R. Subsequently R. left the employment of G. W. & Co., and Mrs. H. verbally agreed with R. to continue the standing order for beer to any person by

Offences —*Continued.*

whom R. might be employed. R. was employed by the appellant, and he took the standing order to the appellant at his licensed premises, who accepted the order and agreed with him to supply beer to Mrs. H. Afterwards R. died, and one D., on behalf of the appellant, continued to deliver beer to Mrs. H. in pursuance of the said order. The beer was paid for on delivery. The justices found that the sale took place at the house of Mrs. H., and convicted the appellant under sect. 3 of the Licensing Act, 1872.

HELD—that the statement by Mrs. H. that she would continue the standing order for beer to any person by whom R. might be employed was equivalent to her assenting to the appropriation of the goods on the licensed premises, and that, therefore, the sale took place on the licensed premises, and the conviction was wrong.

Walker v. *Walker*, No. 82, *supra*, followed.

HEWITT *v.* JARVIS. (1904) 68 J. P. 54; 90 [L. T. 88—Div. Ct.

84. *Order taken by Traveller — Duty of Traveller to communicate Order to Principal— Acceptance of Order by Principal — Appropriation of Goods at Licensed Premises — Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 3.]—The appellant, a brewer, held a licence to sell by retail beer to be consumed off his premises at Pendle Street, Nelson. He employed a traveller to obtain orders for beer from persons residing at Rishton. The traveller was required to observe the following rules: (1) No person in the employ of the appellant is to deliver beer, either in bottles, casks, or otherwise, in any quantity to any person unless the same has been previously ordered and the name and postal address of the person by whom the goods are ordered are first handed in to the office; (2) no money must be received by any person taking or receiving orders until the goods ordered have been delivered; (3) the full name and postal address of all persons ordering must be entered in the office the day before the orders are to be delivered. The traveller called on a customer at Rishton and obtained from him there an order for a two-gallon jar of stout. The traveller entered such order in his order book, and on the following day posted such order book to the appellant, with a summary of the orders obtained by him.

HELD—that the contract of sale had taken place at the licensed premises, and not at the house of the customer.

Walker v. *Walker*, No. 82, *supra*, discussed.

STRICKLAND *v.* WHITTAKER, (1904) 68 J. P. [235; 52 W. R. 538; 90 L. T. 445; 20 T. L. R. 224; 20 Cox, C. C. 610—Div. Ct.

85. *Receiving Orders at Unlicensed Office— Transmission of such Orders to Licensed Premises — Appropriation — Excise Act*, 1860 (23 & 24 Vict. *c.* 113), *s.* 37.]—The taking of an order at an unlicensed office for the sale of beer by retail in a less quantity than four and a half gallons, or in a less quantity than two dozen reputed quart bottles, at one time, such order to be forwarded to licensed premises belonging to the same persons, where the order might be accepted or not according to the discretion of the manager of the licensed premises, is not a sale by retail at the unlicensed office, contrary to sect. 37 of the Excise Act, 1860.

Pletts v. *Beattie* ([1896] 1 Q. B. 519; 65 L. J. M. C. 86; 60 J. P. 185; 74 L. T. 148; 18 Cox, C. C. 264—Div. Ct.) followed.

STEPHENSON *v.* ROGERS, (1899) 63 J. P. 230; [80 L. T. 193; 15 T. L. R. 148—Div. Ct.

85a. *Receiving Order at Unlicensed Shop— Transmission of Order to Licensed Premises— Revenue Act*, 1867 (30 & 31 Vict. *c.* 90), *s.* 17.]—The appellants were grocers carrying on business at two sets of premises in the same town. In respect of one set of premises they held licences as spirit dealers, beer dealers and wine dealers, and a retail licence for the sale of beer to be consumed off the premises. In respect of the other they held all the above licences except the retail beer licence. At these latter premises they displayed crates of four quart flagons of beer, and the prices of the said beer by crate. Such crates were kept for window display, all other beer being stored at the first named premises. The respondent went to the shop and ordered four quarts of beer to be sent home with some groceries. The assistant told him the beer would have to come from the other shop. The order was forwarded to the licensed premises and executed from there.

HELD—that the appellants were rightly convicted of having received and taken orders for beer without having the necessary excise licence.

ELIAS *v.* DUNLOP, [1906] 1 K. B. 266; 75 [L. J. K. B. 168; 70 J. P. 103; 94 L. T. 164; 22 T. L. R. 162; 21 Cox, C. C. 105—Div. Ct.

86. *Receiving Order at Unlicensed Restaurant —Transmission of such Order to Licensed Premises—Refreshment Houses and Wine Licences Act*, 1860 (23 & 24 Vict. *c.* 27), *s.* 19.]—A restaurant keeper carried on business at premises which were not licensed for the sale of intoxicating liquors. He also carried on the business of a wine dealer in partnership at other premises in the neighbourhood, in respect of which his partner held a licence as a dealer in foreign wine. F., an excise officer, entered the restaurant, ordered a meal and a pint bottle of claret from the waiter, and gave the waiter the money for the claret. Thereupon the waiter went and purchased the claret at the other premises, served F. with it, and F. consumed it. On these facts the magistrate held that there had been a sale of wine to F. by the appellant's servant at the restaurant, and convicted him.

HELD—that it was impossible to say that there was no evidence to support the view which the magistrate took.

PASQUIER *v.* NEALE, [1902] 2 K. B. 287; 71 [L. J. K. B. 835; 51 W. R. 92; 87 L. T. 230; 18 T. L. R. 704; 67 J. P. 49; 20 Cox, C. C. 350—Div. Ct.

Offences—*Continued.*

87. *Sale by Drayman — Unauthorised Act of Servant — Liability of Master — Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 3.]—The respondent was the manager of a brewery company, and held a licence to sell beer by retail at the premises of the brewery. The respondent had control over the draymen and had given orders to all such draymen to be careful never to deliver beer unless an order for such beer had been previously received by the said company at their offices, and took every care to prevent any beer being sent out which had not been ordered The beer was sold for cash on delivery, and the drayman was authorised to receive payment. It happened occasionally that beer sent out could not be delivered owing to persons who had ordered it having left their houses. None of the bottles or crates of beer bore the name of the customer for delivery to whom the beer was loaded on the van, and there was no appropriation by identifying marks or otherwise to any particular customer. One of the draymen in the employ of the company sold beer for cash to a person who had not previously ordered it. The respondent was summoned for selling beer at an unlicensed place contrary to sect. 3 of the Licensing Act, 1872.

HELD—that as the sale by the drayman was an unauthorised act the respondent was not liable.

BOYLE *v.* SMITH, [1906] 1 K. B. 432 ; 75 L. J. [K. B. 282 ; 70 J. P. 115 ; 54 W. R. 519 ; 94 L. T. 30 ; 22 T. L. R. 200 ; 21 Cox, C. C. 84—Div. Ct.

88. *Working Men's Club—Sale to Agent of Member—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 3.]—The appellant was a waiter employed at a *bonâ fide* club, duly registered under the Friendly Societies Act, 1875. A member's wife asked the appellant for a bottle of stout, and handed to him a ticket which had been filled in and signed by her husband, who was at home, and she returned home with the stout and handed it to her husband, who drank it. It was agreed that in all that she did the wife was acting as her husband's agent.

HELD—that as a member of such a club may by his lawful agent carry out a transaction which is legal when done by the member himself, no offence was committed against sect. 3 of the Licensing Act, 1872.

DAVIES *v.* BURNETT, [1902] 1 K. B. 666 ; 71 [L. J. K. B. 355; 66 J. P. 406 ; 50 W. R. 391 ; 86 L. T. 565 ; 18 T. L. R. 354 ; 20 Cox, C. C. 193—Div. Ct.

(d) Selling or Keeping Open during Prohibited Hours.

89. "Bonâ fide *travellers.*"] — Four men walked on Sunday to a licensed house two miles in a direct line from their home, but about three miles by the way they had come. They were known to the licence holder ; but it was found out that they had not gone out with the intention of getting liquor.

HELD — that they were not "*bonâ fide* travellers," and that the licence holder was properly convicted for supplying them with liquor.

GRAHAM *v.* M'DOUGALL, (1905) 6 F. (J. C.) [57—Ct. of Justiciary.

90. *Exemption from Closing—Order of Local Authority giving an Exemption from Closing in Respect of Certain Trades*—Certiorari—*Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 26—*Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 32.]—From 1874 there had been an order of the county licensing committee declaring U. to be a populous place, and the licensed premises were accordingly closed from 11 p.m. till 6 a.m. In 1902 the county licensing committee revoked such order. In 1904, two justices purported to make an order under such section applying to all the licensed houses in the district.

HELD—that the justices had exceeded their jurisdiction by making such order without hearing the evidence contemplated by sect. 26, and that such order could therefore be quashed by *certiorari*.

REX *v.* JOHNSON AND OTHERS, [1905] 2 K. B. 59 ; [74 L. J. K. B. 585 ; 69 J. P. 236 ; 53 W. R. 655 ; 92 L. T. 654 ; 21 T. L. R. 423—Div. Ct.

91. *Keeping Open—Customers remaining after Closing Time—Outer Doors closed—Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 9.]—When the outer doors of a licensed house are closed and locked during prohibited hours, so that there is no access to the licensed premises from the outside, the house is not "open or kept open" for the sale of intoxicating liquors, even though persons who have been drinking in the house before closing time remain in the premises after closing time, and are served with drink during such closing hours, and afterwards leave by a back door. To be "open or kept open" within the meaning of sect. 9 of the Licensing Act, 1874, there must be, during prohibited hours, some means of access to the premises from the outside.

JEFFREY *v.* WEAVER, [1899] 2 Q. B. 449 ; 68 [L. J. Q. B. 817 ; 63 J. P. 663 ; 47 W. R. 638 ; 81 L. T. 193 ; 15 T. L. R. 422—Div. Ct.

92. *Keeping Open—Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 9.]—A public-house was entered by the police, after closing time (11 o'clock). Five men were found in the bar with glasses of liquor before them. Both doors of the public-house were open, but no one had entered and no drink had been drawn after closing time.

HELD—that the premises had not been kept open for the sale of intoxicating liquor after closing time within the Licensing Act, 1874, s. 9.

LLOYD *v.* BARNETT, (1900) 64 J. P. 708 ; 82 [L. T. 804—Div. Ct.

93. *Keeping Open—Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 9.]—The respondent, a licence-holder, obtained an occasional licence to keep open after 11 p.m., the usual closing hour, to

Offences—*Continued.*

12.30 a.m. The doors of the premises were closed at 12.30 a.m., but singing was going on inside the premises till 12.38, and between 12.40 and 12.45 several persons came out of the private door of the said premises. There was no evidence that any persons were admitted or served with intoxicating liquor after 12.30 a.m.

HELD—that the respondent could not be convicted of opening and keeping open the licensed premises for the sale of liquor during prohibited hours contrary to sect. 9 of the Licensing Act, 1874.

Jeffery v. *Wearer*, [1899] 2 Q. B. 449; 68 L. J. Q. B. 817; 63 J. P. 663; 47 W. R. 638; 81 L. T. 193—(Div. Ct., No. 91, *supra*) followed.

COMMISSIONER OF POLICE *v.* ROBERTS, [1904] [1 K. B. 369; 73 L. J. K. B. 231; 68 J. P. 39; 52 W. R. 560; 20 T. L. R. 105—Div. Ct.

94. *Keeping Open—Permitting Drinking after Closing Hour.*]—The manager of a public-house returned to the public-house as it was closing, with a friend whom he had met at a theatre. When in the public-house, after it had been closed, he gave half a glass of sherry to his friend from the public-house stock. Neither he nor his friend paid anything for the sherry.

HELD—that he could not on these facts be convicted of keeping open house and permitting and suffering drinking.

WHITE *v.* NEILSON, (1905) 6 F. J. C. 51—Ct. of [Justiciary.

95. *Sale during Prohibited Hours—Intoxicating Liquor bought and paid for during Legal Hours—Agreement to deliver during Prohibited Hours—No Appropriation of Goods at Time of Sale—Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 9.]—Two men went to the house of the respondent, a licence-holder, on Saturday during legal hours and asked if they could have half a gallon of beer delivered to them on Sunday morning during prohibited hours. They paid for the beer, and directly afterwards, before closing time, half a gallon of beer was drawn and put in a bottle belonging to the respondent, and corked and put on the bar counter by the respondent's son. It was subsequently taken by him about closing time to the brewhouse stable, within the curtilage of the licensed premises, whence it was taken by him on the Sunday morning and given by him to the barman behind the counter in the licensed premises to deliver to the purchasers during prohibited hours.

HELD—that there had been no appropriation of the beer at the time of the sale and the respondent was liable to a penalty under sect. 9 of the Licensing Act, 1874.

Pletts v. *Beattie* ([1896] 65 L. J. M. C. 86; 60 J. P. 185; 74 L. T. 148; 18 Cox, C. C. 264—Div. Ct.) distinguished.

HELD, further, by Alverstone, L.C.J. and Kennedy, J. (Ridley J., dissenting), that even if there had been an appropriation at the time of the sale, the agreement to deliver during prohibited hours was an essential part of the contract of sale, and that the respondent could be convicted under sect. 9 of the Licensing Act, 1874, "for selling intoxicating liquor" during prohibited hours.

NOBLETT *v.* HOPKINSON, [1905] 2 K. B. 214; [74 L. J. K. B. 544; 69 J. P. 269; 53 W. R. 637; 92 L. T. 462; 21 T. L. R. 448—Div. Ct.

96. *Sale during Prohibited Hours—Opening during such Hours—Two Offences or One—Irish Licensing Acts.*]—Under the Irish Licensing Acts a person cannot be convicted both of selling during prohibited hours and also of keeping open during such hours, the selling and the opening being part of the same transaction on any given occasion.

DORRIAN *v.* M'HUGH, [1907] 2 Ir. R. 564—[K. B. D.

97. *Sunday Closing—Beer ordered and paid for on Saturday, but delivered on Sunday—Opening Licensed Premises during Prohibited Hours—Conviction for—Sunday Closing (Wales) Act*, 1881 (44 & 45 Vict. *c.* 61), *ss.* 1, 2—*Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 9.]—Sect. 9 of the Licensing Act, 1874, provides that any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed, "opens or keeps open such premises for the sale of intoxicating liquors" shall be liable to a penalty.

A dozen bottles of beer were ordered from a beerhouse-keeper and paid for on a Saturday evening, and they were to have been delivered at the house of the purchaser on the Saturday night, but in consequence of an accident the delivery was overlooked, and did not take place on the Saturday as arranged.

On the Sunday during closing hours the purchaser of the beer sent his servant to the public-house for two bottles of the beer, which were delivered to the servant, who was seen to come out of the public-house with the beer.

HELD—that, although the beer had been ordered and paid for during the time the premises were allowed to be open, the beerhouse-keeper, by the delivery of the two bottles of beer during prohibited hours, had "opened his premises for the sale of intoxicating liquors" within the meaning of sect. 9, and was liable to the penalty imposed by the section.

SAUNDERS *v.* THORNEY, (1898) 62 J. P. 404; 78 [L. T. 627; 14 T. L. R. 346—Div. Ct.

98. *Selling Intoxicating Liquor during Prohibited Hours—Exemption—Theatre—Theatres Act*, 1843 (6 & 7 Vict. *c.* 68)—*Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 72—*Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 3.]—The appellant, G., was the manager of the Theatre Royal, Stockton, and on September 2nd, 1896, he was granted a licence for the theatre under the Theatres Act, 1843. By that licence the theatre was to be closed every Saturday night at half-past eleven.

On October 11th, 1896, he was granted a theatre excise licence, under 5 & 6 Will. 4, c. 39,

Offences—*Continued.*

and 43 & 44 Vict. c. 20, to sell intoxicating liquors by retail in the theatre.

On the evening of Saturday, January 23rd, 1897, the performance concluded at the theatre at 10.55 p.m., but the appellant kept one of the bars of the theatre open for the sale of intoxicating liquors until 11.20 p.m.

All the people who were there present were either persons who were employed in the performance or had been *bonâ fide* attending the performance as spectators at the theatre that evening. The appellant was convicted.

The present question for the decision of the Court was whether that conviction was right, the borough of Stockton being a town within the meaning of the Licensing Act, 1874, and the appellant being convicted of an offence under sect. 9 of the Licensing Act, 1874.

By the Licensing Act, 1872, sect. 72: "Nothing in this Act shall affect or apply to (4) the sale of intoxicating liquor by proprietors of theatres in pursuance of the Act in that behalf."

By the Licensing Act, 1874, that Act is to be construed as one Act with that of 1872, and by sect. 3, "All premises in which intoxicating liquors are sold by retail shall be closed as follows: (2) If situated . . . in a town . . . as defined by the Act; (a) on Saturday night from eleven o'clock."

For the appellant it was contended that the exemption contained in sect. 72 was an absolute exemption, and that a theatre duly licensed under the Acts in that behalf was exempt from this provision as to closing.

HELD (affirming the decision of quarter sessions)—that, on the true construction of sect. 72, the exemption does not affect the proper closing hour, and that it only applies in that the holders of theatre licences need not go to justices for a licence for the sale of intoxicating liquors.

GALLAGHER *v.* RUDD, [1898] 1 Q. B. 114; 18 [Cox, C. C. 654; 61 J. P. 789; 67 L. J. Q. B. 65; 77 L. T. 367; 14 T. L. R. 105; 46 W. R. 108—Div. Ct.

99. *Traveller — Refreshment Room — Person arriving at or departing from Station—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 25—*Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 10—*Sunday Closing* (*Wales*) *Act*, 1881 (44 & 45 Vict. *c.* 61), *s.* 4.]—A person cannot be convicted under sect. 25 of the Licensing Act, 1872, of falsely representing himself to be a traveller and obtaining intoxicating liquor at a railway station refreshment room during the hours when licensed premises are closed, if, at the time he obtains the drink, he has taken a ticket and intends to travel by railroad, and does so travel, even though he only took such ticket and travelled so as to be able to obtain such drink. He is within the exemption in sect. 10 of the Licensing Act, 1874, in favour of "persons arriving at or departing from such station by railroad."

WILLIAMS *v.* MACDONALD, [1899] 2 Q. B. 308; [68 L. J. Q. B. 678; 63 J. P. 501; 47 W. R. 701; 80 L. T. 758; 15 T. L. R. 343; 19 Cox, C. C. 339—Div. Ct.

(e) Miscellaneous Offences.

See also CLUBS, NOS. 3, 7.

100. *Illegal Measure—Sale by "Schooner of Beer."*]—A man entered a public-house and asked for a "schooner" of beer; a "schooner" is a glass tumbler capable of holding about a third of a quart. He was supplied with one filled from the counter pump, and paid 2*d.*

HELD—that the publican had contravened the enactment corresponding to sect. 8 of the English Licensing Act, 1872.

RIDDELL *v.* NEILSON, (1904) 5 F. (J. C.) 57—[Ct. of Justy.

101. *Permitting Drunkenness—Person actually found Drunk on Premises—Burden of Proof—Licensing Act*, 1902 (2 Edw. 7, *c.* 28), *s.* 4.]—On a charge against a publican for permitting drunkenness on his premises, it was proved that at 3 a.m. he and a friend were found intoxicated on the premises.

HELD—that, having regard to the section of the Scotch Act corresponding to sect. 4 of the Licensing Act, 1902, he must be convicted.

KESSACK *v.* SMITH, (1906) 7 F. 75—Ct. of [Justy.

102. *Permitting Gaming—"Licensed Person"—Executrix of Deceased Licensee—Liability to Penalties for allowing Gaming—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *ss.* 3, 17.]—An executrix in occupation of a licensed house, and carrying on the business of the house and selling liquors upon the premises prior to the next special sessions, may be made subject to penalties for allowing card-playing to take place on those premises during such period as a licensed person, meaning thereby a person holding a license as defined by the Licensing Act, 1872.

M'DONALD *v.* HUGHES, [1902] 1 K. B. 94; 71 [L. J. K. B. 43; 66 J. P. 86; 50 W. R. 318; 85 L. T. 727; 18 T. L. R. 79—Div. Ct.

And see under GAMING AND WAGERING.

103. *Serving reputed Prostitutes—Reasonable time for Refreshments—Affirmative Evidence of Offence alone will support conviction—Licensing Act*, 1872 (*c.* 94), *s.* 14—*Summary Jurisdiction Act*, 1879 (*c.* 49), *s.* 39.]—M. was convicted under sect. 14 of the Licensing Act, 1872, of having permitted a reputed prostitute to remain on licensed premises longer than a reasonable time for the woman to take refreshments.

HELD—that the conviction must be quashed because the evidence of the offence having been committed given by the prosecution was in fact circumstantial; and before a publican could be convicted affirmative evidence in every case must be given by the prosecution;

HELD, also, that under the Summary Jurisdiction Act, 1879, s. 39, the onus of proving the offence rests on the prosecutor, and that the defendant was right in not calling evidence to rebut the charge.

MILLER *v.* DUDLEY JJ., (1898) 46 W. R. 606—[Div. Ct.

V. SALE TO CHILDREN.

104. *Corked and sealed Vessels*—Mens rea—*Intoxicating Liquors (Sale to Children) Act*, 1901 (1 Edw. 7, *c.* 27), *s.* 2.]—Where a licensed person sells intoxicating liquor to a person under 14 years of age in a bottle not properly corked and sealed, it is no defence to an information charging an offence under sect. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, that the licensed person honestly believed that the bottle was corked and sealed in conformity with the requirements of the section.

BROOKS *v.* MASON, [1902] 2 K. B. 743; 19 T. L. R. [4; 72 L. J. K. B. 19; 67 J. P. 47; 51 W. R. 224; 88 L. T. 24; 20 Cox, C. C. 464—Div. Ct.

105. "*Corked and Sealed*"—*Gummed Paper Label—Intoxicating Liquors (Sale to Children) Act*, 1901 (1 Edw. 7, *c.* 27), *s.* 2.]—A bottle of beer sold to a child messenger had a screw stopper and a paper label gummed over the top: the label extended an inch down each side of the neck of the bottle, and the gum was quite dry at the time of sale. The justices having convicted the vendor, after ocular demonstration, that the label could be removed intact by moistening it with the tongue:—

HELD—that it was a question of fact whether the bottle was properly corked and sealed, and that there was evidence to support the conviction. A label secured by gum may, however, in some cases be sufficient. The true test is, is the stopper so secured that the child cannot get at and abstract the liquor without detection?

MITCHELL *v.* CRAWSHAW, [1903] 1 K. B. 701; [72 L. J. K. B. 389; 67 J. P. 179; 88 L. T. 463; 19 T. L. 352; 20 Cox, C. C. 395—Div. Ct.

106. *Corked and Sealed Vessel—Bottle with Screw Stopper and Adhesive Label—Sufficiency of Label as a "Sealing"—Intoxicating Liquors (Sale to Children) Act*, 1901 (1 Edw. 7, *c.* 27), *s.* 2.]—The appellant was convicted under sect. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, for selling beer to a child under fourteen, the beer not being sold in a sealed vessel. It was admitted that an adhesive paper label adhered to the top of the stopper and to the sides of the neck of the bottle. No evidence was given that the stopper had been removed or could be removed without destroying the label. The magistrate was of opinion that the label could be removed in several ways without destruction—*e.g.*, by the application of steam, or by separating the label from the neck of the bottle by means of a penknife—and the stopper could then be withdrawn and that in this way access to the beer could be obtained, and with the aid of some adhesive substance the label could be replaced at the will of the messenger, and that therefore the bottle was not "sealed" within the meaning of the section.

HELD—that the magistrate could not act upon common knowledge, and that therefore no evidence had been given upon which his finding could be supported.

MACEY *v.* M'KENZIE, (1903) 67 J. P. 251; 88 [L. T. 631; 20 Cox, C. C. 449—Div. Ct.

107. *Knowledge—Barman selling Innocently—Intoxicating Liquor (Sale to Children) Act*, 1901 (1 Edw. 7, *c.* 27), *s.* 2.]—Sect. 2 of the Sale to Children Act, 1901, does not create an absolute prohibition against the sale of liquor to children under fourteen except in corked and sealed vessels. Knowledge is an essential ingredient of the offence.

Therefore a licence holder cannot be convicted if his barman sells liquor to a child under fourteen, honestly believing him to have attained that age.

GROOM *v.* GRIMES, (1903) 67 J. P. 345; 89 L. T. [129; 20 Cox, C. C. 515—Div. Ct.

108. "*Knowingly allows any Person to sell*"—*Sale by Barman without Licensee's Knowledge—Intoxicating Liquors (Sale to Children) Act*, 1901 (1 Edw. 7, *c.* 27), *s.* 2.]—Knowledge can be imputed to an absent master, who has deputed his authority to a servant; but not to a master, who is present and in authority and has expressly forbidden his assistant to do the act complained of.

The appellant, a licensed person, posted a notice on his premises stating that every servant was forbidden to supply intoxicating liquors to any child under fourteen except in sealed and corked bottles; and he gave express instructions to his barman to the same effect. While the appellant was present in the bar in charge of the premises, the barman, without his knowledge or connivance, knowingly sold liquor to a child under fourteen in a bottle which was neither corked nor sealed.

HELD—that the appellant could not be convicted of an offence under sect. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901.

EMARY *v.* NOLLOTH, [1903] 2 K. B. 264; 72 [L. J. K. B. 620; 67 J. P. 354; 89 L. T. 100; 19 T. L. R. 530; 52 W. R. 107; 20 Cox, C. C. 507—Div. Ct.

109. "*Knowingly allows any Person to Sell*"—*Sale by Assistant to Child without Knowledge and Contrary to Orders of Licensee—Intoxicating Liquors (Sale to Children) Act*, 1901 (1 Edw. 7, *c.* 27), *s.* 2.]—M., a publican, was charged with having allowed his barman knowingly to sell and deliver intoxicating liquor to a girl under fourteen for consumption off the premises, the same not being in a corked or sealed vessel. M. had given orders to his assistants not to supply liquor to children in contravention of the statute. The liquor in the present case was sold by M.'s barman, M. himself not being in the shop at the time, though his foreman was. The magistrate found that the sale to the child was knowingly effected by the barman, but without the knowledge, actual or constructive, or the wilful connivance of M. or his foreman, and he dismissed the summons.

Sale to Children —*Continued.*

HELD—that M. had not knowingly allowed the intoxicating liquor to be sold within the meaning of the Intoxicating Liquor (Sale to Children) Act, 1901, and that the summons was properly dismissed.

Emary v. *Nolloth* ([1903] 2 K. B. 264; 72 L. J. K. B. 620; 67 J. P. 354; 89 L. T. 100; 19 T. L. R. 530—Div. Ct., No. 108, *supra*) followed.

CONLON *v.* MULDOWNEY, [1904] 2 Ir. R. 498—[K. B. D.

110. "*Knowingly allows any person to sell*"—*Barmaid Selling to Child—Express Order not to do so—No Delegation of Authority—Intoxicating Liquors (Sale to Children) Act*, 1901 (1 Edw. 7, *c.* 27), *s.* 2.]—A barmaid, contrary to express orders, knowingly sold intoxicating liquor to a child under fourteen years of age in a bottle not corked and sealed. The licence holder, although not in the bar, was within call, and the justices found as a fact that he had not delegated to the barmaid the charge and control of the bar.

HELD—that the licence holder could not be convicted on a charge of "knowingly allowing" the barmaid to so sell the liquor.

Emary v. *Nolloth* ([1903] 2 K. B. 264; 72 L. J. K. B. 620; 67 J. P. 354; 89 L. T. 100; 19 T. L. R. 530—Div. Ct., No. 108, *supra*) applied and followed.

It cannot be said, as a matter of law, that a licence holder who is absent from his bar, but within call, has delegated the control of it to the person serving in it.

MCKENNA *v.* HARDING, (1905) 69 J. P. 354—[Div. Ct.

111. "*Knowingly allows any person to sell*"—*Barmaid Knowingly Selling to Child—Express Order not to do so—Manager in Charge—No Control Delegated to Barmaid—Intoxicating Liquors (Sale to Children) Act*, 1901 (1 Edw. 7, *c.* 27), *s.* 2.]—A licence holder left the management of a public-house to a manager. A barmaid, contrary to express orders, sold intoxicating liquor to a child under fourteen years of age in a bottle not corked and sealed. At the time the manager was in an adjoining bar, and might have seen, but did not see, what she was doing. The magistrate found as a fact that the manager was at the time in charge of the premises, and that neither the licence holder nor the manager knowingly allowed or connived at the sale.

HELD — that his decision could not be disturbed.

ALLCHORN *v.* HOPKINS AND ANOTHER, (1905) [69 J. P. 355—Div. Ct.

112. *Unsealed Bottle—Quantity Less than One Reputed Pint—Intoxicating Liquors (Sale to Children) Act*, 1901 (1 Edw. 7, *c.* 27), *s.* 2.]—*Per* Darling and Lawrence JJ.: It is an offence against sect. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, to send a child under the age of fourteen years to any place where intoxicating liquors are sold or distributed for the purpose of obtaining a pint (or more) of intoxicating liquor unless it is sold in a corked and sealed vessel belonging to and provided by the vendor.

Per Lord Alverstone, C.J.: Possibly it may be sufficient if the purchaser sends the child with a vessel of his own, but proves that he intended it to be corked and sealed by the vendor.

Semble, to send a child for less than a pint, though to be delivered in a corked and sealed vessel belonging to the vendor, is an offence.

FARNDALE *v.* DILLON, [1907] 2 K. B. 513; 76 [L. J. K. B. 922; 71 J. P. 374; 97 L. T. 284—Div. Ct.

VI. HABITUAL DRUNKARDS.

113. "*Black List*"—*Proof of Previous Convictions—Production of Register—Inebriates Act*, 1898 (61 & 62 Vict. *c.* 60), *s.* 2—*Licensing Act*, 1902 (2 Edw. 7, *c.* 28), *s.* 6 (1).]—In any particular Police Court the register of that Court, together with evidence of identification, is sufficient evidence of previous convictions for the purposes of sect. 2 of the Inebriates Act, 1898, and sect. 6 (1) of the Licensing Act, 1902; and, *semble*, also for other purposes.

A magistrate cannot make an order under sect. 6 (1) of the Licensing Act, 1902, unless the defendant consents to be dealt with summarily.

COMMISSIONER OF POLICE FOR THE METRO-[POLIS *v.* DONOVAN, [1903] 1 K. B. 895; 72 L. J. K. B. 545; 67 J. P. 147; 52 W. R. 14; 88 L. T. 555; 19 T. L. R. 392; 20 Cox, C. C. 435—Div. Ct.

114. *Prisoner Pleading Guilty to Primary Offence—Trial on issue of Habitual Drunkenness—Jury—Evidence—Depositions—Inebriates Act*, 1898 (61 & 62 Vict. *c.* 60), *s.* 1.]—Sect. 1 of the Inebriates Act, 1898, applies to cases where a prisoner pleads guilty to the primary offence charged.

If he then pleads not guilty to a further charge of habitual drunkenness, a jury may be sworn to try this issue.

By a majority—upon the trial of such an issue the depositions of witnesses may be used as evidence.

REX *v.* MEEHAN, [1905] 2 Ir. R. 577—Ir. C. C. R

VII. MISCELLANEOUS.

115. *Appeal to Quarter Sessions—Costs—Taxation out of Sessions—Consent—Order on Borough Treasurer to Pay Costs of Licensing Justices—Right of Treasurer to be Present at Taxation — Jurisdiction — Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 29.]—Sect. 29 of the Licensing Act, 1828, provides that, in the case of an appeal from the judgment of a justice in or concerning the execution of the Act to the court of quarter sessions having been reversed, "it shall be lawful for the Court, if it shall think fit, to adjudge and order that the treasurer of the county or place in and for which such justices whose judgment shall have been so reversed shall have acted on the occasion when he shall have

Miscellaneous—*Continued.*

given such judgment, shall pay to such justice, or to whomsoever he shall appoint, such sum as shall, in the opinion of such Court, be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been so put."

When a court of quarter sessions, under this enactment, orders the expenses of licensing justices to be paid by the treasurer of the county or place for which the justices acted, the amount of such expenses ought not to be taxed out of sessions without the consent of the treasurer; and if, in the absence of such consent, the Court refer the taxation to their clerk of the peace, they must adopt his decision during the sessions. The treasurer is entitled to have notice of, and to attend, the taxation of the expenses.

A court of quarter sessions ordered the treasurer of a borough to pay a sum of money to the clerk of licensing justices whose judgment, while acting for the borough, had been appealed against, for the expenses to which he (the clerk) had been put in supporting the judgment of the justices.

HELD—that the order was bad.

REG. *v.* WINDER, [1900] 2 Q. B. 666; 69 L. J. [Q. B. 729; 64 J. P. 740; 48 W. R. 605; 83 L. T. 171; 16 T. L. R. 400—Div. Ct.

116. *Appeal to Quarter Sessions — Personal Service of Notice of Appeal—Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *s.* 31, *sub-ss.* 2, 7.]—Personal service of a notice of appeal to quarter sessions from a conviction under the Licensing Acts is not necessary under the Summary Jurisdiction Act, 1879, s. 31. sub-s. 2.

REG. *v.* SOMERSETSHIRE JJ., EX PARTE [TALBOT, (1900) 69 L. J. Q. B. 311; 64 J. P. 341; 16 T. L. R. 166—Div. Ct.

117. *Beerhouse—"Real Resident Holder and Occupier" — Salaried Manager of Brewers — Beerhouse Act*, 1840 (3 & 4 Vict. *c.* 61), *s.* 1.]—By sect. 1 of the Beerhouse Act, 1840. "No licence to sell beer or cider by retail . . . shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed."

HELD—that the fact that the applicant for a beer licence in respect of a dwelling-house is paid a salary by brewers, and has to pay over to them the profits made upon the sale of the beer, does not of itself in law prevent him from being the "real resident holder and occupier" of the house.

Judgment of Div. Ct. (63 J. P. 676) affirmed.

NIX *v.* NOTTINGHAM JJ., [1899] 2 Q. B. [294; 68 L. J. Q. B. 854; 63 J. P. 628; 47 W. R. 628; 81 L. T. 41; 15 T. L. R. 463—C. A.

118. *Beerhouse — Spirits — Sale without Licence — Second Conviction — Disqualification to hold Licence—Application by Owner for Authority to carry on Business—Jurisdiction—Licensing Act*, 1872 (35 & 36 Vict. *c.* 94), *s.* 3—*Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 15.] —A beerhouse-keeper was upon the same day twice convicted under sect. 3 of the Licensing Act, 1872, of selling spirits without a spirit licence, and upon such second conviction he was disqualified for two years from holding any licence, and by the operation of the section he also, upon such second conviction, forfeited his licence to sell beer. Upon an application being made after the second conviction by the owner of the premises under sect. 15 of the Licensing Act, 1874, for an authority to carry on the business until the next special sessions :—

HELD—that the justices had jurisdiction to entertain the application, although made after the second conviction, as the words "for the first time" in sect. 15 were to be construed as governing the latter part of the section as well as the former, and that the application could be made after the first conviction, which caused a personal disqualification or a forfeiture of the licence, which, in the case of selling spirits without a spirit licence, was the second conviction.

EX PARTE FLINN & SONS (No. 1), [1899] 2 Q. B. [154; 68 L. J. Q. B. 777; 63 J. P. 660; 47 W. R. 697; 81 L. T. 27; 15 T. L. R. 406—Div. Ct.

119. *Beerhouse — Forfeiture of Licence by Conviction of Licensee—Application by Owner for Temporary Authority to carry on Business—Limitation of Discretion of Justices—Grounds of Refusal of Application — Wine and Beerhouse Act*, 1869 (32 & 33 Vict. *c.* 27), *ss.* 8, 19—*Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 15.]—Where the holder of a beerhouse licence which has existed before and continuously since 1869 has forfeited his licence by conviction for offences under sect. 15 of the Licensing Act, 1874, and the owner of the premises makes an application under that section to a court of summary jurisdiction for a temporary authority to carry on the business until the next special licensing sessions, the justices in such court have not a general discretion to refuse such application, and cannot go beyond the four grounds of refusal specified in sect. 8 of the Wine and Beerhouse Act, 1869.

EX PARTE FLINN & SONS (No. 2). [1899] 2 [Q. B. 607; 68 L. J. Q. B. 1025; 63 J. P. 740; 48 W. R. 29; 81 L. T. 221; 15 T. L. R. 532—Div. Ct.

Disapproved in *Tower JJ. v. Chambers*, No. 120, *infra*.

120. *Beerhouse — Conviction of Tenant for Selling Spirits without a Licence—Closing of House — Application by Owner to Special Sessions—Jurisdiction of Justices to refuse Grant of Licence— Wine and Beerhouse Act*, 1869 (32 & 33 Vict. *c.* 27), *ss.* 8, 19—*Licensing Act*, 1874 (37 & 38 Vict. *c.* 49), *s.* 15.]—The tenant of a beerhouse which had been licensed prior to May 1st, 1869, and the licence renewed continuously since that date, was convicted of

Miscellaneous—*Continued.*

selling spirits without a licence, and the house was thereupon closed for the sale of wine and beer until after the hearing of an appeal from the refusal of the application hereinafter mentioned.

At the next special sessions for licensing purposes, the owner applied for the grant of a licence for the sale of beer and wine by retail in respect of such premises pursuant to sect. 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49). The grant of such licence was refused by the justices at special sessions upon grounds other than one or more of the four grounds specified in sect. 8 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27).

HELD—that the licence had been forfeited by the conviction and was no longer "in force," and that, therefore, the justices had jurisdiction to act as they did.

Freer v. *Murray* ([1894] A. C. 576; 63 L. J. M. C. 242; 58 J. P. 508; 71 L. T. 444) followed.

Ex parte Flinn (No. 2) ([1899] 2 Q. B. 607; 68 L. J. Q. B. 1025; 63 J. P. 740; 48 W. R. 29; 81 L. T. 221—Div. Ct., No. 119, *supra*) overruled.

Decision of Div. Ct. (68 J. P. 204; 52 W. R. 541; 90 L. T. 228; 20 T. L. R. 160) reversed.

TOWER JJ. *v.* CHAMBERS, [1904] 2 K. B. 903; [73 L. J. K. B. 951; 20 T. L. R. 784; 68 J. P. 581; 91 L. T. 643—C. A.

121. *General Annual Licensing Meeting — Adjournment—Further Adjournment for Lack of Time—Fresh Application made at such Second Adjourned Meeting—Held not in Time—Licensing Act*, 1902 (2 Edw. 7, *c.* 28), *s.* 14 (1).]—By sect. 14 (1) of the Licensing Act, 1902, every adjournment of the general annual licensing meeting must be held within one month of the date thereof. This means every adjournment "for new business," and does not prevent a further adjournment to hear applications duly made, but which cannot be dealt with for lack of time.

But at such second (or subsequent) adjournment no application can be considered, which was not made in time to be heard at the first adjourned meeting, had the justices been able to deal with it.

REX *v.* BRISTOL JJ., EX PARTE WHITING, (1903) [67 J. P. 375; 19 T. L. R. 596; 89 L. T. 474—Div. Ct.

122. *General Annual Licensing Meeting — Adjournment beyond September — "Persons Aggrieved"—Alehouse Act*, 1828 (9 Geo. 4, *c.* 61), *s.* 3—*Wine and Beerhouse Act*, 1870 (33 & 34 Vict. *c.* 29), s. 11.]—Under the Alehouse Act, 1828, an adjourned general annual licensing meeting to receive original or fresh notices cannot be held in the month of October. Sect. 3 of that Act clearly contemplates that the general annual meeting and every adjournment of it shall be held in the month of August or September.

Sect. 11 of the Wine and Beerhouse Act, 1870, which allows an adjournment where an applicant for the "grant or renewal of a certificate" has, through inadvertence or misadventure, failed to comply with any of the preliminary requirements of "the principal Act or this Act, or any Act incorporated therewith," is not attracted to the Act of 1828, and does not enable the justices to adjourn an application for an alehouse licence.

A brewer having licensed premises in the district within which a licence has been granted, who has opposed the grant of the licence and the order confirming the same, is a "person aggrieved" by such order, as he has a real interest in the decision of the justices, and he is entitled to a writ of *certiorari*.

REX *v.* GROOM, EX PARTE COBBOLD, [1901] 2 [K. B. 157; 70 L. J. K. B. 636; 65 J. P. 452; 49 W. R. 484; 84 L. T. 534; 17 T. L. R. 433—Div. Ct.

123. *Occasional Licence—Conditions attached to Existing Licence—Hours of Opening—Monopoly Value—Hours excluded by Terms of Condition—Licensing Act*, 1872 (35 & 36 Vict. *c* 94), *s.* 29—*Licensing Act*, 1904 (4 Edw. 7, *c.* 23), *s.* 4 (2).]—The fact that the justices have attached to the grant of a licence under sect. 4 (2) of the Licensing Act, 1904, the conditions that the premises should only be open between noon and 2 p.m., and that the licence-holder should pay a monopoly value of £20, does not prevent the licence-holder being granted an "occasional" licence under sect. 29 of the Licensing Act, 1872, to keep the premises open on a particular day from 7 to 11 p.m.

GROH *v.* HESKETH, [1907] 2 K. B. 232; 76 L. J. [K. B. 787; 71 J. P. 339; 97 L. T. 179; 23 T. L. R. 501—Div. Ct.

Affirmed, [1908] 1 K. B. 654; 77 L. J. K. B. 481; 72 J. P. 114—C. A.

124. *Refreshment Houses Act*, 1860 (23 Vict. *c.* 27), *s.* 3—*Retail Wine Licence—Validity of Notices*—Mandamus.]—Notice of application for a shopkeeper's retail wine licence signed by the applicant as secretary for a limited company is not bad because the applicant does not so describe himself in the body of the notice.

REG. *v.* LYON, EX PARTE SKINNER, (1898) 62 [J. P. 357; 14 T. L. R. 357—C. A.

125. *Spirit Dealer's Additional Licence — Applicant not having taken out Dealer's Licence —Power of Adjournment—Revenue Act*, 1861 (24 & 25 Vict. *c.* 21), *s.* 2.]—Where it appears, after the hearing of an application for an additional licence to retail spirits in pursuance of the Revenue Act, 1861, that the applicant has not taken out his licence as a dealer in spirits, the justices can adjourn the application in order to enable him to obtain the dealer's licence, and on the adjourned day can grant his application on his producing such licence.

RE BYFORD, (1905) 69 J. P. 152—Qr. Sess.

126. *Spirits — "Sending out, delivery, or removal"—Spirits over One Gallon—Spirits Act*, 1880 (43 & 44 Vict. *c.* 24), *ss.* 105, 107.]—

Miscellaneous—*Continued.*

By sect. 105 of the Spirits Act, 1880 (43 & 44 Viet. c. 24): "Except as in this section provided, no spirits exceeding the quantity of one gallon of the same denomination at a time for the same person may be sent out, delivered, or removed from any one place to another place unless accompanied by a permit." And by sect. 107 of the same Act: "If any person sends out, delivers, or removes, or receives any spirits required to be accompanied by a permit without a permit; . . . . he shall, in addition to any other penalty or forfeiture, incur a fine of £500.

In 1897 one J. B. gave the respondent, who was licensed to sell beer only and had no spirit licence, an order, to forward to his brother, who had such a licence, for two gallons of rum.

The rum was delivered by a carman at the respondent's house and sent to J. B. by his potman.

The spirits were not accompanied by any permit or certificate.

HELD—that the respondent was guilty of sending out, delivering, and removing spirits within the Act.

TEESE *v.* JENNINGS, (1898) 79 L. T. 300; 62 [J. P. 771; 19 Cox, C. C. 174—Div. Ct.

INVENTIONS.

See PATENTS AND INVENTIONS.

ISLE OF MAN.

See DEPENDENCIES AND COLONIES.

JAMAICA.

See DEPENDENCIES AND COLONIES.

JOINT STOCK COMPANIES.

See COMPANIES AND COMPANY LAW.

JOINT TENANCY AND TENANCY IN COMMON.

See PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL.

JOINTURE.

See HUSBAND AND WIFE; REAL AND PERSONAL PROPERTY.

JUDGMENT.

See also BANKRUPTCY; ESTOPPEL; LIMITATION OF ACTIONS, 20-22; PLEADING; PRACTICE AND PROCEDURE.

1. *Amendment*—"*Accidental Slip or Omission*"—*Correction of Bill of Costs*—*Certificate of Taxing Master*—*R. S. C., Ord.* 28, *r.* 11.]—In an action in the Queen's Bench Division the plaintiffs recovered judgment against the defendant for a sum to be ascertained by a special referee. The referee assessed the sum, and judgment was drawn up and entered for the plaintiffs for the sum so assessed with costs to be taxed. The plaintiffs carried in their list of costs for taxation, but by a pure slip they did not include in their list of costs the sum which they had paid to the referee when they took up the award.

HELD—that the omission of such sum was an "accidental slip or omission" within the meaning of r. 11 of Ord. 28, and the error in the judgment could therefore be corrected "at any time," even after the judgment had been drawn up and entered; that the referee's fees should be referred to the taxing Master for taxation; and that his certificate should be amended.

Fritz v. *Hobson* ((1880) 14 Ch. D. 542; 49 L. J. Ch. 735; 28 W. R. 722; 42 L. T. 677—Fry, J.) followed.

CHESSUM & SONS *v.* GORDON, [1901] 1 Q. B. [694; 70 L. J. Q. B. 394; 49 W. R. 309; 84 L. T. 137—C. A.

2. *Amendment*—"*Accidental Slip or Omission*"—*Correction*—*R. S. C., Ord.* 28, *r.* 11.]—The plaintiff brought an action for an injunction to restrain the defendants from maintaining a wall abutting upon the plaintiff's premises, and also for damages for injuries caused to the plaintiff by reason of the defendants permitting water to escape from the defendant's premises into the plaintiff's house. The injunction was refused. In respect of the damage caused by the water the plaintiff was awarded £6, with such costs, if any, as would be allowed in the County Court. The defendants sought to have the order varied by adding such words as would restrict the costs to costs allowed on the lower scale in the County Court.

HELD—that as the action was one which should never have been brought, and that if the judge's attention had not been called to the County Court Ord. 50A, r. 9, he would have made a different order, there had been such an accidental omission within R. S. C., Ord. 28, r. 11, as would justify him in making the necessary correction in the order.

DOSWELL *v.* NORTON, (1902) 18 T. L. R. 228—[Bucknill, J.

3. *Foreign Judgment*—*Judgment by default in France*—*Defendants appearing in Belgium to resist Execution there* — *No Estoppel.*] — An English vessel, after colliding with a French

vessel, proceeded to Belgium, and her owners there gave bail to avoid her arrest pending a suit by the owners of the French vessel in the French Courts.

In the French suit the English owners did not appear, and judgment was given against them: this judgment was rendered executory in Belgium, and thereupon the English owners appeared in the Belgium Courts to resist an execution against their vessel.

Subsequently the English owners instituted proceedings in respect of the collision in the English Courts, and the French owners (the defendants) pleaded the French judgment as a bar thereto.

HELD—that the English owners were not subject, and had not submitted to the jurisdiction of the French Court; and, that, as the judgment was not one pronounced upon the merits in the presence of the parties, it was not binding upon an English Court.

The Delta ((1876) 1 P. D. 393; 45 L. J. Ad. 111; 25 W. R. 46—Phillimore, J.) followed.

Decision of Barnes, J. ([1904] P. 41; 73 L. J. P. 8; 89 L. T. 481; 9 Asp. M. C. 497) affirmed.

THE CHALLENGE AND THE DUC D'AUMALE, [1905] P. 198; 74 L. J. P. 55; 93 L. T. 390—C. A.

And see CONFLICT OF LAWS.

4. *Joint Contractors — Co-defendants — Judgment by consent against one Defendant—Effect as regards Proceeding against the Other—Pleading—Costs.*]—Where two joint contractors are sued in the same action for the same debt, a judgment recovered by consent against one is a bar to the plaintiff proceeding against the other for the same cause of action, in the same way as if separate actions had been brought against the two.

The rule in *King* v. *Hoare* (13 M. & W. 494) applied.

A defendant who relies on such a judgment as a bar ought to state in his pleadings that he does so.

MCLEOD v. POWER, [1898] 2 Ch. 295; 67 L. J. [Ch. 551; 79 L. T. 67; 47 W. R. 74—Byrne, J.

5. *Judgment in Default of Appearance against one Defendant—Right to Proceed against Others—Irish Gen. Orders* 13, *r.* 4 (14), *r.* 5.]—A plaintiff, by entering judgment in default of appearance against one of several joint defendants, does not abandon his right to proceed against the others.

PIM BROTHERS, LD. *v.* COYLE AND ANOTHER, [1903] 2 Ir. R. 457—K. B. Div.

6. *Setting aside — Fraud in obtaining Judgment.*]—A judgment obtained by a fraud on the Court may be set aside, even though perjury is not sufficient cause therefor.

COLE *v.* LANGFORD, (1898) 2 Q. B. 36; 67 [L. J. Q. B. 698; 14 T. L. R. 427—Div. Ct.

7. *Setting Aside—Application by Person not Party to Record—Irish R. S. C. Ord.* 16, *r.* 11 *—Ord.* 27, *r.* 16.]—In an action against the administrator of an intestate for money alleged to have been paid by the plaintiff for the use of the deceased, judgment was allowed to be entered by collusion between the plaintiff and the defendant.

HELD—that a next of kin, not a party to the record, whose interest in the assets of the deceased was prejudicially affected by the judgment, had such a specific interest in the deceased's assets as to entitle him to an order in the action setting aside the judgment and giving him leave to intervene.

MEHAFFEY *v.* MEHAFFEY, [1905] 2 Ir. R. 292—[K. B. Div.

8. *Setting aside — Grounds for—Action for Libel—No Defence—Interlocutory Judgment for Damages to be assessed — Verdict exceeding Amount claimed—Amendment of Claim—Speech of Counsel inflaming Damages—New Trial.*]—In an action of libel the plaintiff claimed £1,000 damages. No defence was delivered, and interlocutory judgment was signed for the damages to be assessed in the sheriff's Court. The jury returned a verdict for £2,500. The plaintiff, without applying to amend the statement of claim, signed judgment for this amount. The speech of plaintiff's counsel had a very serious effect in inflaming the damages.

HELD—that the judgment was bad; and that the defendants might move to set aside the judgment and to make it conform to the claim, otherwise there should be a new trial.

CHATTEL *v.* "DAILY MAIL" PUBLISHING CO., [LD., (1902) 18 T. L. R. 165—C. A.

JUDGMENT SUMMONS.

See COUNTY COURTS.

JUDICIAL COMMITTEE.

See COURTS.

JUDICIAL SEPARATION.

See HUSBAND AND WIFE.

JURIES.

And see COUNTY COURT; MAGISTRATES; PRACTICE AND PROCEDURE.

1. *Juryman protesting against Verdict — Application for New Trial — Affidavit—Inadmissibility of.*]—A juryman cannot be heard to complain of a verdict to which he has been a party after he has left the jury box. He must protest in the jury room or in the Court. Two

days after the verdict of the jury was pronounced in Court, one of the jury wrote to the Lord Chief Justice, who tried the case, stating that he had not agreed to the verdict as pronounced. This juryman had since made an affidavit.

HELD—that the affidavit was not admissible on an application for a new trial.

NESBITT *v.* PARRETT AND ANOTHER, (1902) 18 [T. L. R. 510—C. A.

JUS TERTII.

See PRACTICE AND PROCEDURE.

JUSTICE OF THE PEACE.

See MAGISTRATES.

JUVENILE OFFENDER.

See CRIMINAL LAW AND PROCEDURE.

KIDNAPPING.

See CRIMINAL LAW AND PROCEDURE.

LACHES.

See LIMITATION OF ACTIONS; WAIVER.

LANCASTER PALATINE COURT.

See COURTS.

LAND.

See REAL PROPERTY AND CHATTELS REAL: SALE OF LAND, &C.

LAND AGENTS.

See AGENCY; SALE OF LAND; VALUERS AND APPRAISERS.

LAND CHARGES.

See REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

LAND CLAUSES CONSOLIDATION ACTS.

See COMPULSORY PURCHASE AND COMPENSATION.

LAND REGISTRY.

See SALE OF LAND; REAL PROPERTY AND CHATTELS REAL.

LAND TAX.

See COL. 522.

LAND TRANSFER.

See REAL PROPERTY AND CHATTELS REAL: SALE OF LAND.

LANDLORD AND TENANT.

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I. RELATION OF LANDLORD AND TENANT.

See also Bankruptcy, Nos. 21, 22, 23, 25, 170, 194, 272, 275; Limitation of Actions, Nos. 39–43; Mortgages; Practice and Procedure, No. 154.

1. *Innocent Misrepresentations — Insanitary condition—Rescission — Indemnity — Damages.*]—The plaintiffs asked for rescission of a lease on the ground of admittedly innocent misrepresentations, and also an indemnity from the consequences of having entered into the contract. Innocent misrepresentations as to the sanitary condition of the premises had been actually made.

Held—that to make good the consequences of misrepresentation was the same thing as damages, and damages could not be recovered for innocent misrepresentations: and that the plaintiffs were not entitled to anything more than what they had paid and expended under the actual terms of the lease. Anything else would be damages pure and simple.

The law as laid down by Bowen, L.J., in *Newbigging* v. *Adam* ((1886), 34 Ch. D. 582; 56 L. J. Ch. 275; 35 W. R. 597; 55 L. T. 275—C. A.), followed.

Whittington *v.* Seale-Hayne, (1900) 82 L. T. [49; 16 T. L. R. 181—Farwell, J.

2. *Intermeddling by Landlord — Intermeddling with Assets before Administration—Injunction.*]—Shortly after the death of a tenant intestate, the landlord wrongfully entered and seized the goods of the deceased. On the *ex parte* application of the sole next of kin before administration:—

Held—that the Court would grant an injunction restraining the landlord from interfering with the assets, the plaintiff giving an undertaking as to damages.

Cassidy *v.* Foley, [1904] 2 Ir. R. 427—[Andrews, J.

3. *Lease to Trustee—Payment of Rent and Occupation by* Cestui que Trust—*Liability of Cestui que Trust for Repairs.*]—A lease was granted by the plaintiffs to J. S. Womack, who thereby covenanted for himself, his heirs, executors, administrators, and assigns, that he and they would repair the premises. The lease also contained a declaration by J. S. Womack that he held the premises in trust for the defendant, his wife, as part of her separate estate. J. S. Womack died intestate, and no letters of administration of his estate were taken out. The defendant from the first paid the rent and did the repairs which were done. On the expiry of the term the premises were out of repair. The plaintiffs brought an action against the defendant for damages for breach of the covenant to repair.

Held—that there was no legal contract of tenancy between the plaintiffs and the defendant, nor any contract by which she became legally bound by the covenants in the lease; and that there was no equitable liability depending on her beneficial interest alone or coupled with the fact of occupation.

Walters v. *Northern Coal Mining Co.* ((1855) 5 D. M. & G. 629; 25 L. J. Ch. 633) and *Cox* v. *Bishop* ([1857] 8 D. M. & G. 815; 26 L. J. Ch. 389) followed.

Ramage *v.* Womack, [1900] 1 Q. B. 116; 69 [L. J. Q. B. 40; 81 L. T. 526; 16 T. L. R. 63—Wright, J.

4. *Liability of Landlord—Demise of Room in Factory—Supply of Power from Engine—Power not fit for Purpose—Accident caused thereby—Sale of Goods Act*, 1893 (56 & 57 Vict. *c.* 71), *s.* 14, *sub-s.* 1.]—The defendants, who were the lessees of a factory, demised to the plaintiffs a room therein, and agreed to supply to them power from an engine for working a machine in the demised room at a yearly rent of £100. The engine was under the control and in the possession of the defendants. While the engine was working the machine, owing to a defect in the governor, it went too fast, with the result that part of the machine in the plaintiff's room became heated and broke, and killed a workman employed by the plaintiffs. The plaintiffs, having paid the widow compensation under the Workmen's Compensation Act, 1897, sued the defendants to recover the amount so paid. The jury found that the defendants had not supplied power which was reasonably fit for the purpose of working the machine.

Held—that, apart from the demise of the room, there was a contract by the defendants to supply to the plaintiffs power for working the machine; that this was a contract of purchase and sale; that there was therefore an obligation to supply power reasonably fit for the purpose; and that the plaintiffs were entitled to recover.

Bentley Brothers *v.* A. Metcalfe & Son, [1906] 2 K. B. 548; 75 L. J. K. B. 891; 95 L. T. 596; 22 T. L. R. 676—C. A.

5. *Liability of Landlord—Condition of Premises—Patent Defect.*]—A landlord is not an insurer of the safety of his tenants. He is not

Relation of Landlord and Tenant—*Continued.*

responsible for a defect of construction (*e.g.*, a staircase rail with interstices wide enough for a child to fall through) which was as obvious to the tenant when taking the house as it was to the landlord.

MECHAN *v.* WATSON, [1907] S. C. 25—Ct. of [Sess.

6. *Liability of Lessors to Third Party—Lessee of Building Land raising it so as to drain on to adjoining Land—Canada*—Action négatoire.]—The respondents were the owners of land adjoining, but on a lower level than, some land of the appellant. This land was leased by the respondents to a builder, the lease containing a contract by him to subsequently purchase the land, and he thereupon commenced building operations; in the course of such operations he raised the level of the land, so that, instead of receiving the drainage of the appellant's land, as it had hitherto done, it now drained on to his land, and in consequence the present proceedings were instituted.

HELD—that the lessee was not acting under the control or direction of the respondents, or under such circumstances as to render them liable for his acts; and, therefore, that the appellant's right against them was, not to call upon them to pay damages, and reinstate the *locus in quo* in its former condition at their expense, but merely to allow him to enter their land, and, at his own expense, or at that of any person liable for the damage done, to do the work necessary to relieve his land of the new servitude imposed upon it.

Judgment of the Court of King's Bench for Quebec reversed.

KIEFFER *v.* LE SEMINAIRE DE QUEBEC, [1903] [A. C. 85; 72 L. J. P. C. 18; 87 L. T. 184; 19 T. L. R. 50—P. C.

7. *Occupation — Demise of Close — Tenant occupies additional Close belonging to Landlord —No Presumption.*]—H. demised an island to E. Subsequently E. occupied two other plots of H.'s land. These plots were situate on the mainland, and were something between half a mile and a mile from the island demised to E. They were inclosed land. There was no evidence that they were occupied by E. as an addition to his holding under H., and no rent was paid in respect of them. After more than twelve years had elapsed, when E.'s tenancy of the island had determined, H. brought an action against E.'s successor in title to obtain possession of the two plots. The county court judge held that there was a presumption that E. had occupied them as H.'s tenant, and in the absence of evidence to rebut this presumption H. was entitled to recover possession. On appeal:—

HELD—that there was no such presumption.

Semble, the presumption that a tenant who occupies more land than is demised to him occupies it for the benefit of his landlord is confined to encroachment on waste.

LORD HASTINGS *v.* SADDLER, (1898) 79 L. T. [355—Div. Ct.

8. *Store—Implied Fitness—Reasonable Use—Usage of Trade—Loading in Excess.*]—A lessor of a store is bound to provide a store reasonably fit for the purpose for which it is to be let, the lessee is bound to use the store reasonably. The criterion is, not the relation of stability to capacity or cubic contents, but the relation of stability to weight, that is the weight which according to the ordinary usage of trade would be put into such a building. If it be proved that the building was loaded by the tenant in excess of what is recognised as safe in the trade, and it falls, then there is evidence from which it may be inferred by a Court or jury that the building fell through the fault of the tenant.

GLEBE SUGAR REFINING CO. *v.* PATERSON, [(1900) 2 F. 615. (Compare *Manchester Bonded Warehouse Co.* v. *Carr*, (1880) 5 C. P. D. 507; 49 L. J. C. P. 809; 45 J. P. 7; 29 W. R. 354; 43 L. T. 476.)

II. AGREEMENTS FOR LEASES.

9. *Agreement not to give Notice to Quit—Document inoperative as a Lease—Good as an Agreement to grant Lease—Specific Performance on Terms—Real Property Act*, 1845 (8 & 9 Vict. *c.* 106), *s.* 3.]—A landlord sought to eject a tenant, who was in possession under an agreement, of which the following are the material words: "I have let to Mr. A. . . . at a weekly rental of 23*s.*, and I agree not to raise Mr. A. any rent as long as he lives in the house and pays rent regular. I shall not give him notice to quit." A week's notice to quit was given.

HELD—that the document, not being under seal, did not vest in the tenant any interest in land whatever; but that, on the authorities, it must be treated as an agreement to grant a lease of the premises for the rest of the tenant's life subject to two conditions: (1) regular payment of rent, (2) determination at the option of the tenant; and that, therefore, the tenant could elect within a fortnight to have specific performance of it, on paying any arrears of rent.

Browne v. *Warner* ((1807) 14 Ves. 156, 409; 9 R. R. 259), *Parker* v. *Taswell* ((1858) 2 De G. & J. 559) followed.

ZIMBLER *v.* ABRAHAMS, [1903] 1 K. B. 577; 72 [L. J. K. B. 103; 51 W. R. 343; 88 L. T. 46; 19 T. L. R. 189—C. A.

10. *Commencement of Term—Statute of Frauds* (29 Chas. 2, *c.* 3), *s.* 4.]—It is essential to the validity of a lease that it shall appear in express terms, or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain those elements.

Marshall v. *Berridge* ((1881) 19 Ch. D. 233; 51 L. J. Ch. 329; 46 J. P. 279; 30 W. R. 93; 45 L. T. 599—C. A.) followed.

HUMPHERY *v.* CONYBEARE, (1899) 80 L. T. 40; [15 T. L. R. 162—C. A.

Agreements for Leases—*Continued.*

11. *Construction — Agreement of Tenancy — Agreement for twelve months with option of a Lease.*]—A tenant took possession of premises under an agreement "for a period of twelve months with the option of a lease after the aforesaid time at the rental of £30 per annum."

HELD—that he could claim a lease for a further term of (at least) one year after the end of the first twelve months.

Semble, per Kennedy, J., he could claim a lease for his life.

AUSTIN *v.* NEWHAM, [1906] 2 K. B. 167; 75 [L. J. K. B. 563: 95 L. T. 490—Div. Ct.

12. *Further Lease—Lessee not named—"You having this day paid me"—Sufficient description—Identity—Statute of Frauds* (29 Chas. 2, *c.* 3), *s.* 4.]—The Statute of Frauds will be satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed. The defendant agreed with J. to grant him an extension of the lease for the further term of 24 years, for a fine of £50, on receipt of which sum in cash the defendant signed and handed to J. the following memorandum: — "Dear Sir,—In consideration of you having this day paid me the sum of £50 (fifty pounds), I hereby agree and undertake to grant you or your assigns a further lease of 24 years (twenty-four) 'W. L.' of the premises known as the 'Warden Arms,' 27, Warden Road, Kentish Town, London, N.W., to run immediately after the expiration of the term granted by the now existing lease, dated the 24th day of June, 1885." The existing lease and the benefit of the extension agreement were subsequently assigned to the plaintiff, who brought an action against the defendant for specific performance. The defendant relied on the Statute of Frauds.

HELD—that it was plain on the memorandum that the lease was to be granted to the person who paid the £50, and therefore the parties were sufficiently described so that their identity could not fairly be disputed.

Potter v. *Duffield* ((1874) L. R. 18 Eq. 4; 43 L. J. Ch. 472; 22 W. R. 585) followed.

CARR *v.* LYNCH, [1900] 1 Ch. 613; 69 L. J. Ch. [345; 48 W. R. 616; 82 L. T. 381—Farwell, J.

13. *Part performance — Increased Rent — Statute of Frauds* (29 Chas. 2, *c.* 3), *s.* 4.]—Payment by the tenant and acceptance by the landlord of an increased rent in respect of premises hitherto held and occupied by the tenant as a yearly tenant, may be acts unequivocally and in their nature referable to an alleged new agreement for a lease of twenty-one years, and therefore such a part performance as takes the case out of the Statute of Frauds, and allows parol evidence to be given of the alleged agreement.

Nunn v. *Fabian* ((1865) L. R. 1 Ch. 35; 35 L. J. Ch. 140; 13 L. T. (N.S.) 343) followed.

MILLER & ALDWORTH, LD. *v.* SHARP, [1899] 1 [Ch. 622; 68 L. J. Ch. 322; 47 W. R. 268; 80 L. T. 77—Byrne, J.

14. *Part performance — Parol agreement — Payment of Rent in advance—No entry—Statute of Frauds* (29 Chas. 2, *c.* 3), *s.* 4.]—The defendant verbally agreed to hire the plaintiff's flat for thirteen weeks at £4 10*s.* a week, and paid the first week's rent in advance, but in fact never took possession.

HELD—in an action to recover rent for the full period, that the payment of one week's rent in advance on a parol agreement was not such a part performance as would take the case out of the 4th section of the Statute of Frauds, and that the action could not be maintained.

THURSBY *v.* ECCLES, (1901) 70 L. J. Q. B. 91; [49 W. R. 281; 17 T. L. R. 130—Bigham, J.

15. *Specific Performance—Alternative Offers—Acceptance of One Alternative—Tenancy from Year to Year—Statute of Frauds* (29 Chas. 2, *c.* 3), *s.* 4.]—By a memorandum in writing, dated April 12th, 1900, signed by the authorised agent of the defendant, the defendant offered to let to the plaintiff certain premises known as "Minydon," comprising a messuage and about eight acres of land situate near Colwyn Bay, North Wales, upon an annual tenancy, at the rent of £150, on certain conditions named therein. The memorandum also contained these words: "He (the defendant) will sell you (the plaintiff) the residence," &c.

The plaintiff verbally accepted the offer and wrote as follows: "Referring to your offer of 'Minydon,' of the 12th April, I hereby accept same on the conditions named therein."

The plaintiff brought an action for specific performance.

HELD—that the plaintiff accepted the offer to let.

Dictum of Earl Cairns, L.C., in *Hussey* v. *Horne-Payne* ((1879) 4 App. Cas. 311, 317; 48 L. J. Ch. 846, 849; 27 W. R. 585; 41 L. T. 1—H. L. (E.)) followed.

HELD, also, that if the agreement had been for a tenancy from year to year it was enforceable.

Clayton v. *Illingworth* ((1853) 10 Hare, 451) and *De Brassac* v. *Martyn* (1863) 11 W. R. 1020; 2 N. R. 511) considered.

LEVER *r.* KOFFLER, [1901] 1 Ch. 543; 70 [L. J. Ch. 395; 49 W. R. 506; 84 L. T. 584—Byrne, J.

III. ESSENTIALS OF LEASE.

16. *Agreement—Demise or Licence—Advertising Station—Hoarding—Gable Wall—Revocation—Notice to Determine.*]—The plaintiff agreed to let the defendant erect hoarding for a bill-posting and advertising station upon the forecourt of a cottage, together with the end or gable wall of another cottage, at a rent of £10 per annum, payable quarterly on the four usual quarter-days. The defendant gave the plaintiff a quarter's notice to quit, expiring at the end of a current year.

HELD—that the exclusive possession of any property or building of the defendant was not

Essentials of Lease—*Continued.*

conferred on the plaintiff, and there was therefore no demise or lease, and that the relation of landlord and tenant was never created between them; that the licence was always revocable at any time upon giving a sufficient and reasonable notice; and therefore the use of the forecourt and end or gable wall was determined by the three months' notice given by the defendant.

WILSON *v.* TAVERNOR, [1901] 1 Ch. 578: 70 [L. J. Ch. 263; 84 L. T. 48—Joyce, J.

17. *Letter—Words amounting to a Lease for Years—Licence, Covenant or Agreement—"For a Term of Ten Years."*]—Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other shall come into it for such a determinate time, such words, whether they were in the form of a licence, covenant or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose. The owners of a house and shop wrote to the person who was then and had been in occupation of the same for ten years under a prior agreement the following letter:—"We hereby agree to let you keep peaceable possession of your present house and shop in Strand Lane for a term of ten years, on condition that you commit no nuisance, and pay us the sum of 9*s.* 3*d.* per week for rent thereof, you to pay local board rates, and we to pay poor rates and water rates as hitherto." The occupier continued in possession, and afterwards assigned to her son.

HELD—that both parties were bound for a term of ten years, and that the agreement was not personal to the mother.

DUXBURY *v.* SANDIFORD, (1899) 80 L. T. 552—[C. A.

IV. PREMISES INCLUDED IN THE DEMISE.

(a) Easements.

18. *Wayleaves—Agreement for Lease—Interpretation—Acts of Parties—Contemporaneous Usage.*]—By an indenture of May 18th, 1854, it was covenanted that Lord Hastings would grant by indenture, and a railway company would accept, a grant of a wayleave over certain portions of Lord Hastings' lands. By the proposed form of lease the term was to be for 1,000 years from May Day, 1845, at certain yearly rents for every ton of coals, &c., which should pass over "the said railways" or any part thereof respectively, and in addition to such rents the sum of 3*s.* per ton on coals, &c., conveyed over "*any part of the railways comprehended in the Blyth and Tyne Railway Consolidation and Extensions Act*, 1854," and which should be shipped at the port of Blyth. No formal lease was executed, but the parties acted under the indenture of May 18th, 1854. For more than forty years the railway company and their successors, the appellants, conveyed coal, &c., over portions of the railways comprehended in the Blyth and Tyne Railway Consolidation and Extensions Act, 1854, to the port of Blyth, but paid the rent of 3*s.* per ton only in respect of such coal, &c., as was so conveyed over the lands of Lord Hastings, and no claim was ever made on his behalf except in respect of coal, &c., conveyed over part of his lands. In 1897 the respondent brought an action against the appellants claiming an account and payment in respect of coals conveyed over any part of the railways comprehended in the special Act of 1854, and shipped at the port of Blyth, whether the coal, &c., did or did not pass over any part of the respondent's lands.

HELD—that the words of the indenture of May 18th, 1854, must be construed according to their natural meaning, and no amount of acting by the parties could alter or qualify words which were plain and unambiguous; that the language of the covenant, namely, "the railways comprehended in the Blyth and Tyne Railway Consolidation and Extensions Act, 1854," was conclusive against the appellants; that the Court could not construe the covenant differently from the mode in which it would have construed it if the controversy had arisen the day after the agreement had been executed; and that the appellant company were liable to pay the rent upon coal conveyed over any part of the railways comprehended in the special Act of 1854, and shipped at the port of Blyth, whether it did or did not pass over any part of the respondent's lands.

The decision of C. A. ([1899] 1 Ch. 656; 68 L. J. Ch. 315; 80 L. T. 217; 15 T. L. R. 247) affirmed.

NORTH EASTERN RY. CO. *v.* LORD HASTINGS, [1900] A. C. 260; 69 L. J. Ch. 516; 82 L. T. 429; 16 T. L. R. 325—H. L. (E.).

19. *Demise with all Lights—Covenant by Lessee "not Object to any Works to Adjoining Premises"—Obstruction of Lights—Action by Lessee—Stay of Proceedings—Judicature Act*, 1873 (36 & 37 Vict. *c.* 66), *s.* 24, *sub-s.* 5.]—A lessee of a house, demised with all lights, covenanted that he would "not object to any works to adjoining premises" which might be sanctioned by or on behalf of the lessor, or the superior landlords. The occupier of the adjoining premises proposed to erect thereon, with the sanction of the superior landlords, buildings which would interfere with the access of light to the lessee's house. The lessee thereupon brought an action against the occupier to restrain him from building so as to obstruct the access of light. The lessor moved under sect. 25, sub-sect. 5, of the Judicature Act, 1873, for a stay of proceedings in the action.

HELD—that "adjoining" meant adjoining in the sense in which the word was used in the London Building Act, 1894, and was used in the sense of "in physical contact with," and was not used in the sense of "neighbouring;" and that the lessee was not precluded by the covenant from objecting to the building works.

Premises included in the Demise—*Continued.*

Decision of Joyce, J. ((1901) 50 W. R. 166 : 85 L. T. 677 ; 18 T. L. R. 129) reversed.

WHITE *v.* HARROW, HARROW *v.* MARYLEBONE [DISTRICT PROPERTY CO., (1902) 50 W. R. 259 ; 86 L. T. 4 ; 18 T. L. R. 228—C. A.

20. *Lease—Right of Turbary—Bog Peat or Surface Turf—"Mountain"—Construction.*]—A lease gave the lessee right to cut "turf" on the "mountain of C."

HELD—having regard to all the circumstances that upon the true construction of the lease "turf" meant deep bog turf and not surface turf, and that the word "mountain" was a descriptive word meaning uncultivated land and not the whole mountain of C., part of which had been reclaimed.

Kildare v. *Fisher* ((1717) 1 Str. 71, 72) applied.

JAMESON *v.* FAHEY, [1907] 1 Ir. R. 411—C. A.

21. *Right of Way — Interpretation* — Falsa demonstratio non nocet — *Rectification.*]—The doctrine of *falsa demonstratio non nocet* is only applied where a description is made up of more than one part, and one part is true, but the other false; then, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected, and will not vitiate the instrument. By an underlease rooms on the second floor of Nos. 13 and 14, Old Bond Street, were demised to the plaintiff, "together with free ingress and egress for the lessee, her servants and customers, through the staircase and passages of No. 13 to and from the demised rooms." There was a staircase in No. 14, but in No. 13 there was only a lift and no staircase.

HELD—that as the rejection of the words "of No. 13" would not leave a description applicable to the staircase in No. 14, the doctrine of *falsa demonstratio non nocet* did not apply ; but that it was the intention of the parties that the plaintiff should have access over the staircase of No. 14, and that the underlease should be rectified accordingly.

Decision of Romer, J. ([1898] 2 Ch. 551 ; 67 L. J. Ch. 695 ; 47 W. R. 29 ; 79 L. T. 348), affirmed.

COWEN *v.* TRUEFITT, [1899] 2 Ch. 309 ; 68 [L. J. Ch. 563 ; 47 W. R. 661 ; 81 L. T. 104—C. A.

(b) Fixtures.

22. *Covenant to leave certain things on the Premises — Construction — General Words — Ejusdem Generis — Whether Trade Fixtures included.*]—An underlease of premises to be used for the business of a boot and shoe manufacturer contained a covenant by the lessee to yield up the premises on the determination of the time, "together with all doors, locks, keys, bolts, bars, staples, hinges, iron pins, wainscots, hearths, stones, marble and other chimney pieces, slabs, shutters, fastenings, partitions, pipes, pumps, sinks, gutters of lead, posts, pales, rails, dressers, shelves, and all other erections, buildings, improvements, fixtures and things which then were or which at any time during the said term should be fixed, fastened, or belong to the said demised messuage and premises or any part thereof."

The mesne landlord mortgaged the premises, and on the tenant becoming bankrupt, a question arose between his trustee in bankruptcy and the mortgagee as to the title to certain trade fixtures such as, *e.g.*, an electric motor, shafting, heel-building and heel-trimming machines, &c.

HELD (reversing Kekewich, J.)—that the special words of the covenant included only what are generally known as "landlords' fixtures" and did not include the articles in question ; and that the general words must be construed in accordance with the rule as to words *ejusdem generis* (*Bishop* v. *Elliott*, *infra*), and that, therefore, the covenant did not include the articles in question, which might be removed by the trustee.

Decision of Kekewich, J. ([1903] 1 Ch. 806 72 L. J. Ch. 400 : 88 L. T. 263) reversed.

Bishop v. *Elliott* ((1855) 11 Ex. 113 ; 24 L. J. Ex. 229 ; 3 W. R. 454) followed.

Bidder v. *Trinidad Petroleum Co.* ((1868) 17 W. R. 153) not followed.

LAMBOURN *v.* MCLELLAN, [1903] 2 Ch. 268 : 72 [L. J. Ch. 617 ; 51 W. R. 594 ; 88 L. T. 748 ; 19 T. L. R. 529—C. A.

23. *Tenant's Fixtures—Forfeiture of Lease—Right of Mortgagee of Lease to remove Fixtures within reasonable time.*]—Where a lease is prematurely determined by forfeiture or surrender, a mortgagee thereof is entitled to a reasonable time wherein to remove the tenant's fixtures.

Pugh v. *Arton* ((1869) L. R. 8 Eq. 626 ; 38 L. J. Ch. 619 ; 20 L. T. 865 ; 17 W. R. 984) commented on.

A company issued debentures constituting a floating charge on all its property. A receiver appointed in a debenture holder's action took possession of the company's leasehold premises, and obtained leave from the judge to sell the tenant's fixtures thereon. Before the actual sale the company went into voluntary liquidation, and thereupon the lease determined.

HELD—that the receiver was entitled as against the landlord to a reasonable time in which to remove the fixtures.

Decision of Joyce, J. ([1904] 1 Ch. 819 ; 73 L. J. Ch. 461 ; 90 L. T. 412 ; 11 Manson, 224 ; 21 T. L. R. 354) affirmed.

IN RE GLASDIR COPPER WORKS, LD. ; ENGLISH [ELECTRO-METALLURGICAL CO., LD. *v.* THE COMPANY, [1906] 1 Ch. 365 ; 75 L. J. Ch. 109 ; 94 L. T. 8 ; 22 T. L. R. 101 ; 13 Manson, 41—C. A.

(c) Sporting Rights.

24. *Fishing—Exclusive Right of — Covenant not to "Assign, Transfer, or Set over" the Premises—Omission of Words "any part of the Premises"—Licence for Two Rods—Validity.*]—

Premises included in the Demise—*Continued.*

A covenant in a lease not to part with the possession of premises does not restrain the tenant from parting with a part of the premises.

By an indenture the defendant demised to the plaintiff "all that the exclusive right of fishing" in manner thereinafter mentioned in a certain river, "together with full liberty of ingress, egress, and regress, for the said lessee and his authorised friends at all times during the term intended to be hereby granted to fish . . . with rods and lines in a proper and sportsmanlike manner." The lease contained a covenant by the lessee that he should not nor would during the said term "underlet, assign, transfer, or set over or otherwise by any act or deed procure the said premises to be assigned, transferred, or set over unto any person or persons whomsoever without the consent in writing of the said lessor." The lessee granted B. a licence and authority to fish in that portion of the river comprised in the lease in the manner and for the like periods as in the lease provided (but so that not more than two rods should be used at any time) for the whole residue then unexpired of the term granted by the lease.

HELD—that the licence to B. for two rods was perfectly good by reason of the omission from the covenant of the words "any part of the premises."

Dictum of Lord Eldon in *Church* v. *Brown* ((1808) 15 Ves. 258 ; 10 R. R. 74) followed.

GROVE *v.* PORTAL, [1902] 1 Ch. 727 ; 71 L. J. Ch. [299 ; 86 L. T. 350 ; 18 T. L. R. 319—Joyce, J.

25. *Fishing — Fishery — Implied Right of Tenant to Fish in Stream opposite the Land— — Reservation of Right.*]—In the ordinary case of a lease of lands, including waters or streams, the right of fishery is necessarily implied as part of the general right to the soil and water unless the lessor specially reserve it. If, therefore, there is no special reservation of the right of fishery, the tenant and not the landlord will be the party entitled to the fishery. Properly speaking the right cannot be reserved by the lease, but, what is practically the same thing, the reservation is construed as a re-grant by the tenant to the landlord.

DAVIES *v.* JONES AND OTHERS, [1902] 66 J. P. [439 ; 86 L. T. 447 ; 18 T. L. R. 367 ; 20 Cox, C. C. 184—Div. Ct.

26. *Shooting—Hiring at a certain Rent per Annum — Notice to determine — "Reasonable Notice."*]—By a memorandum of agreement a landlord agreed to let and the defendants to hire pheasant shooting at a certain rent per annum, payable half-yearly. From Lady Day, 1896, the defendants continued to enjoy the shooting rights until the landlord, early in the year 1901, verbally informed them that the arrangement was revoked as from March 25th.

HELD—that the defendants were entitled to "reasonable notice," expiring at Lady Day ; and that the verbal notice given in February, or at the latest in the early part of March, after the end of the shooting season, was reasonable and sufficient.

LOWE *v.* ADAMS, [1901] 2 Ch. 598 ; 70 L. J. Ch. [783 ; 50 W. R. 37 ; 85 L. T. 195 ; 17 T. L. R. 763—Cozens-Hardy, J.

27. *Shooting — Obligation of Landlord — Fencing Plantations.*]—In the case of a lease of the house on a small residential estate together with the shooting there is no implied obligation on the part of the lessor to fence the plantations effectually so as to exclude stock.

PATRICK *v.* HARRIS' TRUSTEES, [1905] 6 F. 985 [—Ct. of Sess.

V. DURATION OF TENANCY.

(a) Notice to Quit.

28. *Expiration—Yearly Rent—Tenant to pay rates and taxes—Three months notice.*]—A landlord let premises on an agreement from October 1st, "at an inclusive rental of £25 per annum," the tenant to pay rates and taxes, and "three months' notice on either side." The rent was in fact always paid quarterly.

HELD—to be a yearly tenancy, which could only be determined by a three months' notice expiring with a year of the tenancy and not at any time.

Doe v. *Donovan* ([1809] 1 Taunt. 555) applied.

DIXON *v.* BRADFORD AND DISTRICT RY. SERVANTS COAL SUPPLY SOCIETY, [1904] 1 K. B. 444 ; 73 L. J. K. B. 136 ; 90 L. T. 122 ; 20 T. L. R. 159—Div. Ct.

29. *Service—Holding Over—Subsequent Payment of Rent — New Tenancy — Recovery of Possession.*]—The plaintiffs let to the defendant a portion of certain land. On September 29th, 1900, the plaintiffs left at the defendant's house, with his servant, a good notice to quit apart from the question of service. The defendant remained in possesssion of the land after the expiration of the notice to quit, and paid rent up to December 25th, 1900. On August 14th, 1901, the plaintiffs' secretary wrote to the defendant, who was still in possession without having paid any rent as under the former agreement : "I find it can now be probably arranged to leave you in undisturbed possession of this site, upon condition that you raise no objection to the rent for the year . . . and I shall be glad to hear that you acquiesce in this arrangement" ; and on August 27th, the defendant wrote in reply that she did not raise any objection to anything that was fair and right. In January, 1902, the defendant paid the plaintiffs the sum of £15 as rent for the year 1901.

HELD—that the plaintiffs were entitled to recover possession of the land ; that the notice to quit was properly served ; that the payment of the £15 ought to be taken in conjunction with the letter ; and that the holding over had been allowed to continue for a year.

Whiteacre d. *Boult* v. *Symonds* ([1808] 10 East, 13) followed.

SCHOOL BOARD FOR LONDON *v.* PETERS [1902] [18 T. L. R. 509—Ridley, J.

Duration of Tenancy—*Continued.*

30. *Tenancy for one year certain and so on from year to year—Proviso for notice to quit at any time—Notice to quit during first year.*]—Premises were let, under a written agreement, "for the term of one year certain from the date thereof, and so on from year to year, unless or until the tenancy thereby created should be determined by either party giving to the other twenty-eight days' notice in writing, such notice to expire at any period of the year without any reference to the time of entry, the date of the agreement, or the commencement of the tenancy."

HELD—that the tenancy could not be determined by notice during the first year.

CANNON BREWERY *v.* NASH, (1898) 77 L. T. 648; [14 T. L. R. 158—C. A.

31. *"Three Months' Notice at any time to terminate this Agreement"—Validity of Notice.*]—An agreement provided that the tenancy of a public-house was to commence on May 1st, at a yearly rent payable quarterly on May 1st, August 1st, November 1st, and February 1st, subject to three months' notice on either side "at any time" to terminate the agreement. The plaintiff, the landlord, on January 24th gave the defendant, the tenant, three months' notice to quit and deliver up the premises on April 25th following.

HELD—that the notice to quit was good, as the parties had stipulated that they should be at liberty to put an end to the tenancy by a notice expiring at any time; and that there was no special reason why the tenancy should be determinable on one of the four days named.

Bridges v. *Potts* ((1864) 17 C. B. (N.S.) 314; 33 L. J. C. P. 338; 10 Jur. (N.S.) 1049; 11 L. T. (N.S.) 373) followed.

SOAMES *v.* NICHOLSON, [1902] 1 K. B. 157; 71 [L. J. K. B. 24; 50 W. R. 169; 85 L. T. 614—Div. Ct.

32. *Yearly Tenancy—"At the End of the Current Year's Tenancy"—Sufficiency of Notice.*]—A landlord, on March 24th, 1898, gave to his tenant, who held on a yearly tenancy from Lady Day to Lady Day, a notice in the following terms:—"I hereby give you notice to quit and deliver up to me all that cottage, &c., on the 24th of June, 1898, or at the end of your current year's tenancy."

HELD—that it was a notice to quit on March 25th, 1899, and was good, as it could not have been intended by the landlord or understood by the tenant, that the words "current year" applied to the few hours of that year which had still to run.

Doe d. *Huntingtower* v. *Culliford* ((1824) 4 D. & R. 248) followed.

Doe d. *Richmond* v. *Morphett* ((1845) 7 Q. B. 577; 14 L. J. Q. B. 345) dissented from.

WRIDE *v.* DYER, [1900] 1 Q. B. 23; 69 L. J. [Q. B. 17; 64 J. P. 118; 48 W. R. 73; 81 L. T. 453; 16 T. L. R. 23—Div. Ct.

33. *Weekly Tenancy—Week's Notice—Notice given before 12 noon on one Monday to expire at 12 noon on the following Monday—Notice insufficient.*]—The defendant held certain premises of the plaintiff on a weekly tenancy. By the rent-book agreement it was stipulated that either plaintiff or defendant might determine the tenancy by a week's notice to the other, and that the key was to be delivered to the plaintiff or his agent before 12 o'clock on the day of leaving.

HELD—that, on the true construction of the special agreement, a notice to quit given before 12 noon on one Monday to expire at 12 noon on the following Monday was not a week's notice, as the law does not take notice of the fraction of a day. A week's notice requires seven whole days.

WESTON *v.* FIDLER, (1903) 67 J. P. 209; 88 [L. T. 769—Div. Ct.

34. *Yearly Tenancy—Landlord granting long Lease to a Third Party—Landlord subsequently giving Notice to Quit—Effect.*]—Where a landlord during the currency of a yearly tenancy demises the premises in question for a long term to a third person, the landlord cannot during such term give to the yearly tenant a valid notice to quit.

WORDSLEY BREWERY CO. *v.* HALFORD, (1904) [90 L. T. 89—Div. Ct.

35. *Yearly Tenancy—Three Months' Notice—Construction.*]—By an agreement dated June 1st, 1901, the plaintiff let to the defendant a licensed house from May 13th, 1901, "until such tenancy shall be determined as hereinafter mentioned," at the yearly rent of £70 clear of all deductions except land and property tax, to be paid by equal quarterly payments on August 13th, November 13th, February 13th, and May 13th, in every year, the first payment to be made on August 13th, 1901; and the tenant agreed to keep the premises in repair, and to apply for and procure a renewal of all necessary licences, and there was a clause enabling the landlord to eject the tenant if the latter was convicted of an offence through which the licence was endorsed. The agreement further provided that "it shall be lawful for either of the parties to determine the tenancy hereby created by giving to the other of them three calendar months' notice in writing for that purpose."

HELD—that the agreement created a yearly tenancy determinable on three months' notice expiring at the end of the year of the tenancy.

Doe d. *King* v. *Grafton* ((1852) 21 L. J. Q. B. 276; 18 Q. B. 496) discussed.

Decision of Jelf, J. ([1905] 2 K. B. 576; 74 L. J. K. B. 617; 93 L. T. 267; 21 T. L. R. 539) affirmed.

LEWIS *v.* BAKER, [1906] 2 K. B. 599; 75 L. J. [K. B. 848; 95 L. T. 10; 22 T. L. R. 680—[C. A.

(b) Renewal.

36. *Breaks in Lease—Proviso to Determine—Mesne Assignments—Who can give Notice.*]—In

Duration of Tenancy—*Continued.*

an action brought to recover two quarters' rent, the plaintiff S. was the assignee of the original lessor H., and the defendant D. was the original lessee.

The defendant had assigned to the third party F., who had covenanted to indemnify him. F. in turn assigned to one Y., who had covenanted to indemnify him. Y. deposited the lease with H. & Co. to secure an advance of £50. He then disappeared and left the premises unoccupied. F. purchased the rights of H. & Co. for £10, and he then took possession of the premises and let them and received the rents, and paid the present plaintiff the rent due to him, he being aware what was being done.

The original lease, which was for twenty-one years, contained the following proviso: "In case the said Richard Drew, his executors, administrators, or assigns, shall be desirous of determining this present lease or demise at the end or expiration of the first seven or fourteen years of the said term hereby granted, and of such his or their desire or intention, shall give notice in writing to the said Frederick Hose, his heirs or assigns, or shall leave the same at his or their usual or last-known place of abode in England, six calendar months before the expiration of the said seven or fourteen years of the said term hereby granted . . . then and in such case forward and immediately after the expiration of such seven or fourteen years of the said term this indenture and every covenant, clause, matter, or thing herein contained shall cease and determine."

Notices were duly given by D. and F. to determine the lease at the end of the fourteenth year, and the question was whether the lease was thereby determined.

HELD—that the notice should have been given by Y., and that, therefore, the lease was still subsisting.

SEAWARD *v.* DREW, (1898) 67 L. J. Q. B. 322; [78 L. T. 19; 14 T. L. R. 200—Channell, J.

37. *Breaks in Lease—Lease determined by Lessee—"Indenture to be void"—Covenants already broken—Landlord's right to sue in respect of.*]—A lessee gave notice to determine his fourteen years' lease at the end of seven years, as he was entitled to do; there was a proviso in the lease that "in such case this present indenture and every clause, matter, and thing herein contained shall, upon the expiration of the said notice, cease and determine and be void"; and there was not the usual reservation of the landlord's right to sue in respect to existing breaches of covenant.

HELD—that, nevertheless, the lessor could sue for any breaches of covenant committed by the tenant during the seven years of his occupation.

Hartshorne v. *Watson* ((1838) 7 L. J. C. P. 138; 4 Bing. N. C. 178; 44 R. R. 693) followed.

BLORE *v.* GIULINI, [1903] 1 K. B. 356; 72 [L. J. K. B. 114; 51 W. R. 336; 88 L. T. 235—Wright, J.

38. *Covenant to renew on payment of Fine "at the Costs of the Lessee"—Value of Fine to be determined by Arbitration—Costs of Reference and Award—Umpire's Power or Discretion over Costs.*]—A lease for seventy-five years contained a covenant for renewal in the following terms: "The lessors, their heirs or assigns, will at any time during the said term, upon request and at the costs of the lessee, his executors, administrators, or assigns, and on payment by him or them of a fine calculated according to the table hereunder written upon the number of years of the said term which have expired, and the full improved annual value of the said premises at the time of such renewal (such value to be determined by the said surveyor or, at the option of the lessee, by the award of two referees or their umpire), renew or cause to be renewed the said term for the further term of seventy-five years from the date of such renewal at the like rent, and subject to the like covenants and conditions as are herein reserved and contained, including this present covenant for renewal." The lessee having applied for a renewal for a further term of seventy-five years, differences arose between the parties as to the amount of the fine payable by the lessee to the landlord for or in respect of the renewal; the lessee thereupon gave notice of his desire to have the full improved annual value determined by the award of two referees, or of an umpire appointed by them. The umpire, subject to a special case, directed the lessee to bear the costs of the reference, &c., as part of the costs of renewal.

HELD—that on the true construction of the lease the costs of renewal to be paid by the lessee included the costs of the reference and award.

Decision of C. A. ([1903] 1 K. B. 349; 72 L. J. K. B. 164; 51 W. R. 257; 88 L. T. 7; 19 T. L. R. 191) affirmed.

FITZSIMMONS *v.* LORD MOSTYN, [1904] A. C. [46; 73 L. J. K. B. 72; 52 W. R. 337; 89 L. T. 616; 20 T. L. R. 134—H. L. (E.).

39. *Lease for Lives—Covenant.*]—A lease for three lives contained a covenant by the lessor that he would, upon the dropping of any of the lives which should first happen within a specified term, on the payment of a fine by the lessee, and on the nomination by the lessee of a new life within six months after the death, add such new life in lieu of the person so happening first to die, and that he would in like manner from time to time successively, upon the failure of any and every other life in the said lease nominated and thereafter to be successively nominated, on the like nomination and like payment of a fine, during the same term add the life or lives so successively nominated in the place and stead of each and every of the several persons so successively happening to die as aforesaid.

HELD—that upon the true construction of this covenant it prescribed as necessary for obtaining a renewal the condition that the lessee should renew regularly within six months from the fall of each life, so as always to maintain (except during such six months) the full number of three lives, and that if he failed so to

Duration of Tenancy—*Continued.*

renew within six months from the dropping of any life he lost his right of renewal.

HUSSEY *v.* DOMVILLE, [1903] 1 Ir. R. 265—[C. A.

40. *New Lease—Surrender "by Operation of Law" of Old Lease—Lessee's right to retain Old Lease.*]—The acceptance of a new lease operates as an implied surrender "by operation of law" of the old lease within the meaning of sect. 3 of the Statute of Frauds, but such surrender differs from an actual surrender by deed: it is not absolute; it is subject to an implied condition that the new lease is good, and that being so the old lease remains in force. The lessee retains an interest in the lease, and is entitled to retain it.

KNIGHT *v.* WILLIAMS, [1901] 1 Ch. 256; 70 [L. J. Ch. 92; 49 W. R. 427; 83 L. T. 730—Cozens-Hardy, J.

41. *Reversionary Lease*—Interesse Termini.]—A reversionary lease merely creates an *interesse termini* until entry thereunder, and does not enlarge the term of the original lease.

Smith v. *Day* ((1837) 2 M. & W. 684); *Doe* v. *Walker* ((1826) 5 B. & C. 111); *Hyde* v. *Warden* ((1877) 3 Ex. D. 72); and *Joyner* v. *Weeks* ([1891] 2 Q. B. 31; 60 L. J. Q. B. 570; 55 J. P. 725; 39 W. R. 583; 65 L. T. 16—C. A.) followed.

LEWIS *v.* BAKER, [1905] 1 Ch. 46; 74 L. J. [Ch. 39; 21 T. L. R. 17; 54 W. R. 146—Eady, J.

42. *Three Years' Agreement—"With the option of Renewal" — Purchaser — Notice of Agreement—Ejectment — Specific Performance.*]—On August 30th, 1894, C. agreed to let for three years to the defendant S. certain premises at a fixed yearly rent, "with the option of renewal."

In July, 1896, the plaintiff L. purchased C.'s interest in the premises, and knew that S. was in possession under an agreement, but, till early in 1897, was not aware of the clause giving the option of renewal.

At the expiration of the three years L. commenced an action of ejectment, and S. counterclaimed for specific performance of the agreement to renew.

HELD—that L., as purchaser, must be fixed with notice of the contents of the agreement with S., and, further, that the words in the agreement relating to the renewal were sufficiently definite to enable a decree for specific performance to be made to grant a renewed agreement for a lease for the same period and on the same terms, except as to renewal, as contained in the agreement of August 30th, 1894.

LEWIS *v.* STEPHENSON, (1898) 67 L. J. Q. B. [296; 78 L. T. 165—Bruce, J.

43. *Underlease—Covenant as to granting New Lease on Extension of Term—Personal Covenant—Rule against Perpetuity—Covenant running with Land—Assignee of Reversion*—32 Hen. 8, *c.* 34, *s.* 2.]—A. R. held under a lease dated June 26th, 1833, from Sir C. M., the freeholder, of certain houses and premises, including those in question, for eighty years, from September 29th, 1822.

By an underlease dated December 29th, 1840, A. R. demised to D. A. the premises in question for sixty-two years from September 29th, 1840, less ten days.

By a further underlease dated June 25th, 1851, D. A. demised the same premises to E. F. for fifty-two years, from September 29th, 1850, less twenty days, and D. A. thereby for himself, his executors, administrators, and assigns, covenanted with E. F., his executors, administrators, and assigns, that "in case the said D. A. shall obtain from the said Sir C. M., his heirs or assigns, any extension of the term for which the said D. A. now holds," under the lease dated December 29th, 1840, "then and in that case the said D. A., his executors, administrators, or assigns, shall and will . . . grant unto him, the said E. F., his executors, administrators, and assigns, a new lease of the premises for such extended term as will include the term then unexpired of the term hereby granted and the further term, less ten days, which may be granted to the said D. A. by the said Sir C. M., his heirs or assigns." D. A. died on May 31st, 1854, and by an indenture dated November 1st, 1897, the persons entitled to the premises in question under D. A.'s will assigned the same to the defendant.

The reversion under the head lease of June 26th, 1833, became vested in Lord T., and upon a surrender being made by the defendant to Lord T., Lord T. granted the defendant a new lease for the term of fifty years from September 29th, 1896.

The defendant refused to grant any renewal to the plaintiff, who was the assignee of the executors of E. F. of the underlease of June 25th, 1851, and the plaintiff brought an action for specific performance of the covenant contained in the last-mentioned underlease.

HELD—that the whole covenant depended on the condition precedent that "in case the said D. A. shall obtain," and so on, and the proviso in terms was confined to D. A. personally, and did not include D. A.'s executors, administrators, and assigns, and that the option by way of condition precedent could not properly have been given to D. A., his executors, administrators, and assigns, without limiting it so as to avoid infringing the rule against perpetuities.

HELD, also, that the covenant was not a covenant to renew, and, therefore, as such did not run with the land, and that D. A. had not at the time he entered into the covenant such an interest as could possibly be bound in its inception so as to give effect to the covenant which he entered into; that the statute 32 Hen. 8, c. 34, did not apply, as that statute applied to a reversion which is vested in the covenantor at the time he enters into it; and that the action for specific performance failed.

Brereton v. *Tuohey* ((1858) 8 Ir. C. L. Rep.

Duration of Tenancy — *Continued.*

190), *Kent* v. *Stoney* ((1859) 9 Ir. Ch. Rep. 249), and *Coey* v. *Pascoe* ([1899] 1 Ir. R. 125) followed.

MULLER *v.* TRAFFORD, [1901] 1 Ch. 54; 70 [L. J. Ch. 72; 49 W. R. 132—Farwell. J.

(c) Tenancy at Will.

44. *Determination by Alienation — New Tenancy by Estoppel—Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *ss.* 2, 7—*Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 1.]—A tenancy at will is determined by either party alienating by a legal mortgage his interest; provided, and as soon as such alienation comes to the knowledge of the other. After such a determination a new tenancy may be implied from acts and conduct, if such are proved, as ought to satisfy a jury that the parties actually made such an agreement. If a new tenancy is created, the landlord has twelve years from that period before he can forfeit his estate.

JARMAN *v.* HALE, [1899] 1 Q. B. 994; 68 L. J. [Q. B. 681—Div. Ct.

45. *Entry by Landlord to effect Repairs—Determination of Tenancy—Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 7—*Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 1.]—Where a tenant at will remains in possession of a house rent free for more than twelve years after the expiration of the first year of the tenancy, the fact that the landlord enters from time to time in order to effect repairs, if it is not against the will of the tenant, does not operate as a taking possession so as to determine the tenancy at will, and therefore the tenant acquires a statutory title to the house by virtue of sect. 7 of the Real Property Limitation Act, 1833, and sect. 1 of the Real Property Limitation Act, 1874.

LYNES *v.* SNAITH, [1899] 1 Q. B. 486; 68 L. J. [Q. B. 275; 47 W. R. 111; 80 L. T. 122; 15 T. L. R. 184—Div. Ct.

46. *Holding Over—Arbitration Clause in Lease—Expiration of Term—Tenancy at Will expressly created—Continued applicability of Arbitration Clause.*]—The defendants were lessees of a colliery under a lease giving them power to carry to the surface "foreign" coal. The lease contained an arbitration clause. Shortly before the lease expired they asked by letter for a six months' extension and were told in reply that pending definite arrangements they might consider themselves tenants at will of both colliery and way-leave.

Disputes having arisen as to the way-leave :—

HELD—that the arbitration clause applied to the tenancy at will, so far as it could be made applicable, and that the lessors' action should be stayed.

MORGAN *v.* WILLIAM HARRISON, LD., [1907] [2 Ch. 137; 76 L. J. Ch. 548; 97 L. T. 445—C. A.

(d) Tenancy from Year to Year.

47. *Parol Agreement to Quit at a particular Date—Surrender by operation of Law—Estoppel by Conduct.*]—Under a three years' agreement in writing the defendant B. became tenant of certain premises belonging to the plaintiff F., and after the expiration of his tenancy in March, 1898, B. remained on in possession as tenant from year to year. In December, 1898, B. asked F. to release him from his tenancy, and it was verbally agreed that B. should go out on the 24th of June following. F. placed a notice board on the premises that the same were "to be let," and subsequently sold the premises to a third party, who bought with possession at Midsummer, 1899. On June 24th, 1899, the defendant refused to give up possession.

In an action of ejectment brought by F. against B. :—

HELD—that the plaintiff was entitled to judgment on two grounds: (1) Because the agreement of December, although bad as an agreement to surrender by reason of it not being in writing, was nevertheless an acceptance of a new tenancy by B., which was to end at Midsummer, 1899, and that acceptance worked a surrender of the old tenancy by operation of law; and (2) because the defendant by his conduct in standing by and permitting the plaintiff to contract an obligation with the purchaser, was estopped from denying that his tenancy was other than that upon the footing of which he allowed his landlord to sell the property to the purchaser.

FENNER *v.* BLAKE, [1900] 1 Q. B. 426; 69 L. J. [Q. B. 257; 48 W. R. 392; 82 L. T. 149—Div. Ct.

48. *Tenancy by Estoppel — Disclaimer by Trustee in Bankruptcy—Mortgagee in Possession —Admission of Liability for Rent.*]—The plaintiff demised premises to one G., who assigned them to a person who mortgaged them to the defendant. The mortgagor became bankrupt, and the defendant entered upon the premises and gave the plaintiff notice thereof, and of the mortgage. The lease was disclaimed by the trustee of the bankrupt. The defendant paid the rent to the plaintiff irregularly. On four different occasions the defendant was sued by the plaintiff for a quarter's rent, and each time submitted to judgment for the rent sought to be recovered.

HELD—that there was a tenancy from year to year created by estoppel, for he had admitted that he was liable to the defendant for a quarter's rent from time to time, and that in point of law amounted to a yearly tenancy.

JUMP *v.* PAYNE, (1899) 68 L. J. Q. B. 607—[Day, J.

(e) Weekly Tenancy.

49. *Duration—Agreement—Rent 7s. per Week — Rent not to be raised during Landlord's Tenancy—Tenancy for fixed Time not a Weekly Tenancy.*]—A tenant of a shop, whose term expired on June 24th, 1901, let the shop to

Duration of Tenancy—*Continued.*

the plaintiff under the following agreement :—"January 5th, 1900.—I shall be pleased to accept you as tenant for barber's shop at the rental of 7*s.* per week, the rent not to be raised during my present tenancy."

HELD—that this was an agreement for a tenancy to continue until June 24th, 1901.

ADAMS *v.* CAIRNS, (1901) 85 L. T. 10; 17 T. L. R. [662—C. A.

VI. RENT.

50. *Assignment of Lease—Which was an Act of Bankruptcy by Lessee—Disclaimer by Trustee in Bankruptcy—Liability of Assignee for Rent accrued due before the Bankruptcy — Bankruptcy Act*, 1883 (46 & 47 Vict. *c.* 52). *ss.* 4, 43. 44, 54.]—The lessee of certain houses assigned for the benefit of her creditors her leases of those houses (with other property) to the defendant, by a deed which was an act of bankruptcy on her part. After the assignment, and before the lessee's bankruptcy, some rent accrued due under the leases in respect of the houses, and the plaintiffs, in the position of lessors, issued a writ for that rent against the defendant. But subsequently, and before the action came on for trial, the lessee was made bankrupt. The trustee in bankruptcy then disclaimed the leases. Under these circumstances the question arose whether the defendant was liable for the rent.

HELD—that the bankruptcy had not the effect of releasing the existing liability of the defendant for the rent as between the defendant and the plaintiffs, and the delay in the action coming on for trial had not the effect of freeing the defendant from his existing liability for the rent.

Decision of Darling, J. ((1901) 17 T. L. R. 337) affirmed.

STEIN *v.* POPE, [1902] 1 K. B. 595 ; 71 L. J. K. B. [322 ; 50 W. R. 374 ; 86 L. T. 283 ; 18 T. L. R. 337 ; 9 Manson, 125—C. A.

51. *Covenant to pay Additional Rent for Ground on which Buildings shall be Erected—Feu Contract.*]—Land, which then consisted of a mansion-house and grounds, was let upon a contract by which a feu duty of £5 an acre was reserved, and, it being in contemplation of the parties that the land might eventually be used as building land, a provision was inserted for an additional duty "for every square pole of the said piece of ground on which buildings shall be erected," with an exception in the case of additions to the mansion-house, or the building of a lodge. Other buildings were afterwards erected on the land.

HELD—that the additional duty was only payable for land on which buildings were actually erected, and not for land accessory to such buildings, though it might be incapable of separate occupation.

Decision of Ct. of Sess. (3 F. 933 ; 38 S. L. R. 665) reversed.

M'FARLANE *v.* STIRLING MAXWELL, (1903) 87 [L. T. 554—H. L. (Sc.).

52. *Covenant to pay Rent in Advance—Antecedent Agreement to pay by Bill—Admissibility.*] —The plaintiff by deed granted a lease of certain premises to the defendant for a term of years, the defendant "yielding and paying therefor during the said term the yearly rent of £2,500," to be paid quarterly in advance ; and the defendant covenanted to "pay the said yearly rent hereby reserved at the times and in manner hereinbefore appointed." Before the execution of the lease there was a parol agreement between the parties that the rent should be paid each quarter by a bill at three months.

HELD—that the parol agreement was not admissible in evidence, as it would contradict the covenant in the lease, which meant payment in cash.

HENDERSON *v.* ARTHUR, (1906) 23 T. L. R. 60 [—C. A.

53. *Instalments payable in Advance—Re-entry for Breach of Covenant—Apportionment Act*, 1870 (33 & 34 Vict. *c.* 35), *s.* 2.]—A landlord let his house to the defendant for a year at a rental of £357 in all, which was to be payable in advance in certain instalments at certain dates. The defendant covenanted to pay at those dates, and there was also an express and independent stipulation to the effect that if the rent was in arrear for fourteen days after it was due, or in case the premises were left vacant for twenty-four hours, or in case of breach of any of the clauses of the agreement, the landlord on giving a week's notice might re-enter, and this condition was to be without prejudice to other remedies he might have. On December 10th, 1898, an instalment was due which the defendant did not pay. The landlord thereupon re-entered and took possession, and then he resorted to his other remedy and sued for the overdue rent. The defendant relied upon the Apportionment Act, 1870.

HELD—that the Apportionment Act, 1870, did not apply to the case where the rent was due long before the need to have recourse to the Act could arise. The Act does not apply to any sum duly and properly paid or accrued due before the happening of the incident which is said to necessitate or require the apportionment.

Decision of Kennedy, J. (15 T. L. R. 301) affirmed.

ELLIS *v.* ROWBOTHAM, [1900] 1 Q. B. 740 ; 69 [L. J. Q. B. 379 ; 48 W. R. 423 ; 82 L. T. 191 ; 16 T. L. R. 301– C. A.

54. *Lessor, Lessee, and Sub-tenant—Payment of Head Rent voluntarily by Sub-tenant—Non-payment of Rent to Immediate Landlord for Nineteen Years by Sub-tenant—Landlord and Tenant Law Amendment Act (Ireland)*, 1860 (23 & 24 Vict. *c.* 154), *s.* 21.]—In the year 1881 the plaintiff became entitled under a will to the rent of £10 reserved by a yearly tenancy, but never received any payment of the said rent. The yearly tenant, since the year 1881, had paid no rent to his immediate landlord in respect of the premises held by him under the yearly tenancy ; but he had, since the year 1890, paid

Rent—*Continued.*

one moiety of the head rent reserved by an old lease, and payable by his immediate landlord in respect of the premises. These payments in respect of the head rent were made voluntarily. In the year 1900 the plaintiff sued the defendant for rent under the yearly tenancy.

HELD (reversing the decision of the Queen's Bench Division)—that the rent was statute-barred and was not kept alive by the payments made in respect of the head rent.

GROGAN *v.* REGAN, [1902] 2 Ir. R. 196—Q. B. [Div. Ct.

55. *Mortgage by Sub-demise*—Elegit—*Receiver under Mortgage—Distress—Duty of Sheriff.*]—The lessee for years mortgaged property by sub-demise, and covenanted to pay the rent and perform the covenants in the lease. The defendant, the owner in fee simple, recovered judgment for rent due by the lessee, and issued a writ of *elegit*, under which the lands were delivered to the defendant. The mortgagee, the plaintiff, appointed a receiver, who entered into receipt of the rents and profits. The defendant levied a distress for rent subsequently accrued. The plaintiff brought an action to restrain the defendant from distraining on the premises.

HELD—that the whole interest of the lessee was not taken by the judgment creditor, and that he was not a surety for the lessee (*Moule* v. *Garrett* ((1872) L. R. 7 Ex. 101; 41 L. J. Ex. 62; 20 W. R. 416; 26 L. T. (N.S.) 367) followed); and that the land must be taken to have been delivered to the defendant under the *elegit* to the extent of the mortgagor's interest as mortgagor in possession, and not in respect of the mere dry reversion expectant on the determination of the sub-demise (*In re South* ((1874) L. R. 9 Ch. 369; 43 L. J. Ch. 441; 22 W. R. 460; 30 L. T. 347) applied); and that the defendant was entitled to distrain.

JOHNS *v.* PINK, [1900] 1 Ch. 296; 69 L. J. Ch. [98; 48 W. R. 246; 81 L. T. 712; 16 T. L. R. 70—Stirling, J.

56. *Several Sub-tenants liable for whole of Head Rent—Salvage Payment by one Sub-tenant — Principle of Contribution.*] — Lands held together for ever subject to a fee-farm rent were sold in lots. Six lots were made primarily liable for the head rent in certain proportions, and were bound to indemnify the remaining lots accordingly. Afterwards the head rent fell into arrear, owing to the default of the owners of some of the indemnifying lots to pay their proportion, and an ejectment for non-payment of rent was brought by the head landlord. The plaintiff, who was a sub-tenant of part of one of the indemnified lots, paid the rent and costs in order to save the lands from eviction, and claimed contribution from the owners of the several lots.

HELD—that the plaintiff was entitled to contribution on the principle of salvage, and that the owners of the lots should contribute according to the value of the lots at the date when the salvage payment was made.

ALLISON *v.* JENKINS, [1904] 1 Ir. R. 341—M. R.

57. *Suspension of Rent—Lease of Theatre—Damage by fall of Adjoining Wall—Dangerous Structure—Order of Magistrate for Structural Repairs — "Closed by Order of Superior Authority."*] —A lease of a theatre in the metropolis contained a provision that if and whenever during the term the theatre should be "closed by order of any superior authority or be destroyed by fire or so damaged by fire that the same cannot be continued to be used as a theatre," the rent was to be suspended and cease to be payable until the theatre was reopened. The wall of an adjoining railway station fell upon the theatre, and so damaged it that a dangerous structure order was made by a magistrate at the instance of the London County Council, requiring the lessee to take down and secure certain walls thereof. At the time of the accident the theatre was being rebuilt, and there was no licence for it from the Lord Chamberlain in existence. The Lord Chamberlain, in answer to an inquiry, stated that he would not permit the theatre to be opened until it was passed as safe by the London County Council.

HELD—that the theatre was, by virtue of the order of the magistrate, "closed by order of a superior authority," and that therefore the rent was suspended.

LENNOX *v.* CURZON; SCOTT AND OTHERS *v.* [LENNOX, (1906) 22 T. L. R. 611—C. A.

VII. RESTRICTIVE COVENANTS.

58. *Permission to Exhibit Motor-cars—Interpretation — Prohibition against Exhibiting "Cycles of any Kind or Description"—Motor-cycles.*]—The defendant by an agreement with the plaintiff was allowed to exhibit motor-cars but was not allowed to exhibit "cycles of any kind or description."

HELD—that the agreement prohibited the exhibition of motor-cycles.

ROYAL AGRICULTURAL HALL CO., LD. *v.* [CORDINGLEY, 17 T. L. R. 288—Byrne, J.

59. *Reversion acquired by Lessee—Restrictive Covenants as to Building—Merger—Sub-lessee—Notice of Restrictive Covenant—Infringement—Change in the Character of the Neighbourhood—Waste—Injunction.*] —By lease dated February 15th, 1854, the Earl of R. demised certain lands near Belfast to W. T., for the term of 1,000 years, at a yearly rent, and subject, among others, to a covenant on the part of the lessee to expend within three years a sum of £500, at least, in erecting a private dwelling-house on portion of the said premises, and a further covenant not to use, or allow to be used, any house then erected, or thereafter to be erected, on any part of the demised premises, save for a private dwelling-house or tea and refreshment house, without the consent in writing of the Earl of R. A sub-lease dated December 25th, 1863, was made by W. T. of a portion of these premises, containing 2r. 23p., on which a villa residence had been erected called Seville Lodge, to Arabella G. (one of the defendants), for a term of 800 years, subject, however, to all the provisoes, clauses,

Restrictive Covenants—*Continued.*

covenants and agreements contained in the original lease. All the estate and interest of W. T. became vested in R. F., who in 1891 purchased the reversion in fee of the Earl of R. R. F. died in 1896; and the trustees of his will sold his interest in the premises to A. (the plaintiff). By a sub-lease dated December 9th, 1896, portion of the premises comprised in the sub-lease of December 25th, 1863, including Seville Lodge, passed into the occupation of B. and C. (the two other defendants). The sub-lease, which was for a term of 750 years, excepted and reserved all such matters and things as were excepted and reserved in and by the lease of February 15th, 1854, and was made subject to all the clauses, covenants, restrictions, reservations and agreements therein contained so far as they affected the premises demised. Since the date of the original lease the character of the surrounding neighbourhood had completely changed through the extension of the municipal boundaries of Belfast, and on portion of the premises, adjoining those in occupation of B. and C., the plaintiff herself had recently erected a number of small shops and dwelling-houses. The defendants B. and C. having commenced to excavate and remove the soil from the portion of the premises in their occupation, and to erect a spirit grocery thereon:—

HELD (by the Court of Appeal, affirming the decision of the Vice-Chancellor)—that the interest under the lease of February 15th, 1854, had not become merged in the reversion in fee, so as to destroy the plaintiff's rights under the sub-lease of December 25th, 1863; that the defendants had express notice of the restrictive covenants contained in the lease of February 15th, 1854, when they respectively acquired their interests in the premises, and were in equity bound by them; that the right of a person to enforce a restrictive covenant by injunction could not be defeated by mere change in the character of the neighbourhood, unless there was an equity against him arising from his acts or conduct in sanctioning or knowingly permitting such change as to render it unjust for him to seek relief by injunction; that there was not sufficient evidence of such conduct on the part of the plaintiff, and that she was accordingly entitled to an injunction restraining the erection of the spirit grocery aforesaid; but

HELD (by the Court of Appeal, varying on these points the judgment of the Vice-Chancellor)—that this injunction should not go against Arabella G.; and that the plaintiff was not entitled to relief on the ground that the conduct of the defendants in altering the character of the premises demised as a villa residence amounted to waste.

Duke of Bedford v. *The Trustees of the British Museum* ((1822) 2 Myl. & K. 552) distinguished.

CRAIG *v.* GREER, [1899] 1 Ir. R. 258—V.-C.; [—A. C.

60. *Reversion Acquired by Lessee—Restrictive Covenants as to Building—Several Sub-Leases made subject to Covenants in the Head Lease—Implied Obligation on Lessee towards Sub-Lessees to observe Restrictive Covenants — Building Scheme.*]—By lease, dated February 15th, 1854, the Earl of R. demised two adjoining parcels of land near Belfast to W. T. for a term of 1,000 years at a yearly rent, and subject among others, to covenants on the part of the lessee (a) to expend a sum of £500 at least in erecting a private dwelling-house on one parcel of the demised premises; (b) not to use any house on either parcel except as a private dwelling-house or as a "tea" house, without the consent, in writing, of the lessor; (c) that each private dwelling-house to be occupied on the smaller parcel must, except with the consent of the lessor, have cost at least £400; (d) that in the event of the lessee erecting on the larger parcel a house of public entertainment the same should be shut in by planting from the view of the adjoining premises; and (e) that each house intended to be erected on the larger parcel should be of the annual value of £25 at least. At different dates during the next ten years W. T. made nine different sub-leases, eight of which were stated expressly to be subject to the covenants and restrictions contained in the head lease. Three of these sub-leases contained covenants by the sub-lessees for the expenditure of money in building, and restricting the user of the houses on the premises; but these covenants were not identical with, nor in some cases even consistent with, the covenants by the lessee in the head lease. Others of the sub-leases contained no provisions as to building or restrictive covenants on the user. Having made these sub-leases, W. T. built a handsome villa on the remaining portion of the demised premises retained in his hands. The portions of the premises comprised in the sub-leases which contained no restrictive covenants became vested in the plaintiff, and the residue of the premises comprised in the head lease, as well as the estate and interest of W. T. under the head lease, became vested in the defendants, who also acquired the reversion in fee simple expectant on the determination of the head lease. The defendants, after becoming so entitled, built upon the larger portion of the land demised in 1854 seven shops and several cottages not of the annual value of £25 each.

HELD (by the Court of Appeal, reversing the decision of the Master of the Rolls)—that there was no express or implied obligation to observe the covenants in the head lease which the plaintiff—as entitled to the land comprised in the sub-leases which she had acquired—could enforce against the defendants, and that she was not entitled to obtain an injunction restraining the defendants from building and using the premises in a manner different from that allowed by the head lease.

GRAHAM *v.* CRAIG, [1902] 1 Ir. R. 264—A. C.

61. *User—Covenant against carrying on any offensive Trade or Business whatsoever—Fried Fish Shop—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 112.]—Although the business of a fried fish seller is not necessarily an offensive trade or business within the meaning of sect. 112

Restrictive Covenants—*Continued.*

of the Public Health Act, 1875, when such business is shown by the evidence to be carried on in such a way as to be offensive to the neighbours, the Court will grant an injunction for breach of a covenant against using the premises "for any offensive trade or business whatsoever."

DUKE OF DEVONSHIRE *v.* BROOKSHAW, (1899) [63 J. P. 569; 81 L. T. 83—Kekewich, J.

62. *User—Covenant not to exhibit Notice of Business—Name of Theatre for Illumination.*]—A lease of a building contained a covenant by the lessee not to paint or write any inscription, figure, or letter, nor affix, attach, or exhibit any signboard or other notice of trade or business to the exterior walls without the lessor's consent. Part of the building consisted of a theatre, to the front wall of which was attached by iron brackets a metal frame, without the consent of the lessor, on which were the words "His Majesty's Theatre," surmounted by a crown, these words being picked out at night in electric light.

HELD—that this was a breach of the covenant.

ATTORNEY-GENERAL *v.* THE PLAYHOUSE, LD., [(1903) 19 T. L. R. 580—Buckley, J.

63. *User—Covenant not to use or follow Trade or Business of Publican—Licensed Spirit Grocer.*]—A covenant by the lessee in a lease not to use or follow the trade or business of a publican is not broken by his trading as a licensed spirit grocer on the premises.

IN RE CULLEN AND RIAL'S CONTRACT, [1904] [1 Ir. R. 206—Barton, J.

64. *User—Covenants by Landlord and Tenant—Tenant to carry on Specified Business—Landlord not to "let" adjoining Premises for similar Business—Breach by Landlord—Action against Landlord—No right of Action against Lessee of the adjoining Premises.*]—A restrictive covenant as to letting or using property must be construed strictly against the covenantee (*Kemp* v. *Bird*, (1877) 5 Ch. D. 974).

By an agreement in writing T. agreed to let to B. a shop in an arcade for twenty-one years: the lease was to contain a covenant by B. not to carry on any business except that specified, and also a covenant by T. not to "let any other portion of the arcade" for the said business.

Subsequently T. let to G., on a tenancy determinable by three months' notice, a shop in the arcade: G. was not to carry on any business except that of a librarian, newsagent, bookseller, or stationer.

G. proceeded to sell articles commonly included both in his business and also in B.'s business, whereupon B. brought an action for damages, and an injunction against both T. and G.

HELD—(1) That T. had committed a breach of his covenant and was liable in damages, but that under the circumstances an injunction was not necessary.

(2) That, as the covenant contained the word "let" only and not "use," G. was not liable.

BRIGG *v.* THORNTON, [1904] 1 Ch. 386; 73 L. J. [Ch. 301; 52 W. R. 276; 90 L. T. 327—C. A.

65. *User — Covenant to be "performed" — Breach of a "negative" Covenant as to User of Premises—Licence given to original Lessee extending mode of User—Whether it protects Assignees of Lease.*]—The word "perform" as used in a proviso for re-entry may refer to "negative" as well as "positive" covenants.

A lease contained covenants by the lessee not to assign or underlet, and not to use the demised premises for the purposes of any trade except that of an outfitter without the lessor's licensee in writing; it also contained a proviso for re-entry, if the lessee should "make default in the performance of any of the covenants upon his part to be performed." The lessor gave the lessee a written licence extending the list of permissible trades. After assignments of both the reversion and the lease, the assignee of the former claimed to re-enter, and forfeit the lease because the assignee of the lease was carrying on a trade covered by the written licence, and also because he had sub-let without leave.

HELD—that the underletting was a breach of covenant entitling the reversioner to re-enter.

Quære, whether if there had been only a breach as to "user," the licence from the original lessor to the original lessee would have protected the present lessee.

Decision of Wright, J. ([1903] 2 K. B. 241; 72 L. J. K. B. 533; 88 L. T. 770) reversed.

HARMAN *v.* AINSLIE, [1904] 1 K. B. 698; 73 [L. J. K. B. 539; 52 W. R. 615; 90 L. T. 624; 20 T. L. R. 356—C. A.

66. *User—Injunction against Sub-lessee—Not to use Premises for Dangerous Trade—Not to do anything which might render Fire Policy void.*]—By a lease of a shop the lessee covenanted "for himself, his heirs, executors, administrators and assigns," that he would not occupy the premises so as to be a nuisance, annoyance or damage to the owners or occupiers of the offices or rooms in the house, and would not carry on upon the premises a dangerous trade, and would not do or suffer to be done upon the premises anything which might render any increased or extra premium payable for the insurance of the premises against fire or which might make void or voidable any policy for such insurance. The lessee, with the consent of the lessor, assigned the lease, and the assignee, with the like consent, sub-demised the premises to the defendant, who carried on a business there in contravention of the above covenant, the insurance company demanding an increased premium.

HELD—that the under-lessee could be restrained by injunction from using the premises in contravention of the covenant.

TEAPE *v.* DOWSE, (1905) 92 L. T. 319; 21 [T. L. R. 271—Eady, J.

Restrictive Covenants—*Continued.*

67. *User—Act of Sub-lessee.*]—A lessee of a house covenanted that she would not use or permit the premises or any part thereof to be used for any illegal or immoral purpose, and further, that no act, matter, or thing should at any time be done on the premises which might be or tend to the annoyance of the lessor or superior landlord for the time being or the lessees or occupiers of neighbouring premises. There was a condition of re-entry on breach of any of the covenants.

The lessee sub-let the house, and the sub-lessee covenanted that she would not carry on or permit to be carried on any noisome, or dangerous, or offensive trade or business, or anything that might be or cause an injury, nuisance, or annoyance to the sub-lessor or any of the neighbours. During the occupation of the sub-lessee an act was done on the premises which tended to the annoyance of the superior landlord.

HELD—that the original lessee could not be said to have "permitted" the act complained of simply because she had made a sub-lease without inserting therein covenants as strict as those in the original lease; but

HELD, also, that the second part of the covenant in the lease was not qualified by the word "permit" in the first part, but was an absolute covenant, that if the act, matter, or thing specified was done by any one, there was a right of re-entry.

PROTHERO *v.* BELL, (1906) 22 T. L. R. 370—[Jelf, J.

68. *User—Lease of Shop—Affixing Show Cases Outside—Right of Tenant.*]—A lease of premises to be used as a shop in connection with a specified business does not authorise the tenant to put up show cases attached to the outside walls by stanchions.

BRITISH LINEN CO. *v.* PURDIE, (1906) 7 F. [923—Ct. of Sess.

VIII. RATES, TAXES AND OUTGOINGS.

(a) Charges borne by Lessor.

69. *Covenant by Lessor to pay Land-Tax—Building Agreement—Increase in Annual Value of Land—Proportion of Land Tax payable by Lessor.*]—In pursuance of a building agreement the owners of a piece of land granted to a builder, on the completion of a certain house on the land, a lease of the house at a ground-rent. By the lease the lessee covenanted to pay the rent and all outgoings except land tax and landlord's property tax, and the lessors covenanted to pay the land tax chargeable on the demised premises. The annual value of the land was increased when the houses were erected on the land.

HELD—that the lessors were only liable to pay the proportion of the land tax based on the rent received by them, and not the land tax payable on the improved annual value of the land.

Watson v. *Home* ((1827) 7 B. & C. 285); and *Smith* v. *Humble* ((1854) 18 J. P. 760; 15 C. B. 321) followed.

MANSFIELD AND OTHERS *v.* RELF, (1907) 71 [J. P. 556; 24 T. L. R. 79—C. A.

70. *Covenant by Lessor to pay Rates—Covenant with Lessee, "his executors, administrators and assigns"—Sub-Lessee—Right to Sue on Contract—Lessee Buying the Freehold Reversion—"Assign."*]—An underlessee is not an "assign" of his lessor; he cannot therefore sue on a positive covenant entered into by the head lessor in the original lease with the original lessee, "his executors, administrators and assigns," unless the benefit of such covenant has been assigned or demised to him, or unless his lessor has entered into a similar covenant with him.

A. demised part of a freehold house to B., who covenanted to pay one-third of the water rate, A. covenanting to pay all other rates. B. subdemised the same premises to C. who, with knowledge of the terms of the head lease, covenanted to pay one-third of the water rate. Subsequently the defendant acquired the freehold reversion in the whole house, and B.'s leasehold interest in the part thereof. The two parts of the house were separately assessed by the rating authority, and the defendant refused to pay any of the rates on the part sublet by B. to C.

C. having been compelled to pay the rates, sued the defendant.

HELD—that there was no privity of contract and no principle of equity entitling him to succeed.

SOUTH OF ENGLAND DAIRIES, LD. *v.* BAKER, [[1906] 2 Ch. 631; 76 L. J. K. B. 78; 96 L. T. 48—Joyce, J.

71. *Covenant by Lessors to pay Rates—Water Rate.*]—In a lease of the whole of the basement and a portion of the ground floor of a block of buildings in Holborn, the lessors covenanted to pay "all rates and taxes payable in respect of the said demised premises.' Water was supplied for domestic purposes by a water board to the whole block by a common pipe. The lessors demanded payment of a sum which they alleged the lessees were liable to pay as a contribution towards the water rate.

HELD—that, in the circumstances of the case, and having regard to the nature of the premises, the water rate was a rate payable in respect of the demised premises within the meaning of the covenant, and that the lessees were not liable.

Direct Spanish Telegraph Co., Ld. v. *Shepherd* ((1884) 13 Q. B. D. 202; 53 L. J. Q. B. 420; 48 J. P. 550; 51 L. T. 124—Div. Ct.) followed.

Decision of Buckley, J. (70 J. P. 462; 95 L. T. 139) affirmed.

BOURN & TANT *v.* SALMON & GLUCKSTEIN, LD., [1907] 1 Ch. 616; 76 L. J. Ch. 374; 71 J. P. 329; 96 L. T. 629—C. A.

72. *New Rate—To be borne by Landlord—Agreement to the contrary—Tenant to pay all Outgoings.*]—A tenant from year to year agreed

Rates, Taxes, and Outgoings—*Continued.*

to pay all outgoings. In the course of the tenancy a new rate was imposed, to be paid by the tenant, who could deduct it from the rent, apart from any agreement to the contrary.

HELD—that the tenant could deduct it, as the agreement between him and his landlord did not apply to such a new rate, and that there was no agreement to the contrary, but that it could only be deducted from the current rent, and that past rates which the tenant had paid could not be deducted, but only that for the current year.

MILE END OLD TOWN VESTRY *v.* WHITBY, [(1898) 78 L. T. 80—Wright, J.

73. *Tithe Rent-Charge—Obligation of Tenant to pay under a Lease made prior to the Tithe Act, 1891—Remedy of Landowner who pays.*]—When by a lease made prior to the Tithe Act, 1891, a tenant had agreed to pay the tithe rent-charge, but failed to do so, and the landowner paid instead, the remedy of the latter against his tenant is by way of distress only, and not by action.

CHURCH *v.* MAPSTED, (1898) 67 L. J. Q. B. 823—[Day, J.

74. *Tithe Rent-charge—Agreement by Tenant to pay an Amount equal to Rent-charge to Landlord—Validity of Agreement—Tithe Act,* 1891 (54 & 55 Vict. *c.* 8), *s.* 1 (1).]—By an agreement for the lease of a farm, the tenant agreed to pay a "yearly rent of £235, and also by way of further rent so much as the landlord shall pay for tithe rent-charge on the said premises."

HELD—that the above clause in the agreement was prohibited and made void by sect. 1 (1) of the Tithe Act, 1891.

LUDLOW (LORD) *v.* PIKE, [1904] 1 K. B. 531 ; 73 [L. J. K. B. 274 ; 68 J. P. 243 ; 52 W. R. 475 ; 90 L. T. 458 ; 20 T. L. R. 276—Channell, J.

(b) Factories and Workshops.

See also FACTORIES AND WORKSHOPS.

75. *Factory Covenants—To pay all Impositions and Outgoings—To pay fair Share and Proportion of Costs and Expenses for Reparation or otherwise by Virtue of Act of Parliament—Factory and Workshop Act,* 1891 (54 & 55 Vict. *c.* 75), *s.* 7.]—The plaintiffs granted the defendants a lease of certain premises in London for the term of twenty-one years from October 30th, 1891. In the same year was passed the Factory and Workshop Act, 1891, which came into force on January 1st, 1892. The demised premises were a "factory" within the meaning of this Act, and in March, 1897, the London County Council, the proper authority under the Act, acting under sect. 7, gave notice to the plaintiffs, as owners of the factory, to carry out certain structural works for the purpose of providing means of escape in case of fire. The plaintiffs executed the works at a cost of £710. The plaintiffs claimed under the covenants of the lease to recover the whole of that sum from the defendants. By one covenant the tenant was to pay "all . . . impositions and outgoings whatsoever . . . assessed, charged or in any wise imposed upon or in respect of the said demised premises, or part thereof, or upon the landlord or tenant in respect thereof by authority of Parliament or otherwise howsoever," and by the other covenant the tenant was to pay "a fair share and proportion of all costs and expenses which the lessors in respect of being the owners or lessors . . . may be called upon to bear, pay or contribute, or would be liable to in or about every or any reparation . . . or otherwise by virtue of any Act or Acts of Parliament."

HELD—that the sum paid by the plaintiffs was clearly within the words of the second covenant, and that upon the construction of the lease the defendants were only liable to pay a proportion, and not the whole, of the sum.

ARDING *v.* ECONOMIC PRINTING AND PUBLISH-[ING CO., (1899) 79 L. T. 622 ; 15 T. L. R. 111 —C. A.

76. *Underground Bakehouse — Expense of Structural Alterations—Certificate of District Council—"Covenant to pay Outgoings"—Factory and Workshop Act,* 1901 (1 Edw. 7, *c.* 22), *s.* 101 (2), (8).]—A lessee for twenty-one years from 1899 of premises, which included an underground bakehouse, covenanted to pay all existing and future rates, taxes, assessments and outgoings of every description, whether Parliamentary, parochial or otherwise.

The local authority insisted on certain structural alterations being made before they would grant a certificate for the bakehouse under sect. 101 (2) of the Factory and Workshop Act, 1901. The lessee thereupon carried out the alterations at a cost of £130, and a Court of Summary Jurisdiction made an order under sect. 101 (8) apportioning part of the expenses on the lessor.

HELD—that the order was wrong, as the covenant imposed an obligation on the lessee to pay such expenses.

Goldstein v. *Hollingsworth* (*infra*) followed.

MORRIS *v.* BEAL, [1904] 2 K. B. 585 ; 73 [L. J. K. B. 830 ; 68 J. P. 542 ; 20 T. L. R. 682 ; 91 L. T. 486—Div. Ct.

77. *Underground Bakehouse — Expenses of Alterations in order to obtain Certificate—Covenant by Lessee to pay "all Rates, Taxes, Impositions and Outgoings"—Liability of Tenant—Factory and Workshop Act,* 1901 (1 Edw. 7, *c.* 22), *s.* 101.]—The appellant was the lessee of premises let by the respondent to the appellant as a bakehouse. The appellant covenanted to pay "all existing and future rates, duties, assessments, impositions, and outgoings of every description for the time being payable either by landlord or tenant" in respect of the said premises. The certificate required by sect. 101 of the Factory and Workshop Act, 1901, could not be obtained unless certain alterations were made as required by the borough council.

HELD—the expenses of such alterations were covered by the words "impositions and out-

Rates, Taxes, and Outgoings—*Continued.*

goings" in the appellant's covenant, and that he was liable to pay them.

GOLDSTEIN *v.* HOLLINGSWORTH, [1904] 2 K. B. [578; 73 L. J. K. B. 826; 68 J. P. 383; 91 L. T. 85; 20 T. L. R. 550; 2 L. G. R. 879—Div. Ct.

(c) Paving Expenses.

78. *Covenant in Sub-Lease—Charges to be borne by Sub-Lessee—Covenant to perform all Lessee's Covenants in Original Lease—Covenant in Original Lease to pay all Duties, Assessments and Outgoings charged upon the Premises—"Present and Future Rates"—Paving Expenses charged on Premises—Private Street Works Act*, 1892 (55 & 56 Vict. *c.* 57), *ss.* 6, 12, 13.]—A lease contained a covenant by the lessee to "pay and bear all present and future rates, taxes, duties, assessments and outgoings charged upon the said premises or the owner or occupier in respect thereof." The lessee sub-let the premises, the sub-lessee covenanting "to observe and perform all the lessee's covenants and conditions contained in the original lease, and to indemnify the plaintiff from and against all claims and demands in respect thereof." Before the date of the sub-lease the local authority executed and completed certain private street works under the Private Street Works Act, 1892, but the final apportionment on the adjoining premises, including the premises in question, was not made until after the sub-lease. The lessee having paid the original lessor the amount apportioned in respect of the premises, sought to recover the amount from the defendant.

HELD—that the apportioned amount, though not yet ascertained, became a charge on the premises and owner as from the date of the completion of the works; and that, as the date of the defendant's sub-lease was subsequent to the completion, he was not liable to indemnify his lessor:

Meaning of the words "present and future" as applied to rates, &c., discussed.

Stock v. *Meakin* ([1900] 1 Ch. 683; 69 L. J. Ch. 401; 48 W. R. 420; 82 L. T. 248, *see* HIGHWAYS, 155) followed.

Decision of Walton, J. ((1902) 88 L. T. 407; 18 T. L. R. 222) reversed.

SURTEES *v.* WOODHOUSE, [1903] 1 K. B. 396; [72 L. J. K. B. 302; 67 J. P. 232; 51 W. R. 275; 88 L. T. 407; 19 T. L. R. 221; 1 L. G. R. 227—C. A.

79. *Covenant by Tenant to pay Rates, Taxes, and Assessments—Summary Recovery from Landlord—Claim against Tenant—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 150.]—The defendants were tenants of the plaintiffs under a lease containing a covenant by which they covenanted to pay "all rates, taxes, and assessments whatsoever which now are or during the term shall be imposed or assessed upon the premises, or the landlords or tenants in respect thereof, by authority of Parliament or otherwise, except the landlord's property tax." The street upon which the demised premises fronted was paved, &c., by the urban authority, and the expenses thereof recovered in a summary manner from the plaintiffs under sect. 150 of the Public Health Act, 1875.

In an action upon the above covenant to recover these expenses from the defendants:—

HELD—that they were not rates, taxes, or assessments within the covenant.

BAYLIS *v.* JIGGENS, [1898] 2 Q. B. 315; 67 [L. J. Q. B. 793; 79 L. T. 78; 14 T. L. R. 493 —Channell, J.

80. *Covenant to pay all Rates, Taxes, Assessments, and Outgoings—Owners' Proportion—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 150.]—The plaintiffs demised to the defendants certain premises. The lease contained a covenant that the defendants would pay all rates, taxes, assessments, and outgoings then payable or thereafter to become payable, whether by the landlord or tenant, in respect of the said demised premises. The urban authority did the paving required to be done by a notice under sect. 150 of the Public Health Act, 1875, which notice had been disregarded, and apportioned the expenses and recovered the same from the plaintiffs. The plaintiffs now sought to recover the expenses from the defendants.

HELD—that the plaintiffs could recover against the defendants.

WELD AND OTHERS *v.* CLAYTON-LE-MOORS [URBAN DISTRICT COUNCIL, (1902) 86 L. T. 584—Div. Ct.

81. *Covenant to pay "Rates, Taxes, and Outgoings."*]—A lessee who has covenanted to pay "all rates, taxes, and outgoings now payable, or hereafter to become payable in respect of the premises" is liable for the cost of paving works executed under sect. 150 of the Public Health Act, 1875.

GREAVES *v.* WHITMARSH, WATSON & CO., LD., [1906] 2 K. B. 340; 75 L. J. K. B. 633; 70 J. P. 415; 95 L. T. 425; 4 L. G. R. 718—Div. Ct.

82. *Payment by Owners—Liability of Tenant—Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 77.]—The defendant was assignee of a lease granted in 1882 for a term of twenty-one years, determinate, after the expiration of the first seven years, by a six months' notice, on certain terms, without prejudice to any rights or remedies which might have accrued under the covenants. The lease contained a covenant by the lessee, for himself and his assigns, that he would "during the said term bear, pay and discharge all taxes, charges, duties, tithes, and tithe rent-charge assessments and impositions whatever, which are now, or may at any time hereafter be, taxed, charged, rated, assessed or imposed upon the said premises, or any part thereof, or upon the landlord or tenant in respect thereof, the landlord's property tax only excepted." In April, 1898, the plaintiffs gave a six months' notice to determine the lease-

Rates, Taxes, and Outgoings—*Continued.*

On May 19th, 1898, the plaintiffs agreed to sell the property. On June 9th, 1898, the district board of works gave the plaintiffs a notice of apportionment charging the owners with £112 6*s.* 7*d.*, expenses of paving a new street. The plaintiffs paid the amount on July 14th, 1898. The day fixed for completion of the sale was August 11th, 1898.

HELD—that the words of the covenant included the charges made in respect of the paving of new streets under sect. 77 of the Metropolis Management Amendment Act, 1862, and the plaintiffs were entitled to recover them from the defendant.

Thompson v. *Lapworth* ((1868) L. R. 3 C. P. 149; 37 L. J. C. P. 74; 16 W. R. 312; 17 L. T. (N.S.) 507) followed.

WIX *v.* RUTSON, [1899] 1 Q. B. 474; 68 L. J. [Q. B. 298; 80 L. T. 168; 15 T. L. R. 200—Bruce, J.

83. *Works completed before Lease — Final apportionment after Lease — Covenant to pay "Assessment"—Liability of Lessee.*]—A lessee covenanted that he would pay all "rates, taxes and assessments whatsoever which now are or during the said term shall be imposed or assessed upon the said premises or on the landlord or tenant in respect thereof by authority of Parliament or otherwise."

HELD—that he was not liable to pay paving expenses which, under the Public Health Act, 1875, had become a charge upon the premises on the completion of the works before the date of the lease, but which had not been apportioned until after the date of the lease.

Surtees v. *Woodhouse* ([1903] 1 K. B. 396; 72 L. J. K. B. 302; 67 J. P. 232; 51 W. R. 275; 88 L. T. 407; 19 T. L. R. 221—C. A., No. 78, *supra*) followed.

Decision of Div. Ct. (67 J. P. 202; 51 W. R. 522; 88 L. T. 562; 19 T. L. R. 426) affirmed.

LUMBY *v.* FAUPEL, (1904) 68 J. P. 265; 90 L. T. [140; 20 T. L. R. 237; 2 L. G. R. 605—C. A.

(d) Requirements of Sanitary Authority.

84. *Contemplation of Parties — Covenant to Pay and Discharge "Impositions" Charged or Imposed in respect of the Premises—Cost of Making good Structural Defect under Order of Sanitary Authority—Incidence of Cost.*]—By a lease for sixteen years from 1892, in which neither the lessor nor the lessee undertook any obligation to repair, the lessee covenanted to "pay and discharge all taxes, rates, including sewers, main drainage, assessments, and impositions whatsoever, which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed, rated, assessed, charged or imposed upon or in respect of the said premises or any part thereof, or on the landlord, tenant, or occupier of the same premises, by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." The lessor was required by the sanitary authority to remove a privy and build a water-closet. On the refusal of the tenant to do the work the lessor did it, and brought an action to recover the cost.

HELD—that the words of the covenant were *primâ facie* wide enough to cover the obligation in question; that it was one of a class which would be within the contemplation of the parties to the covenant, and that there was nothing in the authorities which debarred the Court from giving to the covenant what appeared to be its proper construction.

Decision of the Div. Ct. ([1901] 2 K. B. 151; 70 L. J. K. B. 580; 49 W. R. 442; 84 L. T. 467) reversed.

FOULGER *v.* ARDING, [1902] 1 K. B. 700; 71 [L. J. K. B. 499; 50 W. R. 417; 86 L. T. 488; 18 T. L. R. 422—C. A.

85. *Contemplation of Parties—Covenant to pay "all Charges and Assessments Imposed, Charged, or Assessed upon the Premises"—Lessee Compelled to Repair Defective Drain—No Right to Recover Cost from Lessor.*]—The plaintiff, who held a house upon a seven years' lease from the defendant, was bound by a covenant "to pay during the term the sewers rate and all other taxes, rates, charges, and assessments whatsoever, parliamentary, parochial, or otherwise, which were or thereafter should be imposed, charged, or assessed upon or in respect of the premises, or payable by either the owner or occupier in respect of the same, the landlord's property tax only excepted." In compliance with a notice from the local authority the plaintiff repaired a defective drain, which was causing a nuisance, and now sought to recover from the defendant the cost of so doing.

HELD—that the case was not distinguishable from *Foulger* v. *Arding* ([1902] 1 K. B. 700; 71 L. J. K. B. 499; 50 W. R. 417; 86 L. T. 488—C. A., *supra*), and that he could not recover.

GEORGE *v.* COATES, (1903) 88 L. T. 48—C. A.

86. *Contemplation of Parties—Yearly Tenancy at £20 Annual Rent—Covenant to pay "Outgoings" — Paving of Yard and Laying Down of New Drains—Supply of Water to Closet in London — Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 2, 4, 37 (3).*] — In a contract of demise between landlord and tenants a covenant by the tenants to pay "all rates, taxes, assessments and outgoings of every description, payable in respect of the premises during the tenancy, except the landlord's property tax," must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by the parties as being within the purview of such a contract. In the case of a tenancy of a cottage and yard from year to year under a lease at the annual rent of £20 where the lease contained such a covenant and the tenant had held the said premises for over ten years, it was

HELD—that a supply of water to a w.c. required by the sanitary authority under the Public Health (London) Act, 1891, was, and that the paving and draining of a yard and

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repairs to drains required by the said authority under the said Act were not, within the reasonable contemplation of the parties to the demise.

Valpy *v.* St. Leonard's Wharf Co., Ld., [(1903) 67 J. P. 402; 1 L. G. R. 305—Farwell, J.

87. *Contemplation of Parties—Tenant holding over after Agreement—Terms of Holding Over—Expense of Sanitary Repairs—Relative proportions of Rent and Expenses.*]—Where a tenant occupies a house for three years at a yearly rent of £70 under an agreement binding him to pay all outgoings, and holds over after the expiration of his term without any fresh agreement, he cannot whilst so holding over be held liable for an expense of £70 incurred by his landlord in executing structural sanitary repairs: having regard to the relative amounts of the rent and expenditure, he cannot be presumed to have become a yearly tenant subject to so onerous an obligation.

Valpy v. *St. Leonard's Wharf* ((1903) 67 J. P. 402—Farwell, J. *supra*) applied.

Harris *v.* Hickman, [1904] 1 K. B. 13; 73 [L. J. K. B. 31; 68 J. P. 65; 89 L. T. 722; 20 T. L. R. 18; 2 L. G. R. 1—Wright, J.

And see No. 92, *infra*.

88. *Duties Covenant to pay all Taxes, Rates, Duties, &c.—Compulsory Drainage Expenses—Liability.*]—A lease contained a clause specifying that the rent should be paid clear of all deductions except property tax, and also a covenant by the tenant "to pay and discharge all taxes, rates, duties and assessments whatsoever, which now are or hereafter may become payable for or in respect of the said premises, or any part thereof, whether parliamentary, parochial or otherwise (except landlord's property tax)." A vestry served on the premises a notice, under sect. 85 of the Metropolis Management Act, 1855, requiring the owner to make certain structural alterations in the system of drainage. It was agreed that the work should be done by the owners—the plaintiffs—without prejudice to their right (if any) under the covenant to throw the liability for its cost upon the defendant—the tenant.

Held—that the word "duties" covered the sum payable for the work, and that the defendant had in effect covenanted to indemnify the plaintiffs, and must pay them the sum.

Thompson v. *Lapworth* ((1868) L. R. 3 C. P. 149; 37 L. J. C. P. 74; 16 W. R. 312; 17 L. T. (N.S.) 507) and *Brett* v. *Rogers* ([1897] 1 Q. B. 525; 66 L. J. Q. B. 287; 45 W. R. 334; 76 L. T. 26; 13 T. L. R. 175) followed.

Decision of Byrne, J. (15 T. L. R. 249) affirmed.

Farlow *v.* Stevenson, ([1900] 1 Ch. 128; 69 [L. J. Ch. 106; 48 W. R. 212; 16 T. L. R. 57—C. A.

89. *Outgoings—Covenant to pay all Outgoings imposed upon Premises—Expenses of abating Nuisance—Reconstruction of House Drainage.*]—A tenant covenanted to pay all . . . outgoings and assessments whatsoever which . . . should be imposed or assessed upon or payable in respect of the said demised premises, and he also covenanted to maintain the demised premises, and sinks and sewers belonging thereto, in good and substantial and complete tenantable repair and condition, and to bear a reasonable proportion of the charges and expenses of making, cleaning, cementing, &c., all gullies, common sewers, drains, cesspools, which should be used in common by the tenants of the premises, and the tenants or occupiers of any contiguous buildings. The landlord received a notice from the sanitary authority requiring him to abate a nuisance on the premises. The works required to be done amounted to a reconstruction of the house drainage. The landlord did the work.

Held—that the landlord was entitled to recover the cost from the tenant as an outgoing imposed or payable in respect of the premises.

Antil *v.* Godwin, (1899) 63 J. P. 441; 15 [T. L. R. 462—Bruce, J.

90. *Tenancy for Three Years — Covenant by tenant to pay "Assessments" and "Outgoings"—Reconstruction of Drainage by Order of Local Authority—Liability of Tenant.*]—The plaintiff let a house to the defendant for three years, and then on from year to year, at a yearly rent of £55; and the defendant agreed to pay "all taxes, rates, assessments, and outgoings of every description for the time being payable in respect of the premises as they become due, landlord's property tax only excepted."

During the term, the local authority served a notice upon the plaintiff, under the Public Health Act, 1875, requiring him to take up and relay the existing drain upon the premises, and the plaintiff carried out the work at a cost of £83 10*s*.

Held—that the defendant was liable under the agreement to repay to the plaintiff the amount expended by him upon the work.

Decision of Wright, J. ([1903] 1 K. B. 873; 72 L. J. K. B. 492; 67 J. P. 435; 88 L. T. 767; 19 T. L. R. 457) affirmed.

Stockdale *v.* Ascherberg, [1904] 1 K. B. [447; 73 L. J. K. B. 206; 68 J. P. 241; 52 W. R. 289; 90 L. T. 111; 20 T. L. R. 235; 2 L. G. R. 529—C. A.

91. *Tenancy for Three Years—Covenant to pay "all Rates, Taxes, Assessments, and Impositions becoming due or assessed in respect of the Premises"—Notice by Local Authority to execute Sanitary Repairs—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76).]—By an agreement for a lease of a house in London for a term of three years at the yearly rent of £54, to be paid free and clear of all deductions whatsoever (property tax only excepted), the tenant agreed to pay and discharge "all rates, taxes, assessments, and impositions whatsoever, whether parliamentary, parochial, or otherwise, that may become due or assessed in respect of the messuage, premises, and garden during the tenancy

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(property tax excepted as aforesaid)." During the term notices were served upon the landlord and the tenant, by the sanitary authority, stating that the premises were in such a state, by reason of their insanitary condition, as to be a nuisance, and requiring specified sanitary work to be executed. The tenant executed the work at a cost of £118. and claimed to recover this sum from the landlord.

HELD—that by the terms of the agreement the tenant was bound to pay for the cost of the work.

Stockdale v. *Ascherberg* (*supra*) followed.

IN RE WARRINER, BRAYSHAW *v.* NINNIS, [1903] [2 Ch. 367; 72 L. J. Ch. 701; 67 J. P. 351; 88 L. T. 766; 19 T. L. R. 543; 1 L. G. R. 765—Swinfen Eady, J.

92. *Voluntarily executed by Landlord—Tenant to pay all Outgoings — Nuisance — Intimation Notice—Work done voluntarily, not under compulsion—Public Health* (*London*) *Act*, 1891 (54 & 55 Vict. *c.* 76), *ss.* 3, 4.]—Where a landlord executes sanitary repairs upon receipt of an "intimation" notice served under sect. 3 of the Public Health (London) Act, without waiting for the service of a notice under sect. 4, he must be deemed to have done such repairs voluntarily and not under compulsion, and therefore cannot recover the cost of them as "outgoings" from his tenant, who has agreed to bear "all outgoings."

HARRIS *v.* HICKMAN, [1904] 1 K. B. 13; 73 [L. J. K. B. 31; 68 J. P. 65; 89 L. T. 722; 20 T. L. R. 18—Wright, J.

And see No. 87.

IX. REPAIRS, MAINTENANCE AND IMPROVEMENT.

(a) Alteration.

93. *Acquiescence of Lessor—Easement—Outlay of Money on Landlord's Land—Lessee's Mistake—Encouragement.*]—A lessor who stands by and allows the lessee before the execution of the lease to repair a passage over which the lessee has a right of way to his shop, and to spend money on improvements, and to put up a sign-board, is not entitled after all the work has been completed to set up his legal right and compel the lessee to restore the premises to their original condition.

The five elements or requisites necessary to constitute fraud that will deprive a man of his legal rights laid down by Fry, J., in *Willmott* v. *Barber* ((1880), 15 Ch. D. 96, at pp. 105, 106; 49 L. J. Ch. 792; 28 W. R. 911; 43 L. T. 95), applied.

CIVIL SERVICE MUSICAL INSTRUMENT ASSOCIA- [TION, LD. *v.* WHITEMAN, (1899) 68 L. J. Ch. 484; 63 J. P. 441; 80 L. T. 685—Kekewich, J.

94. *Alteration in Appearance—Covenant not to make Breach — Use for Bill Posting.*]—The plaintiffs granted a lease of a house to the defendant for twenty-one years, the defendant covenanting—(1) to keep the premises in good and substantial repair and condition; (2) not to make any alteration in the external appearance of the buildings; (3) not to do or suffer to be done any act or thing which might be or grow to the annoyance, damage, or disturbance of the lessors or the neighbourhood; (4) not to carry on upon any part of the premises any other business than that of a tailor; and (5) not to assign or part with the possession of the premises or any part thereof. The plaintiffs held the house under a lease for ninety-nine years from the vicar of the parish, which contained similar covenants. The house adjoined the churchyard, and the defendant let the wall of the house, which faced the principal entrance to the church, to a bill-posting company, who covered the wall with advertisements. The effect of this was to injure the wall, and there was evidence that it was an annoyance to the vicar of the church and members of the congregation. The plaintiffs claimed an injunction to restrain the defendant from allowing the wall to be used as a bill-posting station.

HELD—that there had been a breach of covenants (1), (2), and (3), and perhaps of covenants (4) and (5), and the plaintiffs were entitled to an injunction.

HEARD *v.* STUART AND OTHERS, (1907) 24 [T. L. R. 104—Joyce, J.

95. *Alterations to Premises — Waste — Sub-demise for Rubbish Shoot — Injury to Reversion — Countervailing Advantage — Public Health Acts Amendment Act*, 1890 (53 & 54 Vict. *c.* 59), *s.* 25.]—To constitute waste on the part of a tenant there must be a substantial alteration of the thing demised, resulting in an injury to the inheritance; and such an alteration is not the less waste because it may result also in some countervailing advantage greater than the injury. Therefore, where the land demised was low-lying land, and the lessor shot rubbish containing vegetable matter upon it, and thereby raised it above high-water level, but made it more expensive to build upon, it is no answer to an action for waste to say that it is an advantage for building, for the land to be thus raised. The land demised being building land, the fact that the existence of vegetable matter upon it might, under the Public Health Acts, prevent the lessors at the end of the term from building dwelling-houses upon it, or might put them to the proof that such vegetable matter was not then existing, is an injury to the inheritance making the shooting of the rubbish waste.

The fact that the shooting of the rubbish during the term would prevent the lessors at the end of the term from deriving the special profit to be made by the use of the land in this way, is an injury to the inheritance making the shooting of the rubbish waste.

Lord Darcy v. *Askwith* ((1617), Hob. 234) test applied.

Queen's College, Oxford v. *Hallett* ((1811) 14 East, 489; 13 R. R. 293) observed upon.

WEST HAM CENTRAL CHARITY BOARD *v.* [EAST LONDON WATERWORKS CO., [1900] 1 Ch. 624; 69 L. J. Ch. 257; 48 W. R. 284; 82 L. T. 85—Buckley, J.

Repairs. Maintenance and Improvement—*Continued.*

96. "*Alteration*" *to Premises—Covenant not to make—Erection of Large Clock outside Premises without Consent.*]—A lease of a house and shop for a term of twenty-one years contained a covenant by the lessee to expend £400 at least in alterations to the shop fronts and otherwise in substantial improvements, internal structural alterations, and decorations of the premises, and in such manner as the surveyor of the lessors should approve, not to make or suffer to be made any alteration to the premises except as therein provided without the previous consent in writing of the lessors. The assignee of the lease, the defendant, who carried on the business of a watchmaker and jeweller, erected without the consent of the plaintiffs, the owners, and in spite of their protests, a large clock contained in a circular iron frame four feet in diameter and supported by iron stays bolted into the front wall of the premises, the clock having two faces with the defendant's name and business thereon. The loss to the plaintiffs was at present *nil*, though it would cost £15 or more to restore the wall to its original condition.

Farwell, J., HELD—that this was an "alteration" within the meaning of the covenant; and that a mandatory injunction must be granted.

On appeal—HELD—that some limitation must be put upon the word "alteration" in such a covenant, and that it must be taken as meaning some alteration in the form and structure of the building; that it did not apply to things fixed to the house and convenient for carrying on the business in a reasonable, ordinary, and proper way; and that the erection of the clock did not constitute a breach.

Decision of Farwell, J. ((1902) 18 T. L. R. 416) reversed.

BICKMORE *v.* DIMMER, [1903] 1 Ch. 158; 72 [L. J. Ch. 96; 51 W. R. 180; 88 L. T. 78; 19 T. L. R. 96—C. A.

(b) Building Covenants.

97. *Contract to Build Houses—Specific Description of Houses—Right of Mortgagee to Sue.*]—A lease of land contained a covenant by the lessee to build seven houses thereon similar to those erected in an adjoining street, and to keep and deliver them up in repair at the end of the term. Some of the houses referred to had four rooms, and others five. The lease contained a reservation out of the demise to the persons entitled to the minerals under the land to work them, and for that purpose to occupy and use the surface, paying compensation for the damage done. The lessee had in fact himself acquired a lease of the minerals with a right to work them. The lessor mortgaged his reversion. The lessee not having built the houses on the land, the mortgagees sued for specific performance of the covenant.

HELD—(1) that the fact that the lessee had the right, which he had not yet exercised, to occupy the surface for mining operations did not extinguish the covenant to build; (2) that the particulars of the houses which were to be similar to certain others, were sufficiently specified; (3) that the building of the houses was of importance to the mortgagees, and that therefore an order for specific performance should be made.

Ebbetts v. *Conquest* ([1895] 2 Ch. 377; 64 L. J. Ch. 702; 44 W. R. 56; 73 L. T. 69—C. A.) applied.

MOLYNEUX *v.* RICHARD, [1906] 1 Ch. 34; 75 [L. J. Ch. 39; 54 W. R. 177; 93 L. T. 698; 22 T. L. R. 76—Kekewich, J.

98. *Building not erected—Acquiescence of Lessor—Release of Covenant.*]—By a lease in 1866 the lessee of a plot of land covenanted with the lessor to complete a coach-house and stable upon the land within six months to the satisfaction of the lessor, and to keep in repair the demised buildings. The lease contained a proviso for re entry on breach of covenant. The plot was one of a number of building plots subject to a building scheme. The scheme was subsequently modified, and no coach-house or stable was ever built, the lessor approving and consenting to the alteration. In an action by the assignee of the lessor to recover possession for breach of the covenant to repair the coach-house and stable:—

HELD—that the true inference was that the parties intended to release the covenant to repair as regards the coach-house and stable.

Decision of A. T. Lawrence, J. (22 T. L. R. 54) affirmed.

GIBBON *v.* PAYNE, (1907) 23 T. L. R. 250—[C. A.

99. *Repairing Covenant—Continuing Breach—Waiver by Acceptance of Rent—Notice of Breaches—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 14.]—A piece of land, with four houses, was demised to the defendants by the predecessors in title of the plaintiffs on June 4th, 1894. The lease contained a licence to the defendants to pull down the houses within twelve months, and covenants by the defendants (*a*) within the same period to erect new premises in their place, and (*b*) to "at all times during the said term keep the said messuages and premises so to be erected as aforesaid in good and substantial repair." There was also a proviso for re-entry on "any breach or non-observance of any of the lessees' covenants." The new houses were never built. On August 27th, 1895, rent was paid by the defendants and accepted on behalf of the original lessor. In August, 1898, the plaintiffs served on the defendants a notice under sect. 14 of the Conveyancing Act, 1881, which set out the building covenant and the breach thereof, but did not refer to the repairing covenant.

HELD—(1) that, by the acceptance of rent, the breach of the building covenant, which had been made once for all, had been waived; (2) that there was no continuing breach of the building covenant; (3) that there was a continuing breach of the repairing covenant;

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and (4) that the notice served under sect. 14 of the Conveyancing Act, 1881, was insufficient.

JACOB *v.* DOWN, [1900] 2 Ch. 156; 69 [L. J. Ch. 493; 64 J. P. 552; 48 W. R. 441; 83 L. T. 191—Stirling, J.

(c) Insurance Covenants.

100. *Buildings "to be erected"—Construction of Covenant.*]—An indenture of lease contained a covenant whereby the lessees undertook "to insure, and at all times during the said term keep insured against loss or damage by fire, all buildings, erections and fixtures of an insurable character, which at any time during the said term may be erected or placed upon or fixed upon the demised premises." No new buildings were erected after the commencement of the lease. In an action for breach of covenant to insure, a county court judge gave judgment for the plaintiff.

HELD—that the view taken by the county court judge was reasonable; that upon the opposite construction the burden of insuring the old, buildings would be upon the lessor, which would be inconvenient; and that it was impossible to say that the county court judge was wrong.

SIMS *v.* CASTIGLIONE, [1905] W. N. 112—[Div. Ct.

101. *Landlord to insure Premises, and Tenant to pay Half Premium—Liability of Landlord to reinstate after a Fire.*]—A lease of a mill contained a stipulation that the landlord should insure against loss by fire for such amount as he might consider necessary, the tenant paying one half of the annual premium.

HELD—that this provision gave the tenant no right to have the mill reinstated after a fire, out of the insurance moneys.

CLARK *v.* HUME, (1903) 5 F. 252—Ct. of [Sess.

(d) Liability of Landlord for Non-repair.

102. *Cistern at top of Premises belonging to Landlord — Defect in Cistern — Flooding of Tenant's Premises—Employment by Landlord of Plumber—Negligence of Plumber.*]—The defendant was the owner of premises on the fourth floor of which he had a cistern, which supplied the whole premises with water. He had let the ground floor to the plaintiffs, who took their supply of water from the defendant's cistern, and the cistern was upon the premises and the water laid on when the plaintiffs became tenants. The plaintiffs, having discovered a leakage from the cistern, gave the defendant notice of the same, and requested him to have it remedied. The defendant employed a competent plumber to remedy the defect in the cistern, but through the negligence of the plumber the defect was not remedied, with the result that the water overflowed and damaged the plaintiff's goods.

HELD—that, there having been no negligence or wilfulness on the part of the defendant, the defendant was not liable for the damage caused by the negligence of the plumber, upon either of two grounds: that the water was upon the premises in the ordinary and reasonable user of the premises, and that in such a case the defendant would be liable only for damage caused by his negligence, or that the plaintiffs must be taken to have assented to the water being brought upon the premises.

BLAKE & CO. *v.* WOOLF, [1898] 2 Q. B. D. [426; 62 J. P. 659; 67 L. J. Q. B. 813; 79 L. T. 188; 47 W. R. 8—Wright, J.

103. *House Let in Flats—Repair of Roof—Duty of Landlord to repair—Liability for Damage due to non-repair.*]—The defendants let to the plaintiffs one floor of a building, retaining possession and control of the roof. The plaintiffs gave to the defendants notice that a rain-water gutter on the roof was stopped up, but the defendants for four or five days neglected to have it cleaned out. In the meantime the plaintiffs suffered injury by leakage from it. There was no covenant by the defendants to repair the roof.

HELD—that the defendants owed at any rate some duty to the plaintiffs in respect to the maintenance of the gutter in good repair; and that, even if such duty was not an absolute one, but only to take reasonable care, disregard of the notice was clear evidence of negligence; and that therefore the defendants were liable.

Carstairs v. *Taylor* ((1871) L. R. 6 Ex. 217; 40 L. J. Ex. 217; 19 W. R. 723) and *Miller* v. *Hancock* ([1893] 2 Q. B. 177; 57 J. P. 758; 41 W. R. 578; 69 L. T. 214—C. A.) applied.

HARGROVES, ARONSON & CO. *v.* HARTOPP AND [ANOTHER, [1905] 1 K. B. 472; 74 L. J. K. B. 233; 53 W. R. 262; 92 L. T. 414; 21 T. L. R. 226—Div. Ct.

104. *House with common Stair—Defective condition of Stair—Notice to Landlord—Promise to Repair.*]—A married woman living with her husband in a house with a common staircase was injured by a fall thereon. The husband was a yearly tenant, and had lived there for four years. The plaintiff alleged that the stair was defective and had greatly deteriorated during the tenancy and was badly lighted, that complaint had been made to the landlord's factor, who had promised to repair it; and that in reliance on such promise the plaintiff had lived on in the house. In an action for damages against the landlord:—

HELD—that there was a case to be tried.

GRANT *v.* M'CLAFFERTY, [1907] S. C. 201—[Ct. of Sess.

105. *Injury to Tenant's Servant.*]—An action for damages against the landlord of a dwelling-house for breach of contract will not lie at the suit of one who is not either a party to the lease or a person having a *jus quæsitum* under it; but any person who sustains injuries through the fault of the landlord, *e.g.*, a servant of the tenant,

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can, in Scotland, at any rate, sue him therefor in an action *ex delicto*.

Cavalier v. *Pope* ([1906] A. C. 428; 75 L. J. K. B. 609; 95 L. T. 65; 22 T. L. R. 648—H. L. No. 107, *infra*) distinguished.

KENNEDY *v.* BRUCE, [1907] S. C. 845—Ct. of [Sess.

106. *Injury to Weekly Tenant.*]—The landlord of premises let on a weekly tenancy is liable for injuries caused to his tenants through neglect to do necessary repairs of which he has notice. The absence of an express agreement to repair is not material because of the usual practice in premises so let, for the landlord to do reasonable repairs.

BROGGI *v.* ROBINS, (1898) 14 T. L. R. 439—[Day, J.

107. *Promise by Landlord to Tenant during Tenancy to Repair Defective Condition of Premises—Injury to Plaintiff's Wife through Non-repair—Liability of Landlord to Wife.*]—The defendant let to the plaintiff part of a house at a monthly rent, nothing being said as to repairs. Subsequently the defendant, under a threat that the tenant would give up the tenancy, promised to repair the kitchen floor, which was in a defective condition. The defendant did not do the repairs, and the tenant's wife, who was aware of the danger, was injured by a chair, upon which she was sitting, going through the floor. In an action by the wife to recover damages:—

HELD—that the defendant was not liable to the wife either in contract or in *tort*.

Decision of C. A. ([1905] 2 K. B. 757; 74 L. J. K. B. 857; 54 W. R. 68; 93 L. T. 475; 21 T. L. R. 747) affirmed.

CAVALIER *v.* POPE, [1906] A. C. 428; 75 L. J. [K. B. 609; 95 L. T. 65; 22 T. L. R. 648—H. L. (E.).

108. *Superior Landlord doing Repairs—Work Negligently Done—Injury to Person Living in House—Nuisance.*]—The defendants, who were the owners of premises, let them to a person, who sublet part to a company. The plaintiff's husband was the manager of the company, and he and his wife resided in part of the premises let to the company. They had the use of a lavatory in which there was a flush cistern affixed to the wall some feet from the floor. The plaintiff and her husband complained that the cistern was unsafe and in a dangerous condition owing to the vibration caused by certain engines belonging to the defendants, which were upon adjoining premises. The defendants thereupon sent their workmen, who fixed a bracket under the cistern to support it. Some months afterwards the bracket gave way and fell upon the defendant, who was in the lavatory, and injured her. In an action to recover damages, the jury found that the bracket fell by reason of the working of the engines, which caused vibration amounting to a nuisance, and that the bracket was negligently put up and was left in a dangerous condition.

HELD—(1) that, as the plaintiff had no proprietary or other interest in the premises, she could not recover on the ground of a nuisance which was not a public one; and (2) that the defendants owed no duty to her, and that therefore she could not recover on the ground of negligence.

MALONE *v.* LASKEY AND ANOTHER, [1907] [2 K. B. 141; 76 L. J. K. B. 1134; 97 L. T. 324; 23 T. L. R. 399—C. A.

(e) Repairing Covenants.

109. *Breach by Sub-lessees—Actions for Possession against Sub-lessees — Lessee Defending—Costs of Four Actions.*]—The plaintiff was the assignee of four leases, each lease comprising a certain number of houses, and the defendant was the assignee of four sub-leases of the houses. The leases and sub-leases contained the usual covenants by the lessees to repair. The defendant sub-let all the houses to weekly tenants. The houses becoming out of repair, the original lessor served notices under sect. 14 of the Conveyancing Act, 1881, on the plaintiff requiring him to repair, and the plaintiff served similar notices on the defendant. The object of the plaintiff in serving the notices and in bringing the subsequent actions was to have the repairs to the houses executed and not to recover possession thereof. The plaintiff subsequently brought four actions against all the weekly tenants to recover possession of the houses comprised in the four sub-leases respectively, and served a copy of the writ upon each of the tenants. The defendant obtained leave to defend as landlord, and the repairs having been executed, an order was made by consent in each action giving the defendant relief from forfeiture, and staying all further proceedings, the defendants to pay to the plaintiff his costs of the action as between solicitor and client. Upon taxation, the Master allowed the costs of the four actions and of making a copy of the writ in each action and serving notice of it upon each of the weekly tenants.

HELD—that, having regard to the fact that the object of the action was to enforce the execution of the repairs and not to recover possession of the houses, it was only necessary to sue the defendant, and that, therefore, the costs of making copies of the writ and serving notice thereof upon each of the weekly tenants were unnecessary and ought not to be allowed, but that the defendant had, by the consent orders in which he agreed to pay the costs of each action, precluded himself from setting up that only one action was necessary, and that he must therefore pay the costs of each action.

GEEN *v.* HERRING, [1905] 1 K. B. 152; 74 L. J. [K. B. 62; 53 W. R. 326; 92 L. T. 37; 21 T. L. R. 93—C. A.

110. *Covenant to keep in Repair—Covenant to deliver up in Repair—Recovery for Breaches of*

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both Covenants—Damages.]—The ordinary rule by which damages are assessed for breach of covenant at the end of the term is as follows :—The actual state of disrepair is ascertained, and the cost of correcting that and restoring the premises to their proper condition is estimated, and that cost is the measure of damages. Where in a previous action for breach of covenant to keep in repair during the term the fact that the defendant would have to yield up in repair was taken into account :—

HELD—that there was no estoppel, because, though the parties to the action were the same, the questions to be decided were different. In the prior action the damages to the reversion at the date of the judgment was the matter in dispute; in the subsequent action it was the state of repair at the expiration of the term. The true measure of damages was the cost of putting the premises into the state of repair in which the tenant was bound to leave them at the expiration of the term, and the amount recovered in the prior action must be credited with interest at 4 per cent. from the date of payment to the date of the expiration of the lease.

EBBETTS *v.* CONQUEST, (1900) 82 L. T. 560; 16 [T. L. R. 320—Div. Ct.

111. *"Dangerous Structure Notice" — Dangerous Bay Window — Requirement by County Council to Take Down or Secure—Impossible to Rebuild except on Supports—Liability of Lessee under the Covenant to Replace Window.*]—If a house is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair.

A lease contained a covenant to "substantially and effectually repair, uphold and maintain," and to deliver up the premises in a condition in accordance with such covenant. The London County Council gave the lessee a "dangerous structure notice" in reference to a bay window, and the lessee took such window down, and put in a new window flush with the main wall: thereupon the landlord brought an action to compel him to replace the bay window. The judge found that, owing to the inherent nature of the premises, the bay window could not have been made to comply with the council's requirements without building a practically new window, and supporting it on columns of some kind, and he gave judgment for the defendant.

HELD—that the defendant was not liable.

Dictum of Lord Esher in *Lister* v. *Lane and Nesham* ([1893] 2 Q. B. 212; 62 L. J. Q. B. 583; 57 J. P. 725; 41 W. R. 626; 69 L. T. 176—C. A.) approved.

Decision of Kekewich, J. (19 T. L. R. 203) affirmed.

WRIGHT *v.* LAWSON, (1903) 19 T. L. R. 510; [68 J. P. 34—C. A.

112. *Sub-tenant—Defective State of Premises—Notice of Want of Repair—Personal Injuries.*]—The defendant, who was tenant of a house under a repairing lease, sub-let the first floor unfurnished to the plaintiff's husband upon a weekly tenancy at 10*s.* 6*d.* a week. The plaintiff stepped on to the balcony in front of the window of the first floor, which gave way, and the plaintiff was injured. The defective condition of the balcony was not brought to the notice of or known to the defendant.

HELD—that, even assuming that the defendant had undertaken with the plaintiff's husband to repair, he was not liable in the absence of notice of the defect in the balcony.

TREDWAY *v.* MACHIN, (1904) 91 L. T. 310; 20 [T. L. R. 726; 53 W. R. 136—C. A.

113. *Lessor's Covenant to Repair Outside Walls—Extent of Obligation—Old Building—No Obligation to Rebuild—Notice of Disrepair.*]—Where a lessor covenants to keep outside walls in repair, there can be no breach until he has notice of want of repair; and the extent of his obligation (like that of a lessee) is dependent upon the age and condition of the demised premises: thus he is not bound to rebuild premises which, at the date of the notice to him, have become worn out by age and incapable of repair.

In 1890 the three upper storeys of a London house, nearly 200 years old, were let for eighteen years to the plaintiff's assignor, who covenanted to keep the inside in repair, to permit the lessor to enter and inspect, and to use the premises for a private hotel; the lessor covenanted to keep the outside in good and substantial repair. When three years of this lease were unexpired, the London County Council required the front and back walls to be taken down as dangerous structures; the plaintiff gave notice to the defendant, in whom the reversion had become vested, but the latter did nothing. Thereupon the Council took the walls down and left the house uninhabitable.

The plaintiff sued defendant for breach of his covenant.

HELD—that, as defendant had, before the Council served their notice, no notice of want of repair, and as at that time the natural effect of age and decay had rendered the walls unrepairable, the defendant was not liable to rebuild, and had committed no breach of covenant.

TORRENS *v.* WALKER, [1906] 2 Ch. 166; 75 [L. J. Ch. 645; 54 W. R. 584; 95 L. T. 409—Warrington, J.

114. *Liability of Assignee—Premises out of Repair at Date of Assignment—Notice to Assignee to Repair—Subsequent Assignment by Assignee.*]—A lease contained a covenant of the lessee to well and sufficiently repair and keep in repair the demised premises. The defendant, an assignee of the lease, entered into possession and paid rent. Notice of repair was served upon the defendant, with a schedule of dilapidations. Without complying with the notice, the defendant assigned the lease. The plaintiff, the

Repairs, Maintenance, and Improvement—*Continued.*

assignee of the lessor, brought an action of ejectment against the defendant and his assignee.

HELD—that the covenant was one which once broken was always broken; that it was equal to a continuing covenant, so that it was no defence to say that the premises were out of repair when the defendant took possession; and that the defendant was liable for breach of covenant.

PLUMMER *v.* JOHNSON, (1902) 18 T. L. R. 316 [—Walton, J.

115. *Reasonable Wear and Tear excepted"—Covenant to Deliver up in Good Repair—Dilapidations caused by the Friction of Air, by Exposure, by Ordinary Use.*]—The lease of a house contained a covenant by the lessee to deliver it up at the expiration of the term in as good repair and condition as it was at the date of the lease, "reasonable wear and tear excepted." There was no covenant to repair during the term. At the expiration of the term the lessor claimed for dilapidations, including sums for painting the outside woodwork of the house, for repointing brickwork, and for repairing parts of the kitchen floor which had become affected by dry rot.

HELD—that the lessee was not liable for these three items; and that the words "reasonable wear and tear excepted" excluded dilapidations caused by the friction of the air, dilapidations caused by exposure, and dilapidations caused by ordinary use.

TERRELL *v.* MURRAY, (1901) 17 T. L. R. 570—[Div. Ct.

116. *Repair of Road—Covenant to Contribute Proportion of Expense until taken over by Local Authority—Standard of Repair—Reconstruction—Liability for.*]—A covenant to contribute a proportionate part of the expenses of repairing and maintaining a road until undertaken by the local authority, does not extend to contributing a proportion of the expense of an entire reconstruction of the road.

In construing such a covenant regard must be had to the standard of the condition of the road at the time when the covenant was entered into, and the obligation is to contribute a proportionate part of the expense of putting it into a state of repair corresponding to the standard contemplated or existing at that time.

Where the road is reconstructed for the purpose of its being taken over by the local authority, the covenantor is liable to contribute a proportionate part of such expenses as would have been incurred in putting it into the state of repair above mentioned, but is not liable to contribute to the expenses of such work as amounts to reconstruction.

Decision of Joyce, J. (68 J. P. 181) affirmed.

SCOTT *v.* BROWN, (1905) 69 J. P. 89; 4 L. G. R. [103—C. A.

117. *Specified Buildings — Building erected on Demised Land after Date of Lease.*]—Where there is a general covenant to repair, that must refer both to buildings erected at the date of and subsequent to the demise; but where the covenant to repair in its terms applies to certain specified buildings, it must not be extended beyond those buildings.

SMITH AND ANOTHER *v.* MILLS AND ANOTHER, [(1899) 16 T. L. R. 59—Bigham, J.

X. COVENANTS BY LESSOR.

(a) Restrictive Covenants.

118. *Covenant against Letting "Adjoining Premises" for specified Trade — Confined to Next-door Premises.*]—A lessor, the owner for a leasehold term of a block of buildings, covenanted that he would not permit during the continuance of the demise any of his tenants of his adjoining premises, or of other parts of 74, Queen Street, aforesaid, to carry on or upon such premises or any part thereof the trade or business of a tobacconist.

HELD—that as ground cannot be properly said to adjoin a house unless it is absolutely contiguous, without anything between them, "adjoining premises" was confined to the next-door premises, and did not include any premises in the whole block of buildings of which the lessee's premises formed part.

Rex v. *Hodges* ((1829) Mood. & M. 341) applied.

VALE & SONS *v.* MOORGATE STREET AND [BROAD STREET BUILDINGS, LD., (1899) 80 L. T. 487—Cozens-Hardy, J.

119. *Covenant against Letting Adjoining Houses for specified Trade—Breach—Right of Adjoining Lessee to enforce Covenant.*]—A. let one of a row of houses to B., covenanting not to let any other house in the row for the trade of a greengrocer. A. subsequently let another house in the row to C., taking a covenant from him to use it for an Italian warehouse only. Action by B.'s assignee to restrain A. from letting, and C. from using his premises for the trade of a greengrocer.

HELD—that C. had broken his covenant with A.; that A. had observed his covenant with B.; that the plaintiff could neither sue C. directly for breach of his covenant with A., nor compel A. to sue him; and that the action must be dismissed.

Kemp v. *Bird* ((1877) 5 Ch. D. 974; 46 L. J. Ch. 828; 25 W. R. 838; 37 L. T. 53—C. A.) followed.

Fitz v. *Iles* ([1893] 1 Ch. 77; 62 L. J. Ch. 258; 68 L. T. 108—C. A.) discussed.

ASHBY *v.* WILSON, [1900] 1 Ch. 66; 69 L. J. Ch. [47; 48 W. R. 105; 81 L. T. 480—Kekewich, J.

120. *Lessee of Person Bound—"Assigns" but not "Lessees" mentioned in Covenant—Injunction.*]—The lessee of a person bound by a restrictive covenant may be sued, whether assigns are mentioned or not in the covenant.

Covenants by Lessor—*Continued.*

The defendant in a lease to the plaintiff company covenanted for himself, his heirs, executors, administrators, and assigns with the plaintiff company, their successors, and assigns, that he the lessor, his heirs, executors, administrators, and assigns should not nor would during the first ten years of the continuance of the term thereby granted carry on by himself, or suffer to be carried on by others, in or upon certain named premises or any part thereof, the trade or business of a general clothier and tailor for men and boys. The defendant subsequently demised the premises to a firm of tailors. In an action by the plaintiff company against the defendant and his lessees for an injunction.

HELD—that the mention of assigns without mention of lessees afforded no ground, standing alone, for holding that the covenant was not binding upon the defendant's lessees; that in other respects, though lessees were not mentioned *eo nomine*, the words of the covenant were sufficient to bind them not to carry on the business referred to; and that the plaintiff company were entitled to an injunction.

Bryant v. *Hancock & Co.* ([1898] 1 Q. B. 716; 67 L. J. Q. B. 507; 62 J. P. 324; 46 W. R. 386; 78 L. T. 397, No. 158, *infra*) distinguished.

Kemp v. *Bird* ((1877) 5 Ch. D. 974; 46 L. J. Ch. 828; 25 W. R. 838; 37 L. T. 53—C. A.) is not inconsistent with *Fitz* v. *Iles* ([1893] 1 Ch. 77; 2 R. 132; 62 L. J. Ch. 258; 68 L. T. 108—C. A.).

HOLLOWAY BROTHERS, LD. *v.* HILL, [1902] 2 Ch. 612; 71 L. J. Ch. 818; 87 L. T. 201; 18 T. L. R. 745—Byrne, J.

(b) Quiet Enjoyment.

121. *Assignment of Reversion—Purchase by Assignee of House next Door — Exercise by Assignee of Reversion of Rights under Independent Title—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 11.]—An ordinary covenant for quiet enjoyment does not enlarge the grant.

A lease was granted to the plaintiff of offices on the ground floor of a house. The lease contained a covenant by the lessor for quiet enjoyment "during the said term without any eviction or disturbance by the lessor or any person lawfully or equitably claiming from or under him." The reversion expectant upon the determination of the lease to the plaintiff was assigned to the defendant company, who subsequently purchased from a person who had no connection with the plaintiff's lessor a house next door, and proceeded to pull it down and erect new buildings on its site to a much greater height than the old buildings. This caused the chimney in the plaintiff's offices to smoke, so as to materially interfere with the quiet enjoyment of one of his rooms.

HELD—that the defendants had not committed a breach of the covenant for quiet enjoyment. The lessor at the date of the lease had no interest in the neighbouring premises, and he could not, and did not, purport to restrict the use thereof for the benefit of his lessee.

Booth v. *Alcock* ((1873) L. R. 8 Ch. 663; 42 L. J. Ch. 557; 21 W. R. 743; 29 L. T. 231) followed.

Even if such a covenant by a lessor could extend to user by him of premises subsequently acquired, it would to that extent be personal and collateral, and would not run with the reversion and bind an assignee.

Per Romer and Cozens-Hardy, L.JJ.—The correctness of the decision in *Tebb* v. *Cave* ([1900] 1 Ch. 642; 69 L. J. Ch. 282; 48 W. R. 318; 82 L. T. 115) is doubtful; *semble*, to constitute a breach of such a covenant, an act must interfere directly with the enjoyment of the demised premises.

Per Cozens-Hardy, L.J.—Sect. 11 of the Conveyancing Act, 1881, has not enlarged the class of covenants the burden of which runs with the reversion.

Decision of Byrne, J. ([1902] 2 Ch. 635; 71 L. J. Ch. 900; 51 W. R. 42; 87 L. T. 430) affirmed.

DAVIS *v.* TOWN PROPERTIES INVESTMENT [CORPORATION, LD., [1903] 1 Ch. 797; 72 L. J. Ch. 389; 51 W. R. 417; 88 L. T. 665 —C. A.

122. *Breach—What amounts to.*]—In considering whether or not there has been a breach of a covenant for quiet enjoyment, circumstances existing at the date of the lease, and known to both parties, may be taken into consideration.

ROBSON *v.* PALACE CHAMBERS, WESTMINSTER [CO., LD., [1898] 14 T. L. R. 56—Bigham, J.

123. *Implied Covenant — Letting Furnished House for a Year—"Agreed to Let" implies a Covenant for Quiet Enjoyment — Breach.*]—Where there is a letting, a covenant for quiet enjoyment is to be implied from the mere relationship of the parties.

By a memorandum of agreement not under seal the plaintiff "agrees to let," and the defendant agreed to take, a furnished house for a year. The memorandum contained no other words of letting, and no express contract for quiet enjoyment. The plaintiffs being under a private statutory obligation to paint the outside of the house during the period for which it was let to the defendant, and there being power given to the statutory authority to paint in her default, she did the painting herself. The plaintiff, by doing the painting during the term, deprived the defendant of the possession of the house for that time, as it rendered it necessary for the defendant and her family to leave the house for about a fortnight. The plaintiff at the expiration of the tenancy, brought an action for dilapidations, the defendant counterclaimed for damages for breach of an implied covenant for quiet enjoyment.

HELD—that as there was a letting, a covenant for quiet enjoyment was to be implied from the mere relation of the parties; that the private

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Act of Parliament which was in existence before the plaintiff let her house was no defence to the counterclaim, as it was not a case of *force majeure.*

Bandy v. *Cartwright* ((1853) 8 Ex. 913; 22 L. J. (EX.) 285); and *Hall* v. *City of London Brewery Co.* ((1862) 2 B. & S. 737; 9 Jur. (N.S.) 18; 31 L. J. Q. B. 257) followed.

Dicta of Kay, L.J., in *Baynes & Co.* v. *Lloyd & Sons* ([1895] 2 Q. B. 610; 64 L. J. Q. B. 787; 59 J. P. 710; 73 L. T. 250; 14 R. 679—C. A.) dissented from.

BUDD-SCOTT *v.* DANIELL, [1902] 2 K. B. 351; [71 L. J. K. B. 706; 87 L. T. 392; 18 T. L. R. 675—Div. Ct.

124. *Implied Covenant—Agreement operating on an immediate Letting—Whether implied from Word "Let"—To what Acts it extends.*]—Defendant was lessee of certain premises, and was bound by a restrictive covenant against trading. By an agreement not under seal he agreed to let, and plaintiff agreed to take, the lower part of the premises. The plaintiff entered, and carried on his business until the freeholders obtained an injunction against both him and defendant; whereupon he sued the defendant for damages. The jury negatived fraud, but found for the plaintiff; the judge nevertheless gave judgment against him.

HELD (on a motion for judgment or a new trial)—that plaintiff could not recover: for (1) if, as he alleged, there was a warranty at the time of letting, it was not collateral, and could not be proved by parol; (2) the word "let," if it implies any covenant for quiet enjoyment, cannot imply one covering the acts of persons not claiming under the lessor.

Per Romer, L.J.—In an agreement operating as an immediate letting, the word "let" cannot imply an unlimited covenant either for quiet enjoyment or for title.

Decision of Grantham, J., upheld.

Baynes v. *Lloyd* ([1895] 2 Q. B. 610; 64 L. J. Q. B. 787; 44 W. R. 328; 73 L. T. 250; 11 T. L. R. 560) followed.

JONES *v.* LAVINGTON, [1903] 1 K. B. 253; 72 [L. J. K. B. 98; 51 W. R. 161; 88 L. T. 223; 19 T. L. R. 77—C. A.

125. *Interruption—Act of those claiming under Lessor.*]—A covenant by a lessor with a lessee for quiet enjoyment, free from any interruption or disturbance by the lessor "or any person claiming under him," means an interruption or disturbance by the lessor or by any person claiming under him the right to do the act complained of.

HELD, therefore, that a lessor was not liable under such a covenant, where his assignees, being ordered by a local authority to demolish a part of the building not demised to the lessee, interrupted his enjoyment of the part demised to him.

WILLIAMS *v.* GABRIEL AND OTHERS, [1906] 1 [K. B. 155; 75 L. J. K. B. 149; 54 W. R. 379; 94 L. T. 17; 22 T. L. R. 217—Bray, J.

126. *Lessor Building on adjoining Land so as to obstruct access of Air—Causing Lessee's Chimneys to Smoke.*]—The erection by a lessor, of a building of such a height and so near the demised dwelling-house as to alter the ordinary currents of air and cause the wind to blow down the chimneys and make them smoke, and thus cause grievous annoyance to the lessee, is a physical interference with the house, and a breach of a covenant by the lessor that the lessee should enjoy the premises without any interference or disturbance by the lessor.

TEBB *v.* CAVE, [1900] 1 Ch. 642; 69 L. J. [Ch. 282; 48 W. R. 318; 82 L. T. 115—Buckley, J.

127. *Railway Company—Statutory Powers—Assignment of Freehold to Company by Arrangement—Lessee injuriously affected—Compensation—Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. *c.* 18), *s.* 68—*Railway Clauses Consolidation Act*, 1845 (8 Vict. *c.* 20), *ss.* 6, 16.]—Where a railway company acquires by agreement the reversion expectant on the determination of a lease, but does not acquire the lessee's interest, and the lessee is afterwards injuriously affected by the company's workings, he has nevertheless no remedy under the covenant for quiet enjoyment in his lease, although that covenant is not extinguished, but must obtain compensation under the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845.

A temporary inconvenience which does not interfere with the estate, or title, or possession, is not a breach of a covenant for quiet enjoyment.

Sanderson v. *The Mayor, &c. of Berwick-upon-Tweed* (13 Q. B. D. 547) considered.

Decision of Byrne, J. (78 L. T. 251; 14 T. L. R. 317; 46 W. R. 509) affirmed.

MANCHESTER, SHEFFIELD AND LINCOLNSHIRE [RY. CO. *v.* ANDERSON, [1898] 2 Ch. 394; 78 L. T. 821; 14 T. L. R. 489—C. A.

128. *Underlease—Covenant for Quiet Enjoyment "without any Interruption by the Landlord or any Person claiming through him"—Grant of Underlease in Breach of Covenant against Assignment—Subsequent Assignment of Reversion—Action of Ejectment by Assignees—Consent Judgment.*]—The defendant, being the lessee of a shop which he covenanted not to assign or underlet without the approval of the landlord, let the premises to the plaintiff for the residue of the term without having obtained such approval. The sub-lease contained a covenant by the defendant that the plaintiff should hold and enjoy the premises without any interruption by the defendant or any person lawfully claiming through him. Subsequently the superior landlord assigned the reversion, and the assignees brought an action of ejectment against the defendant on the ground that he had forfeited his lease, by breach of covenant. The defendant consented to judgment being signed against him, and the plaintiff was obliged to go out of possession. In an action by the plaintiff against

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the defendant for breach of covenant for quiet enjoyment, Ridley, J., gave judgment for the plaintiff.

HELD, on appeal, that there was evidence that the interruption of the plaintiff's tenancy was caused by the act of the defendant in consenting to a judgment being signed against him which he might have resisted, and that, therefore, the appeal must be dismissed.

COHEN *v.* TANNAR, [1900] 2 Q. B. 609; 69 [L. J. Q. B. 904; 48 W. R. 642; 83 L. T. 64—C. A.

XI. DEROGATION FROM GRANT.

129. *Agricultural Lease—Power to sell Part of Farm for "Building Sites"—Sale of Site for Small-pox Hospital.*]—A lease of a farm for a term of years contained a reservation to the landlord of a right to sell part of the farm for "building sites," allowing £2 off the annual rent for every acre so sold.

HELD—that "land for building sites" was a well understood expression, referring to something in the nature of shops or dwelling-houses; and that the landlord was not entitled, against the tenant's will, to sell part of the farm as a site for a small-pox hospital.

ENGLISH *v.* TYNEMOUTH CORPORATION, (1903) [67 J. P. 239; 1 L. G. R. 177—Div. Ct.

130. *Obstruction of Light — Lessor building on adjoining Plot—Damages—Conveyancing Act, 1881* (44 & 45 Vict. *c.* 41), *s.* 6].—The use of the general word "lights," and, in its absence, the provision of sect. 6 (2) of the Conveyancing Act, 1881, extend only to such lights as the grantor could grant by express words. The plaintiffs were owners of a leasehold house, 28, Stamford Brook Road, which they acquired from the defendant by assignment, dated August 2nd, 1901. The defendant was a builder, and entered into a building agreement with the Ecclesiastical Commissioners for England, dated August 29th, 1899, which comprised the plaintiffs' house, the adjoining land, and a considerable area of property in the neighbourhood. This agreement gave the defendant the right to enter on the land comprised therein for the purpose of carrying out the several works agreed to be done by him, but for no other purpose whatever. He was bound to erect a house on each of the plots into which the land was divided within a specified time and according to specified conditions, and the Commissioners were bound to grant him or his nominee a lease in a specified form of every house erected and completed in carcase and roofed in. On August 2nd, 1901, plans had been settled of a house to be erected on the adjoining land, and something had been done towards the foundations, but that was all. There was no house on the land, and the defendant had merely the right to enter for the purpose of building one, with the further right to claim a lease when the house had been completed.

HELD—that at the date of the assignment by him to the plaintiffs, the defendant had no such interest in the adjoining plot as would have entitled him to make an express grant of an easement of light over it; and that therefore no such grant could be implied.

Decision of Kekewich, J. (71 L. J. Ch. 879; 87 L. T. 473; 18 T. L. R. 817) reversed.

QUICKE *v.* CHAPMAN, [1903] 1 Ch. 659; 72 L. J. [Ch. 373; 51 W. R. 452; 88 L. T. 610; 19 T. L. R. 284—C. A.

131. *Upper floors of Building—Right to Outer Walls — Signboards.*] — Where the owner of a building let the upper floor on a representation that the tenant should have the use of the outer walls for advertising purposes :—

HELD—that the tenant had a right to the use of the outer walls so far as appropriate, and that the landlord could not derogate from his own grant by putting up a sign outside the walls of the floor included, in the letting.

CARLISLE CAFE CO. *v.* MUSE BROS. & CO., [(1898) 67 L. J. Ch. 53; 77 L. T. 515; 46 W. R. 107—Byrne, J.

132. *Wall not intended to be Party Wall—Trespass — Adjoining Premises — Erection of Warehouse — Plans approved by Landlord — Using Wall as Party Wall.*]—The plaintiffs took a lease from the defendants of a plot of land in London for the purpose of erecting a warehouse and show-rooms, and they submitted plans of the proposed buildings to the defendants. These plans showed three windows in a wall on the first floor next to the adjoining land of the defendants. The plans were approved. Upon the defendants' land there was a cart shed, the roof timbers and iron stanchions of which projected a few inches over the land demised to the plaintiffs. These roof timbers and iron stanchions, instead of being removed when the plaintiffs' wall was erected, were, with consent of the plaintiffs' architect, but without the express authority of the plaintiffs, built into the wall. The wall was built entirely on the plaintiffs' land, and was intended as an external and and not as a party wall. The local authority thereupon served notice upon the plaintiffs under the London Building Act, 1894, to brick up the windows in the wall, upon the ground that it was a party wall. The defendants also used another external wall of the plaintiffs' buildings on the basement floor as the wall of their stables. The plaintiffs brought an action for an injunction to restrain the defendants from trespassing on the walls and from using them as party walls.

HELD—that the defendants were not entitled to use the walls as party walls; that their use of them as party walls was either a derogation from their grant or a trespass; that the plaintiffs' architect had no authority to give his consent thereto; and that the plaintiffs were entitled to an injunction.

FREDERICK BETTS, LD., *v.* PICKFORDS, LD. [1906] 2 Ch. 87; 75 L. J. Ch. 483; 54 W. R. 476; 94 L. T. 363; 22 T. L. R. 315—Kekewich, J.

XII. FORFEITURE.

(a) Notice of Breach of Covenant.

133. *Action for a Declaration of Forfeiture—Conveyancing Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 14, *sub-s.* 1.]—An action for declaration of forfeiture of a lease for breach of a covenant to which sect. 14 of the Conveyancing Act, 1881, applies, though not intended to be followed by a re-entry, will not lie unless the notice required by sub-sect. 1 of that section has first been served.

WILSON *v.* ROSENTHAL, (1906) 22 T. L. R. 223 [—Sutton, J.

134. *Claim for Rent in Action of Ejectment—Continuing Breach—Waiver—Conveyancing Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 14.]—A lessor served on his lessee a notice under sect. 14 of the Conveyancing Act, 1881, in respect of breaches of a covenant to repair in a lease, which contained a proviso for re-entry. By the notice a reasonable time was given to remedy the breaches, which time expired on December 22nd, 1896.

The premises were not repaired, and continued out of repair until January 14th, 1897, on which day the lessor brought an action against the lessee claiming to recover possession on a forfeiture for breach of the covenant to repair, and also claiming rent of the premises up to December 25th, 1896.

HELD (reversing the judgment of Ridley, J.)—that the lessor was entitled to enforce the right of re-entry in respect of the breaches of the covenant to repair which continued after December 25th, without giving a fresh notice under sect. 14 of the Conveyancing Act, 1881.

PENTON *v.* BARNETT, [1898] 1 Q. B. 276; 67 [L. J. Q. B. 11; 77 L. T. 645; 14 T. L. R. 11; 46 W. R. 33—C. A.

135. *Insufficiency—Breaches of several Covenants—Repairs—Dilapidations—Damages—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 14, *sub-s.* 1.]—A notice under sect. 14, sub-sect. 1, of the Conveyancing and Law of Property Act, 1881, "That you have not kept the said premises well and sufficiently repaired, and the party and other walls thereof," is not sufficiently definite; though the notice is sufficiently definite as to other breaches of covenant, a claim by the lessor for possession will fail by reason of the insufficiency of the notice as to one breach; though the lessee is entitled under his lease to three months' notice to remedy breaches of covenant, a notice under the above section requiring the breaches to be remedied within "one month or a reasonable time thereafter" is sufficient; a breach of covenant is a continuing breach, though the premises have been pulled down by the local authority as a dangerous structure, and the lessor is entitled to damages up to the time when the premises were pulled down, independently of the notice, the receipt of rent by him being no waiver.

RE SERLE, GREGORY *v.* SERLE; SERLE *v.* [SERLE; ITTER'S CLAIM, [1898] 1 Ch. 652; 67 L. J. Ch. 344; 78 L. T. 384; 46 W. R. 440 —Kekewich, J.

136. *Notice to Remedy several Breaches—Notice too large—Validity—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 14.]—A notice to a lessee under the 14th section of the Conveyancing Act, 1881, to remedy a number of alleged breaches of covenant, is not bad merely because in respect of one or more of them the breach cannot be established.

Lock v. *Pearce* ((1893) 2 Ch. 271; 62 L. J. Ch. 582; 41 W. R. 369; 68 L. T. 569—C. A.) followed.

Horsey Estate, Ld. v. *Steiger* ((1899) 2 Q. B. 79; 68 L. J. Q. B. 743; 47 W. R. 644; 80 L. T. 857; 15 T. L. R. 367—C. A. No. 184, *infra*), and *In re Serle* ((1898) 1 Ch. 652; 67 L. J. Ch. 344; 46 W. R. 440; 78 L. T. 384—Kekewich, J., *supra*) distinguished.

PANNELL *v.* CITY OF LONDON BREWERY CO., [1900] 1 Ch. 496; 69 L. J. Ch. 244; 48 W. R. 264; 82 L. T. 53; 16 T. L. R. 152—Buckley, J.

(b) Re-entry.

137. *Mortgagor in Possession — Breach of Covenants in Lease — Mortgagor's Right of Re-entry or Forfeiture—Judicature Act*, 1873 (36 & 37 Vict. *c.* 66), *s.* 25, *sub-s.* 5.]—Sect. 25, sub-sect. 5, of the Judicature Act, 1873, gives the mortgagor legal rights which he had not before, but it does not give to a mortgagor any power of re-entry or right of forfeiture which he had not before. The mortgagee alone can elect to re-enter for a forfeiture. A mortgagor, when the equity of redemption is in him, and he is in possession of land subject to a lease, cannot therefore re-enter for breach of a covenant to repair.

Judgment of Ridley, J. (68 L. J. Q. B. 988; 81 L. T. 542) reversed.

MATTHEWS *v.* USHER, [1900] 2 Q. B. 535; [69 L. J. Q. B. 856; 49 W. R. 40; 83 L. T. 353; 16 T. L. R. 493—C. A.

And see No. 198, *infra*.

138. *Proviso for Re-entry—Company—Forfeiture by Voluntary Liquidation for Purpose of Amalgamation — Solvent Company — "Bankruptcy"—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 2, *sub-s.* 15; *s.* 14, *sub-s.* 6]—A lessor demised a public-house to C. & Co., Ld., for thirty years, and there was an express condition that if and whenever the lessees or their assigns, being a company, should "enter into liquidation, whether compulsory or voluntary," it should be lawful for the lessor, his heirs and assigns, to re-enter upon the demised premises. C. & Co., Ld., who were perfectly solvent, were voluntarily wound up for the purpose of being amalgamated with two other large companies. C. & Co., Ld., then applied for a licence to assign. The respondents, who were the successors in title of the original lessor, declined to grant such a licence, alleging that they were entitled to re-enter. The lease was then assigned without licence to the appellant company, and shortly afterwards the respondents brought this action against the appellant company and the underlessee to recover possession.

Forfeiture—*Continued.*

HELD—that the voluntary winding-up worked a forfeiture of the lease; that sect. 14, sub-sect. 1, of the Conveyancing Act, 1881, applied to the forfeiture in this case as by sub-sect. 6 (i.) it applied to a condition of forfeiture on the "bankruptcy" of the lessee, and by sect. 2, sub-sect. xv., of the Act "bankruptcy" includes "any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy."

Horsey Estate, Ld. v. *Steiger* ([1899] 2 Q. B. 79; 68 L. J. Q. B. 743; 47 W. R. 644; 80 L. T. 857; 15 T. L. R. 367—C. A., No. 184, *infra*) approved.

Decision of C. A. ([1901] 1 Ch. 499; 70 L. J. Ch. 138; 49 W. R. 145; 83 L. T. 551; 17 T. L. R. 145) affirmed.

FRYER *v.* EWART, [1902] A. C. 187; 71 L. J. Ch. [433; 86 L. T. 242; 18 T. L. R. 426; 9 Manson, 281—H. L. (E.).

139. *Proviso for Re-entry—"Act or Thing whereby the Premises become vested in Another"—Sub-letting.*]—A lease of a public-house for twenty-seven years contained a proviso for re-entry "if the lessees or their assigns should do or suffer any other act, matter, or thing whereby or by reason or means whereof the demised premises, or any part thereof, should either directly, or by operation of law, or otherwise howsoever indirectly, become or be rendered liable to become vested, either for the whole or any part of the term thereby created, in any person other than the lessees." The lessees sub-let to a tenant from year to year.

HELD (affirming the judgment of Kennedy, J.)—that the lessees had done an act whereby the demised premises became vested for part of the term in the sub-tenant, within the meaning of the proviso, and that a forfeiture had been incurred.

DYMOCK *v.* SHOWELL'S BREWERY CO., LD., [1898] 79 L. T. 329—C. A.

140. *Proviso for Re-entry—Lease exclusively for Agricultural Purposes — Sub-division for Building Purposes—Transvaal.*]—The respondents let land to the appellants' predecessors in title for ninety-nine years, and by the lease it was provided that the land was to be used exclusively for agricultural purposes, and was not to be sub-divided "in order to sell or lease such portion as stands for building purposes." In the event of the breach of any of the conditions the lease was to be null and void, and the lessors were to have the right to resume possession.

The appellants advertised the land for sale in eighty-five one-acre lots in accordance with a plan.

HELD (affirming the judgment of the Court below)—that the lessors were entitled to treat the lease as forfeited, although the land had not in fact been sub-divided and conveyed to separate purchasers, and that their remedy was by ejectment and not by interdict.

SHORT AND OTHERS *v.* TURFONTEIN ESTATE, [LD., [1905] A. C. 584; 74 L. J. P. C. 148; 93 L. T. 57—P. C.

141. *Unequivocal Act declaring Election—Inconsistent Claims in Writ.*]—The plaintiffs, who were the owners of certain mines which had been leased to the defendants, brought an action (1) to recover possession of the mines upon the ground of forfeiture for breach of covenant; (2) for mesne profits; (3) for an injunction to restrain the lessees from further working the mines so as to hazard, endanger, or occasion loss or damage to the mines; and (4) for an order on the lessees from time to time, and at all reasonable times to permit the plaintiffs, their servants and agents, to enter upon the mines and to inspect them.

HELD—that the writ was not unequivocal, but contained inconsistent claims, and was not, therefore, equivalent to re-entry, and that the claim to recover possession failed.

MOORE *v.* THE ULLCOATS MINING CO., LD., [(1907) 24 T. L. R. 54—Warrington, J.

(c) Relief against Forfeiture.

142. *Liquidation—"Sale" within a Year—What amounts to—Conveyancing and Law of Property Act*, 1892 (55 & 56 Vict. *c.* 13), *s.* 2 (2).]—To bring a "sale" within the meaning of sect. 2 (2) of the Conveyancing Act, 1892, which gives relief against forfeiture, the sale must be completed by conveyance, or there must be an absolute contract for sale.

The M. B. company were mortgagees in possession of freeholds leased to the H. C. company. The latter company went into liquidation, thereby forfeiting the lease. Thereupon the receiver appointed by the H. C. company, in order to take advantage of the provisions of sect. 2 (2), entered into a contract for sale of the lease within a year of the liquidation, but the contract was conditional only.

HELD—that the provisions as to relief did not apply, and the M. B. company were entitled to possession.

IN RE CASTLE & SONS, LD., MITCHELL *v.* [CASTLE & SONS AND OTHERS, (1906) 94 L. T. 396—Joyce, J.

143. *Terms on which Relief Granted—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 14 (2).]—A public body had had the lease of certain premises assigned to it, and had, in the mistaken belief that they had also acquired the freehold, committed a breach of a covenant in the lease. Judgment for possession had been given against them on the ground of such breach.

Upon an application under sect. 14 (2) of the Conveyancing and Law of Property Act, 1881, the Court granted relief upon certain terms including reinstatement, but declined to allow a continuing breach of the covenant as one of the terms of relief, although the applicants hoped to

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be able to acquire the freehold compulsorily in the near future.

BATSON AND ANOTHER *v.* LONDON SCHOOL [BOARD, (1905) 69 J. P. 9—Channell, J.

144. *Under-lease—Forfeiture of Head Lease—Vesting Property in Underlessee—Costs—Inquiry—Conveyancing and Law of Property Act*, 1892 (55 & 56 Vict. *c.* 13), *s.* 4.]—Where a lease was declared forfeited for breach of a condition by the lessee, and the Court vested the property comprised in the lease in the underlessee under sect. 4 of the Conveyancing Act, 1892, the under-lessee was ordered to pay the costs of the new lease and of the inquiry as to the rent to be paid.

EWART *v.* FRYER, (1902) 86 L. T. 676; 18 [T. L. R. 590—Joyce, J.

145. *Under-lease—Forfeiture of Head Lease for Non-Payment of Rent—Relief to the Under-Lessee—Conveyancing and Law of Property Acts*, 1881 (44 & 45 Vict. *c.* 41), *s.* 14 (8), and 1892 (55 & 56 Vict. *c.* 13), *s.* 4.]—Sect. 4 of the Conveyancing Act, 1892, is not a mere amendment of sect. 14 of the Act of 1881, extending to under-lessees the bare provisions of that section; but it is an independent provision for giving them relief where the head lease is forfeited for breach of covenant.

Therefore, where a head lease is forfeited for non-payment of rent, relief may be given to the under-lessees under sect. 4, although under sect. 14 no relief against a forfeiture for this cause could be given to the lessees.

In such cases an order should be made vesting the premises in the under-lessees for the term of the under-lease, they making good any existing breaches of covenants, and covenanting to pay the rent reserved by the lease and to perform the covenants contained in it.

GRAY AND OTHERS *v.* BONSALL, [1904] 1 K. B. [601; 73 L. J. K. B. 515; 52 W. R. 387; 90 L. T. 404; 20 T. L. R. 335—C. A.

146. *Under-lease—Apptication for by Mortgagees of Under-lease—Parties necessary—Costs—Common Law Procedure Acts*, 1852 (15 & 16 Vict. *c.* 76), *ss.* 5, 210-2, and 1860 (23 & 24 Vict. *c.* 126), *s.* 1.]—A landlord ejected an under-lessee for non-payment of ground-rent, and thereupon mortgagees by sub-demise of the under-lease applied for relief on the usual terms under the Common Law Procedure Acts and the Court's equitable jurisdiction.

HELD—(1) that in such cases the head lessee and his assignee ought *primâ facie* to be made parties.

Hare v. *Elms* ([1893] 1 Q. B. 604; 62 L. J. Q. B. 187; 57 J. P. 309; 41 W. R. 297; 68 L. T. 223—Div. Ct.) followed.

(2) but that their absence was satisfactorily explained by the fact that such lessee became bankrupt twenty-seven years ago, and that the person to whom his trustee assigned the lease had not been heard of for twenty-five years, and (3) that the application should be granted, the applicants paying the costs except so far as they had been increased by the landlord's unjustifiable opposition on the ground of deficiency of parties.

Howard v. *Fanshawe* ([1895] 2 Ch. 581; 64 L. J. Ch. 666; 43 W. R. 645; 73 L. T. 77—Stirling, J.) followed.

Newbolt v. *Bingham* ((1895) 72 L. T. 852—C. A.) distinguished.

HUMPHREYS *v.* MORTEN, [1905] 1 Ch. 739; 74 [L. J. Ch. 370; 53 W. R. 552; 92 L. T. 834—Eady, J.

147. *Under-lease—Forfeiture of Head Lease for Non-payment of Rent—"Tenant"—No Proof of Title necessary—Common Law Procedure Act*, 1852 (15 & 16 Vict. *c.* 76), *s.* 212.]—Where an under-lessee applies under sect. 212 of the Common Law Procedure Act, 1852, for relief against forfeiture of a head lease for non-payment of rent, he need not prove his title as under-lessee or assignee; the fact that he is "tenant" in possession is sufficient.

Doe d. *Wyatt* v. *Byron* ((1845) 1 C. B. 623—Dictum of Erle, J.) applied.

MOORE *v.* SMEE AND ANOTHER, [1907] 2 K. B. [8; 76 L. J. K. B. 658; 96 L. T. 594—C. A.

148. *Under-lease of Part of the Premises—Forfeiture of Head Lease—Relief to Under-Lessee—Terms of—Conveyancing and Law of Property Act*, 1892 (55 & 56 Vict. *c.* 13), *s.* 4.]—Where a head lease is forfeited by non-payment of rent, and an under-lessee of part of the premises applies for relief, the Court will not compel him as a term of such relief to accept a lease of the whole premises; but he must pay all arrears of rent due in respect of the whole premises down to the date of judgment for possession, and from that date a fair rent for the part comprised in his under-lease.

In respect of the arrears of rent he will have a claim against any under-lessee of another part of the premises who may subsequently apply for relief.

LONDON BRIDGE BUILDINGS CO. *v.* THOMPSON [AND ANOTHER, (1903) 89 L. T. 50—Joyce, J.

XIII. DWELLING HOUSES AND FLATS.

149. *Collateral Warranty—Verbal Assurance that Drains are in Good Order.*]—The plaintiff, who was anxious about drainage, as he had suffered from bad drains in his previous house, by his wife on his behalf, had had interviews with the house agents about the drains of the defendant's house. He sent his wife and daughter to the defendant, who took with them the counterpart, executed by the plaintiff ready to be exchanged for the lease if further assurances about the drains were obtained; he gave particular instructions that the counterpart was not to be exchanged for the lease until they got from the defendant the necessary assurance. The defendant asserted that there was no need for a certificate of a sanitary inspector and that

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the drains were in good order. He gave his word upon the subject. The counterpart was thereupon handed over. The lease was entirely silent about drains. The drains were not in good order.

HELD—that everything necessary to establish a warranty had been proved: and that even if the jury had not found a warranty, the true inference was that there was a warranty given collateral to the lease.

Decision of Bruce, J. (17 T. L. R. 264) reversed.

DE LASSALLE *v.* GUILDFORD, [1901] 2 K. B. [215; 70 L. J. K. B. 533; 49 W. R. 467; 84 L. T. 549; 17 T. L. R. 384—C. A.

150. *Flats — Building Scheme — Implied Covenant—Residental Flats—Common Scheme.*]—The conversion of flats in a building into an hotel is a departure from a scheme in accordance with which the building is to be managed, namely, as residential flats suitable to the convenience of all persons who shall be tenants of the flats.

ALEXANDER *v.* MANSIONS PROPRIETARY, LD., [(1900) 16 T. L. R. 431—Stirling, J.

151. *Flats—Implied Covenant—Flat to be used for Residential Purposes only—Breach—Damages—Injunction.*]—The plaintiff took a lease of a flat in a building from the defendant, the plaintiff covenanting to use the flat for residential purposes only. The other flats in the building were let by the defendant with similar covenants by the lessees, but there was no express corresponding covenant by the defendant as to the use of the flats. The defendant subsequently let some flats in the building to the Government for public offices, and possession was given to them.

HELD (by Buckley, J.)—that there had been a breach of an implied covenant by the defendant that the flats should be used for residential purposes only; but he refused an injunction on the ground that the defendant, having given possession, could not comply with the order, and he directed an inquiry as to damages sustained by the plaintiff.

The Court, on appeal, varied the order by directing an inquiry as to damages sustained by the plaintiff by reason of any lettings by the defendant in breach of his covenant up to the present time, and granting an injunction restraining any future lettings in breach of the covenant.

GEDGE *v.* BARTLETT, (1901) 17 T. L. R. 43—[C. A.

152. *Flats—Covenant — Quiet Enjoyment—Lease of a Flat in a Block—General Scheme—Covenant not to permit User for Immoral Purposes—Receipt of Rent by Landlord after Complaints—Liability of Landlord to other Tenants.*]—The plaintiff was the tenant of a flat under an agreement which contained the usual covenant for quiet enjoyment. The adjoining flats in the same building were held by other tenants under similar agreements, in all of which there was a stipulation by the tenant that he would not permit the premises to be used for any unlawful or immoral purpose, but, on the contrary, would as much as possible contribute to the respectability of the building and keep the premises as a private dwelling-house or residential chambers. The plaintiff now alleged that he was annoyed by the user of the next flat for improper purposes, and he claimed a declaration that the defendants (the equitable assignees of the reversion) were bound by covenant for quiet enjoyment, and also an injunction.

Buckley, J., refused to strike out the statement of claim as disclosing no cause of action, and the defendants appealed.

HELD—that, though a covenant for quiet enjoyment without interruption by the landlord, or any person claiming under him, relates only to freedom from disturbance by adverse claimants, yet it might appear that in this case the user was in fact the user of the defendants, *e.g.*, if they had received rent from the persons in question after complaint made of their conduct, and that, therefore, the case must go for trial; for, if the acts complained of were held to be the acts of the defendants, the plaintiff would have a right of action as tenant under a "common scheme."

Quære, whether disagreeable sights and sounds may not be a breach of a covenant for quiet enjoyment, apart from physical interference with the property.

Decision of Buckley, J. (19 T. L. R. 114) affirmed.

JAEGER *v.* MANSIONS CONSOLIDATED, LD., [(1903) 87 L. T. 690; 19 T. L. R. 145—C. A.

153. *Furnished House—Right of Tenant to move Movables.*]—A landlord let to a tenant a furnished house, in which there were a number of pictures and engravings hanging on the walls, some of which were said to be valuable. The tenant, desiring to have pictures of her own upon the walls, took down these pictures and engravings and placed them together in a room in the house. The landlord objected, and asked for an interdict.

HELD (Ld. Young dissenting) — that the tenant was under no legal obligation to keep the movable articles in the house in the same positions in which he found them during the currency of his tenancy. He was entitled to use them as he might find best for comfort and amenity.

MILLER *v.* STEWART, (1900) 2 F. 309—Ct. of Sess.

154. *Small Tenement — Recovery — Issue of Warrant—Time within which to be executed—Small Tenements Recovery Act*, 1838 (1 & 2 Vict. *c.* 74).]—On an application for a warrant under the Small Tenements Recovery Act, 1838, the magistrates found as a fact that the person who applied for a warrant was the duly authorised agent of the landlord, and made an order that unless the tenant went out in ten days a warrant would issue. On an application for a *mandamus* to the magistrate to state a case:—

HELD—that the finding of the magistrate could not be questioned, but that as to the issue

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of the warrant the practice was wrong, and the warrant could not be enforced before twenty-one days after its issue, and that its issue could not be postponed for ten days on condition that the tenant gave up the premises, but since in this case no warrant had been issued and the tenant had left the premises, the *mandamus* would not be granted.

Reg. *v.* Hopkins, (1900) 64 J. P. 454—Div. Ct.

XIV. LICENSED PREMISES.

(a) Covenants against Forfeiture of Licence.

155. *Covenant running with the Land—Covenant by Lessee for Himself and his Assigns—Absolute Covenant—Liability of Lessee's Assigns for Breach of Covenant by Sub-lessee.*]—The plaintiff demised to the lessee for fourteen years a licensed public-house at a quarterly rent, and the lease contained a set of covenants, beginning as follows: "and the lessee doth hereby for himself and his assigns covenant with the lessor and his assigns in manner following, that is to say" (*inter alia*) "The lessee will at all times during the continuance of this demise use and keep open the said premises as a licensed public-house for the sale of ale, wine, beer, and spirits therein, and will so conduct and manage the same as to afford no reasonable or lawful ground or pretence for the justices refusing to renew, endorsing, or objecting to renewal of the licences now attached to the said premises." The lessee assigned the lease to a company, who afterwards sublet to a tenant from year to year. The tenant was convicted of opening the house in prohibited hours on three separate occasions, and was fined: and it was contended for the plaintiff that this endangered the licence, and, therefore, constituted a breach of the covenant. The action was brought against the trustees of the will of the lessee and the company.

Held—that the covenant ran with the land, and therefore bound the assigns, whether mentioned or not; that the covenant was absolute, and was broken by the act of the tenant; and that judgment must be entered for the plaintiff.

Mumford *v.* Walker and Others, (1901) 85 [L. T. 518; 18 T. L. R. 80; 71 L. J. K. B. 19 —Ridley, J.

156. *Covenant to insure Licence against "loss or forfeiture" — Non-renewal of Licence on ground of Non-necessity.*]—By a lease of a public-house in 1898 it was provided that, if the licensing authority should for any cause whatsoever refuse to renew the licence, the lease should determine, but the above provision should not take effect unless and until the lessee should have effected an insurance of the demised premises in accordance with the covenant thereinafter contained; and the lessee covenanted with the lessor to insure and keep insured against loss or forfeiture the licence of the premises in the sum of £400. The lessee insured the licence, but excluded from the policy the risk of non-renewal on the ground that the licence was not required by the necessities of the neighbourhood. In 1904 the licensing justices refused the renewal of the licence, upon the ground that it was not required by the necessities of the neighbourhood.

Held—that there had been a "loss" of the licence within the meaning of the covenant, and that the lessee had committed a breach thereof by not insuring against such loss.

Williams *v.* Lassell and Sharman, Ld., [(1906) 22 T. L. R. 443—Ld. Alverstone, C.J.

157. *Covenant to pay Liquidated Damages if Licence Forfeited, Lost, or Withheld—Renewal of Licence Refused through no fault of Lessee.*]—The defendants were lessees of a public-house at a rent of £18 per annum. The lease, which was for a term of five years, contained the following covenant: "And the lessees hereby further covenant with the lessor that if at any time during the continuance of this demise the said licence or licences shall be forfeited, lost, or withheld, then and in such case the lessees shall and will thereupon pay to the lessor the sum of £250 as liquidated and ascertained damages and not as penalty." At sessions the justices refused to renew the licence on the ground that the house was not wanted, and its situation was unsuitable for a public-house.

Held—that the covenant to pay £250 being taken by itself, its language was such as to make the damages payable not only if the renewal was refused for misconduct, but also if the renewal was withheld without any fault on the part of the lessees; and that the lessees had made themselves liable to the landlord to pay the £250.

Dalley and Another *v.* Phillips and [Marriott, Ld., (1902) 18 T. L. R. 18— Wright, J.

158. *Covenants pointing to Forfeiture and Non-renewal—"Discontinuing the Licences"—"Withdrawing or withholding" the Licences.*]—A lease of licensed premises contained covenants to the effect (1) that the covenantor and his assigns would "keep the premises open every lawful day, and conduct the business in a proper and orderly manner, so as to afford no ground or pretence for discontinuing the licences thereof"; and (2) that they would not "wilfully do or suffer any act or thing which might be a breach of the rules and regulations established by law for the conducting of licensed public-houses, or be a reasonable ground for the withdrawing or withholding of all or any of the licences for sale of beer and ale, wine and spirituous liquors therein."

Held—that the second limb pointed to non-renewal, and the first to forfeiture.

Bryant *v.* Hancock, [1899] A. C. 442; 68 L. J. [Q. B. 889; 64 J. P. 84; 81 L. T. 96; 15 T. L. R. 490—H. L. (E.).

159. *Licensed Premises—Offence by Underlessee—Renewal of Licence Refused.*]—In a lease of a public-house the lessee covenanted for himself, his heirs, executors, administrators and assigns to use the premises as a public-house or

Licensed Premises—*Continued.*

beerhouse only, to carry on there no other trade, and also not to do or suffer to be done on the premises any act whereby the licence might be forfeited, or indorsed, or the renewal withheld. The lessee assigned his interest in the lease to the defendant, who sub-demised the premises, the sub-lease containing a covenant by the sub-lessee similar to that contained in the original lease. The sub-lessee was convicted of having permitted drunkenness on the premises, and the licence was indorsed, and in consequence the renewal was refused. In an action to recover damages for breach of covenant :—

HELD—(1) that the first clause did not amount to an absolute covenant that the licence should be continually renewed, and (2) that, as the sub-lessee was not the defendant's servant or agent, the defendant had not "suffered" the act to be done, and that therefore the action failed.

Decision of Kennedy, J. (88 L. T. 803; 19 T. L. R. 504) affirmed.

WILSON *v.* TWAMLEY, [1904] 2 K. B. 99; 73 [L. J. K. B. 703; 52 W. R. 529; 90 L. T. 751; 29 T. L. R. 440—C. A.

160. *Offence by Under-Lessee—"Keep and conduct the same in a regular and proper manner"—"Knowingly do or suffer any act" whereby Renewal of Licence refused.*]—By a lease of a licensed house the lessees covenanted that they would at all times during the said term keep and conduct the same in a regular and proper manner in every respect . . . and would not knowingly or willingly do or suffer any act whereby the licence may become endorsed, forfeited, or the renewal thereof refused, and would not commit any offence against the licensing laws for the time being in force. The lessees underlet the house, and the under-lessee, who was the licence-holder, was convicted of having permitted drunkenness on the premises, and in consequence the renewal of the licence was refused. In an action by the lessor against the lessees for damages for breach of the above covenant :—

HELD—that the first part of the covenant—to keep and conduct the house in a regular and proper manner in every respect—was an absolute covenant, and was not qualified by the subsequent part, and that the lessees were liable for breach of the covenant in respect of the offence committed by their under-lessee.

Bryant v. Hancock ([1899] A. C. 442; 68 L. J. Q. B. 889; 81 L. T. 96; 15 T. L. R. 490—H. L., No. 158, *infra*) distinguished.

PALETHORPE *v.* THE HOME BREWERY CO., LD., [1906] 2 K. B. 5; 75 L. J. K. B. 555; 54 W. R. 489; 94 L. T. 871; 22 T. L. R. 505—C. A.

(b) Maintenance of Business and Licence.

161. *Lessee agreeing to Surrender Licence—Action by Landlord to Restrain—Injunction or Damages.*]—A lessee of licensed premises has no right to surrender the licence by agreement with the licensing justices, unless the owner approves. If the latter assents in any way he may lose his right to subsequently claim an injunction, and will only be entitled to damages.

RAE *v.* YATES CASTLE BREWERY AND ANOTHER, [(1903) 67 J. P. 427—Hall, V.-C.

162. *Mode of conducting Business—Covenant to keep as an Inn—Exhibiting Notice restricting sale of Liquor—Breach of Covenant.*]—The defendant expended money upon converting a village public-house into an inn, with good accommodation for guests who desired to stay there. The plaintiffs, who were the owners of the house, gave him a lease thereof for a term of fifty years, and the defendant covenanted that he would not use the premises otherwise than as an inn, tavern, or licensed house, and that he would during the term, so long as the requisite licences could be obtained, keep the house open in due and proper course of business as an inn, tavern, or licensed victualling house during the greatest number of days and the greatest number of hours that should be allowed by law, and would conduct and manage the same in a lawful and proper manner, and would not do or suffer anything whereby the licences or any of them might be or become liable to be forfeited or suspended, or the renewal thereof withheld, or whereby the trade or business, or the goodwill thereof, might be or be liable to be prejudicially affected, or break the laws affecting licensed victuallers either by act of commission or omission.

The defendant proposed to exhibit a notice in the house that no one would be served with refreshment on Sunday except visitors staying in the hotel and their guests, and travellers, and that no one would be served with alcoholic drink more than once during any morning or afternoon or evening on any week-day.

HELD—that the proposed mode of carrying on the business was a breach of the covenants in the lease.

Decision of Warrington, J. (22 T. L. R. 502) reversed.

DARTFORD BREWERY CO., LD. *v.* TILL AND [GODFREY, (1906) 70 J. P. 519; 22 T. L. R. 792; 95 L. T. 636—C. A.

163. *No other Business to be carried on—Loss of Licence—Effect.*]—Premises were let on lease for ten and a half years for the express purpose of a "wine and spirit merchant's" business, and there was a provision that they should be exclusively used for such business.

A renewal of the licence was refused after the premises had been used for over three years as a public-house. The landlord was willing to remove the restriction as to the user of the premises.

HELD—that the impossibility of using the premises for the purpose contemplated did not terminate the lease.

HART'S TRUSTEES *v.* ARROL, (1904) 6 F. 36—[Ct. of Sess.

Licensed Premises—*Continued.*

164. *Receiver—Recovery of Possession—Preservation of Licences—Notice—Conveyancing and Law of Property Act*, 1884 (44 & 45 Vict. *c.* 41), *s.* 14.]—The plaintiffs, brewers, let to the defendant a public-house for one year certain. The defendant covenanted with the plaintiff that he would not do, or cause or suffer to be done, any act, deed or thing whereby the licences to the public-house or any of them might be jeopardised, indorsed, withheld, suspended, forfeited, or lost; that he would reside in the public-house and not shut up the same; and that he would upon quitting the premises assign over all licences. The defendant, after continuing in possession for eight years and more, closed the house and went away. The plaintiffs brought an action to recover possession of the premises. On an *ex parte* application an interim order was made appointing a receiver of the licences, and of the rents and profits of the public-house. Under this order the receiver went into possession. The plaintiffs moved for the appointment, until judgment or further order, of a receiver of the rents and profits of, and of the licences belonging to, the public-house, and for the delivery over of such licences to the receiver. No notice under sect. 14 of the Conveyancing Act, 1881, had been served on the defendant.

HELD—that the interim order was quite right; that the defendant had committed a most flagrant breach of the terms on which he held the property; that such an order must be made as would preserve the licences pending the dispute; and that therefore the receiver must be given possession only for the purpose of preserving the licences, and the defendant would be at liberty, with the consent of the plaintiffs, to return to the house and remain there, so long as he did not interfere with the possession of the receiver.

CHARRINGTON & CO. *v.* CAMP, [1902] 1 Ch. 386; [71 L. J. Ch. 196; 86 L. T. 15; 18 T. L. R. 152—Joyce, J.

165. *Receiver—Tenant Vacating Possession—Action to Recover Possession—Appointment of Receiver of Licences—Power to Receiver to Appoint Person to carry on Business.*]—The defendant, who was tenant to the plaintiffs of a public-house, disappeared and vacated the premises, and his address was unknown. The plaintiffs commenced an action to recover possession of the premises, and moved *ex parte* for the appointment of a receiver of the rents and profits of the public-house and of the licences belonging thereto, and that the receiver when appointed might be at liberty to appoint some fit and proper person to reside upon the premises and to hold the licences under his supervision.

HELD—that the application should be granted.

Charrington & Co. v. *Camp* ([1902] 1 Ch. 386; 71 L. J. Ch. 196; 86 L. T. 15; 18 T. L. R. 152—Joyce, J., *supra*) doubted but followed.

WHITBREAD & CO. *v.* GRAIN, (1907) 23 T. L. R. [462—Kekewich, J.

166. *Receiver — Forfeiture — Licences — Delivery of Possession to Receiver.*]—The tenant of a licensed house covenanted to pay the rent and to keep the premises continuously open as an hotel, and to conduct and manage the hotel in an orderly manner, and not to do anything whereby the licence might be endangered. The tenant made default in payment of a quarter's rent, and he shut up the hotel for short periods, as he had not the means to carry it on. In an action by the lessors to recover possession of the premises, the judge at chambers, upon the application of the plaintiffs, made an order for the appointment of a receiver of the rents and profits of the hotel, and the defendant was ordered to deliver up to the receiver all books, papers, and licences relating thereto, and also possession of the premises so far as was necessary for the purposes of the receiver, who was to be at liberty to appoint some fit and proper person to reside upon the premises and to hold the licences and conduct the business under his supervision.

HELD—that the order so far as it appointed a receiver of the licences and of the rents and profits of the hotel, and gave him possession thereof so far as was necessary for preserving the licences was right; but that it went too far in ordering the defendant to deliver over all books and papers, and authorised the receiver to appoint some one to conduct the business; and that therefore the order should be modified in that respect by ordering the defendant to hand over the licences to the receiver, and the receiver would be authorised to appoint some fit and proper person to do such things as were necessary to prevent the licences being endangered.

Charrington & Co. v. *Camp* ([1902] 1 Ch. 386; 71 L. J. Ch. 196; 86 L. T. 15; 18 T. L. R. 152—Joyce, J., No. 164, *supra*) discussed.

LENEY & SONS, LD. *v.* CALLINGHAM AND [THOMPSON, (1907) 24 T. L. R. 55—C. A.

167. *Reversionary Lease—Public-house—Implied Conditions that Premises should be maintained as a Fully Licensed Public-house.*]—A reversionary lease was granted to the defendant by the plaintiff's predecessor for a term of years to take effect on the determination of the tenancy of the then tenant. One of the covenants of such lease was that the lessee should, during the continuance of the term thereby granted, use the demised premises as and for a fully licensed public-house only so long as the necessary licence could be obtained for that purpose. The licence was forfeited during the tenancy of the tenant, and before the date of the commencement of the defendant's lease. The premises accordingly were greatly depreciated.

HELD—that there was no implied condition in the lease that the premises should be maintained as a fully licensed public-house at the commencement of the defendant's lease, and that the defendant was therefore liable for the rent reserved under the lease.

BLUM *v.* ANSLEY, (1900) 64 J. P. 184; 16 T. L. R. [249—Phillimore, J.

Licensed Premises—*Continued.*

(c) Tied Houses.

168. *Assignment of Reversion—Severance of Business.*]—A brewer's lease of a beerhouse contained a covenant by the lessee to deal exclusively with the lessor or his firm, or his or their successors in business, and there was also an interpretation clause whereby the expression "lessor" and "lessee" were to include their respective executors, administrators, and assigns, where the context allowed. The lessor assigned the reversion of the house to a brewery company, who did not, however, purchase his business, which was still being carried on as at the date of the lease.

HELD—that the context did not allow of the insertion in the covenant of the words "executors, administrators, and assigns" after the word "lessor"; that the meaning of the covenant was that the lessee was to buy all his beers, &c., from the lessor or his successors in business; and that he could not be compelled to buy from the company.

Clegg v. *Hands* (44 Ch. Div. 503) and *Doe* d. *Culvert* v. *Reid* (10 B. & C. 849) discussed.

Decision of Byrne, J. ((1898) 78 L. T. 37; 14 T. L. R. 223; 46 W. R. 375) reversed.

BIRMINGHAM BREWERIES, LD. *v.* JAMESON [(1898) 67 L. J. Ch. 403; 78 L. T. 512; 14 T. L. R. 396—C. A.

169. *Assignment of Reversion—Covenant running with Land—Executed by Lessee only—Specific Performance—Injunction.*]—The plaintiffs sought for an injunction to restrain the defendants from committing any breach of a covenant to buy beer, &c., from them. The defence was (1) an allegation that the plaintiffs supplied bad beer; (2) that the covenant in question was personal to the original landlord, *i.e.*, that the tenant was only bound to take beer brewed in his brewery, either by him or his successors in his business; and (3) that the plaintiffs could not maintain any action on the covenant in question, because the original landlord, through whom they claimed as assigns, did not execute the agreement.

HELD—(1) that there had been no breach by the plaintiffs of their obligation to supply good beer, and that the evidence of those who paid for and sold the beer was admissible if the identity of the liquor and brew was established; (2) that the defendant in fact contracted under seal to deal with the persons who purchased the business from the original landlord, and not from persons who brewed beer at the same brewery as the original landlord; (3) that, as a fact, the defendant agreed that the plaintiffs should occupy the position of landlord to him in the same way as the original landlord had done; (4) that the plaintiffs were the assigns of the benefit of the agreement both by implication from the conveyance of the land subject to the lease, and by the express words of clause 26 of the agreement. The plaintiffs could, therefore, obtain specific performance of the contract so far as it was incomplete, and by virtue of the Judicature Act the tenant held under the same terms, and had the same rights and liabilities, as if a lease had been granted; and therefore the plaintiffs, being entitled to specific performance of the agreement under which the defendant had been for years and still was in possession, could sue him on the covenants in the same manner as they could have done if the original landlord had executed the original lease.

MANCHESTER BREWERY CO. *v.* COOMBS, (1900) [82 L. T. 347; 16 T. L. R. 299; (1901) 2 Ch. 608; 70 L. J. Ch. 814—Farwell, J.

170. *"Fair Current Market Price"—Covenant to buy Liquors from Landlord.*]—The plaintiffs, who were brewers and wine and spirit merchants, let a licensed house to the defendant, who covenanted to buy from them all liquors for consumption on the premises which they should be willing to supply at the "fair current market price." The plaintiffs issued price lists, and supplied the ordinary public at the full price on the list, and they supplied "free" licensed houses at ordinarily a discount of 20 per cent. They allowed the defendant and the tenants of their other tied houses a discount of 10 per cent. These were the usual prices charged by brewers generally.

HELD—that the words "fair current market price" meant a price which was current and fair in the case of tied houses, and which was not in excess of the general market rate, and that the price did not cease to be current and fair because the tenants of free houses, who were exceptionally circumstanced, obtained lower prices by special bargain.

ARNOLD, PERRETT & CO., LD. *v.* RADFORD, [(1901) 17 T. L. R. 301—Wright, J., Gloucester Assizes.

XV. COVENANTS AGAINST ASSIGNING OR UNDER-LETTING.

171. *Assignment by one Lessee to his Co-lessee on Dissolving Partnership.*]—A lease was vested in two partners, and by its terms the landlord's consent was required to any assignment. The partnership being dissolved, the retiring partner assigned to the continuing partner all his share and interest in the demised premises.

HELD—a breach of the covenant.

Varley v. *Coppard* ((1872) L. R. 7 C. P. 505; 20 W. R. 972; 26 L. T. 882) followed.

Bristol Corporation v. *Westcott* ((1879) 12 Ch. D. 461; 27 W. R. 841; 41 L. T. 117—C. A.) distinguished.

LANGTON *v.* HENSTON, (1905) 92 L. T. 805—[Buckley, J.

172. *Assignment without Consent.*]—A lease contained a covenant by the lessee not to let or demise the demised premises without the consent of the lessor. The lessee sold the premises, and the lessor gave his consent, which was indorsed on the assignment. The assignee, Doyle, then put the premises up for sale, and O'Hara purchased them. O'Hara required the assignment

Covenants against Assigning or Under-letting— *Continued.*

to be made with the consent of the lessor. Doyle refused to obtain the lessor's consent, and the purchaser refused to complete.

HELD (by the Master of the Rolls), on a summons under the Vendor and Purchaser Act, 1874—that by the covenant the assignee was restrained from assigning without the lessor's consent.

HELD, by the C. A. (reversing the decision of the Master of the Rolls)—that the covenant only restrained sub-letting without consent of the lessor, and that it was not necessary that the consent of the lessor should be obtained to make title.

Greenaway v. *Adams* ((1806) 12 Ves. 395) distinguished.

IN RE DOYLE AND O'HARA'S CONTRACT, [1899] [1 Ir. R. 113—M.R.; 118—C. A.

173. *Mistake, Thoughtlessness, Forgetfulness—Consent not to be unreasonably withheld—Right of Re-entry—Relief.*]—A lease which had a good many years to run contained a covenant that the defendants should not "underlet, assign or part with the possession of the rooms or offices and premises, or any part thereof, to any person or persons without the consent in writing of the company (the plaintiffs) for that purpose first obtained, such consent not to be unreasonably withheld." There was also a proviso for re-entry upon breach of any of the covenants. The defendants, without the consent of the plaintiffs being asked for, let a part of one of the rooms to desirable tenants, and had the consent of the plaintiffs been asked, it could not have been reasonably withheld.

HELD—that if the defendants had committed the breach of covenant through mistake, thoughtlessness or forgetfulness, or because they thought the breach unimportant, they were not entitled to be relieved against the forfeiture.

Hyde v. *Warden* ((1877) 3 Ex. D. 72; 47 L. J. Ex. 121; 37 L. T. 567—C. A.) questioned.

Barrow v. *Isaacs* ([1891] 1 Q. B. 417; 60 L. J. Q. B. 179; 55 J. P. 517; 39 W. R. 338; 64 L. T. 686—C. A.) followed.

Decision of Kennedy, J. (78 L. T. 713; 14 T. L. R. 479) affirmed.

EASTERN TELEGRAPH CO. *v.* DENT, [1899] 1 [Q. B. 835; 68 L. J. Q. B. 564; 80 L. T. 459; 15 T. L. R. 296—C. A.

174. *Consent not to be unreasonably withheld to a responsible Assignee.*]—The defendant became tenant to the plaintiff of a house, and he covenanted not to assign the premises without the consent of the plaintiff, such consent not to be unreasonably withheld to a responsible assignee. The plaintiff refused his consent to an assignment. The plaintiff having sued for rent, the defendant counter-claimed for a declaration that the proposed assignee was a responsible person, or, alternatively, for damages for breach of covenant by the plaintiff in refusing the consent.

HELD—that there was no covenant by the plaintiff to give his consent in the case of a responsible assignee, such words being merely a qualification of the defendants' covenant.

Sear v. *House Property and Investment Society* ((1880) 16 Ch. D. 387; 50 L. J. Ch. 77; 45 J. P. 204; 29 W. R. 192; 43 L. T. 531) followed.

GOODWIN *v.* SATURLEY, (1900) 16 T. L. R. 437—[Ridley, J.

175. *Equitable Assignment — Condition of Re-entry on Assignment for Benefit of Creditors —"Disposing of the Land Leased"—Notice specifying Breaches — Service on "Lessee" — Judicature Act*, 1873 (36 & 37 Vict. *c.* 66) *s.* 24, *sub-s.* 4—*Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 14, *sub-s.* 1, 6 (i.); *s.* 67, *sub-s.* 2.]—The defendant made an assignment for the benefit of his creditors. By the deed he assigned to a trustee all his freehold, copyhold, and other lands, estates, tenements, hereditaments, and premises, save and except such as were of a leasehold tenure, and as regards his leasehold property he declared that he would stand possessed of it upon trust for the trustee, and to assign and dispose of the same in such manner as the trustee should from time to time direct.

By a lease granted by the plaintiff to the defendant the latter covenanted not to assign or underlet the premises or any part thereof without the consent, in writing, of the lessor first had and obtained, such consent not to be unreasonably withheld in the case of a respectable and responsible tenant; and there was a proviso for re-entry on breach of any of the covenants, or if the lessee should (*inter alia*) execute an assignment for the benefit of his creditors. The trustee entered into possession of the demised premises, but no legal assignment of them was executed. The lessor brought an action of ejectment against the defendant founded upon an alleged forfeiture for breach of covenant.

HELD—that as the plaintiff had failed to prove that there had been any assignment at law within the covenant, the alleged forfeiture did not exist.

HELD, also, that sect. 14, sub-sect. 6 (i.), of the Conveyancing Act, 1881, only applies to a covenant or condition which upon its face is an absolute covenant or condition against assigning or disposing of the land leased, and that the plaintiff had not made out that the condition against assignment for the benefit of creditors came within sub-sect. 6 (i.). Consequently the defendant ought to have been served with the notice specifying breaches required by sect. 14, and not the trustee.

Decision of Ridley, J. (68 L. J. Q. B. 848; 81 L. T. 294; 15 T. L. R. 466) reversed.

GENTLE *v.* FAULKNER, [1900] 2 Q. B. 267; 69 [L. J. Q. B. 777; 82 L. T. 708; 16 T. L. R. 397—C. A.

176. *Estate or Interest in a Theatre—Exclusive Licence and Right to use Refreshment Rooms at a Theatre—Breach.*]—In the lease of a theatre the lessee covenanted not to assign, demise, or

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otherwise part with the indenture, or any estate or interest therein, for all or any part of the term, to any person without the licence of the lessor, such consent not to be unreasonably withheld. There was a proviso for re-entry on breach of any covenant in the lease. At the date of the lease a refreshment contractor had the exclusive right to supply refreshments in the theatre. By a subsequent agreement the lessee, who was therein described as landlord, granted to the refreshment contractor, who was therein described as the tenant, the free and exclusive licence and right to the use of all the refreshment rooms, bars, smoke room, wine cellars, and offices, and the exclusive privilege of advertising and letting spaces for advertisements in the said rooms. No licence was obtained from the lessor for this agreement.

HELD—that the real intention of the parties was that one person should be exclusively the refreshment contractor, and the other, who was the lessee of the theatre, should have certain control and certain powers in dealing with that part of the theatre which was reserved for refreshments; and that though the instrument was most unfortunately framed in the form of a lease there was nothing in the language of the instrument which prevented the giving effect to the real intention of the parties.

Decision of the C. A. (*sub nom. Daly* v. *Edwardes*, (1901) 49 W. R. 244; 83 L. T. 548; 17 T. L. R. 115) affirmed.

EDWARDES *v.* BARRINGTON, (1902) 50 W. R. [358; 85 L. T. 650; 18 T. L. R. 169—H. L. (E.).

177. "*Fine or Sum of Money in the Nature of a Fine*"—*Covenant by Assignee to pay Rent—Liability of Assignee—Conveyancing Acts*, 1881 (44 & 45 Vict. *c.* 41), *s.* 2 (ix.); *and* 1892 (55 & 56 Vict. *c.* 13), *s.* 3.]—By sect. 3 of the Conveyancing Act, 1892, in all leases containing a covenant against assignment, underletting, or parting with the possession without consent, such covenant shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso that no fine or sum of money in the nature of a fine shall be payable for or in respect of such consent.

A lease contained a covenant by the lessee not to assign without the consent of the lessor, such consent not to be unreasonably or capriciously withheld. The assignee of the lessee applied to the lessor for his consent to assign to the defendant, and the lessor required as a condition to giving his consent that the defendant should covenant to pay the rent during the remainder of the term. A covenant to that effect was accordingly entered into, the consent was given, and the assignment to the defendant was executed. The defendant subsequently by consent assigned the lease, and upon a quarter's rent becoming due after this last assignment the lessor sued the defendant for it upon his covenant.

HELD—that, even assuming that the covenant came within the words of sect. 3, "fine or sum of money in the nature of a fine," the statute had not made the payment of a fine illegal, and the defendant, who was no party to the original lease, could not avail himself of the section as a defence to the action.

Semble, per Vaughan Williams and Stirling, L.JJ., that the covenant was not within the above words of sect. 3; per Moulton, L.J., that it was.

WAITE *v.* JENNINGS, [1905] 2 K. B. 11: 75 [L. J. K. B. 543; 54 W. R. 511; 95 L. T. 1; 22 T. L. R. 510—C. A.

178. "*Fine or Sum of Money in the Nature of a Fine*"—*Validity—Conveyancing Act*, 1892 (55 & 56 Vict. *c.* 13), *s.* 3.]—Where a lease contains an unqualified covenant against assignment without the consent of the lessor, sect. 3 of the Conveyancing Act, 1892, does not render illegal the demand by the lessor from the lessee of a fine for giving consent to assign. It merely makes the demand of a fine something that is not contracted for, and does not prevent the parties from bargaining as to the terms upon which the consent shall be given.

Decision of Channell, J. ([1907] 2 K. B. 494; 76 L. J. K. B. 879; 97 L. T. 432; 23 T. L. R. 548) affirmed.

ANDREW *v.* BRIDGMAN, [1908] 1 K. B. 596; 77 [L. J. K. B. 272; 52 Sol. Jo. 148—C. A.

179. "*Fine or Sum of Money in the Nature of a Fine*"—*Demand of Increased Rent—Covenant to Reside—Limited Company—Inability to Reside—Conveyancing Act*, 1892 (55 & 56 Vict. *c.* 13), *s.* 3.]—A lease of a licensed house contained a covenant by the lessee not to assign, transfer, underlet, or part with the possession of the premises without the consent of the lessor, such consent not to be unreasonably withheld. The lessee applied to the lessor for his consent to assign the premises to a brewery company, and the lessor replied that he would agree to an assignment to a private person only who would carry on the business as a free house, but that if the assignment was to a brewery firm the rent must be increased by £25 a year. The lessor imposed this latter condition because a tied house was less valuable to sell than a free house.

HELD—that the condition was a "fine or sum of money in the nature of a fine" within the meaning of sect. 3 of the Conveyancing Act, 1892, and was one which the lessor could not impose; and that, therefore, the lessor had unreasonably refused his consent, and the lessee might assign without further consent.

BUT HELD—that the lessee having no cause of action against the lessor for withholding consent, was not entitled to the costs of the action brought to obtain the declaration.

JENKINS *v.* PRICE, [1907] 2 Ch. 229; 76 L. J. Ch. [507; 23 T. L. R. 608—Eady, J.

On appeal: held that the covenant impliedly prohibited an assignment to a limited company, such as the proposed assignees were ([1908] 1 Ch. 10; 77 L. J. Ch. 41; 97 L. T. 734; 14 Manson 343; 24 T. L. R. 70—C. A.).

Covenant against Assigning or Under-letting— *Continued.*

180. *Injunction—South Australia.*]—A lease contained a covenant that the lessee, the person who for the time being stands in that relation to the lessor, should not assign to any person without the lessor's consent. The assignees from the original lessees re-assigned to the lessees; the lessor refused his consent. It was admitted that the covenant ran with the land.

HELD—that the covenant applied to a re-assignment to the original lessees, and that it was a case for an injunction, as there was a threat to commit a clear breach of a plain contract expressed in a negative form.

The doctrine expounded by Ld. Cairns, L.C., in *Doherty* v. *Allman* ((1878) 3 App. Cas. 709; at pp. 719-20; 26 W. R. 513; 39 L. T. 129—H. L.) followed.

MCEACHARN *v.* COLTON, [1902] A. C. 104; 71 [L. J. P. C. 20—P. C.

181. *"Mines, Powers, Authorities, and Premises"—Sale by Lessee of Marl to be gotten by Purchasers.*] — The plaintiff demised to the defendant for a term certain quarries of hard and soft limestone, with full power and authority to work the quarries; and the defendant covenanted not to "assign, demise or part with the said mines, powers, authorities, and premises, or any part thereof whatsoever, for the whole or any part of the term." There was a right of re-entry for breach of covenant. The defendant sold to certain purchasers marl to be gotten by them from the lands included in the above demise, and the purchasers in pursuance thereof worked the marl and took it away.

HELD—that the plaintiff had made out a *primâ facie* case of breach of covenant, and that he was *primâ facie* entitled to an interim injunction until the trial of the action to restrain the further working of the quarries.

Decision of Farwell, J. (17 T. L. R. 199) affirmed.

MOSTYN (LORD) *v.* MANGER, (1901) 17 T. L. R. [281—C. A.

182. *Mortgage by Sub-demise—Writ issued by Head Lessor—Election to forfeit Lease—Distress by Mesne Landlord—Wrongful Distress.*]—The plaintiff originally held a long lease of certain premises with a covenant not to assign or underlet without consent. He assigned the lease with the proper consent to B.; and B. thereupon gave him a yearly tenancy of the premises, and, without the lessor's consent, mortgaged them by way of sub-demise. Subsequently the mortgagees put in the defendant H. as receiver, and the lessor, learning of the sub-demise, served a writ claiming possession; the writ gave no particulars, and the plaintiff paid H. the rent for the next quarter; but, on the writ being amended so as to show a distinct claim for forfeiture on the ground of the sub-demise, he refused to pay to H. the rent subsequently accrued due. H. distrained, and plaintiff brought this action for wrongful distress against H. and the mortgagees' solicitors.

HELD—that he could recover, for (1) a mortgage by sub-demise (just as a mortgage by assignment) is a breach of a covenant not to assign or underlet; (2) the lessor by serving his writ irrevocably elected to avoid the tenancy, and therefore there was no tenancy existing to support the distress, though judgment for possession had not yet been obtained; (3) even if the payment of one quarter's rent before the amendment of the writ could have estopped the plaintiff from saying that no tenancy was existing, the circumstances prevented such estoppel.

Grimwood v. *Moss* ((1872) L. R. 7 C. P. 360; 41 L. J. C. P. 239; 20 W. R. 972; 27 L. T. 68) approved.

SERJEANT *v.* NASH, FIELD & CO. AND ANOTHER, [1903] 2 K. B. 304; 72 L. J. K. B. 630; 89 L. T. 112; 19 T. L. R. 510—C. A.

183. *Proviso for Re-entry on Bankruptcy or Breach of Covenant—Lessee adjudicated Bankrupt on his own Petition—Peaceable Re-entry—Statutory Notice—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 14, *sub-ss.* 1, 2, 6—*Conveyancing and Law of Property Act*, 1892 (55 & 56 Vict. *c.* 13), *s.* 2, *sub-s.* 2—*Bankruptcy Rules*, 1886, *r.* 190.]—A lease contained a covenant by the lessee not to assign the demised premises without the consent in writing of the lessor, and a proviso for re-entry if the lessee should become bankrupt, or file any petition under the bankruptcy laws. In January, 1901, the lessee filed his own petition, expressly asking for adjudication; and on January 18th a receiving order was made; and on the same day he was adjudicated a bankrupt. On January 22nd the lessor peaceably entered upon the premises, alleging that under the proviso for re-entry the lease was determined by the bankruptcy or petition. He did not give the statutory notice required by sect. 14 of the Conveyancing Act, 1881. The trustee moved for a declaration that he was entitled to the lease and for possession.

HELD—(1) that assuming the case to have been one in which by sub-sect. 1 of sect. 14 of the Conveyancing Act, 1881, the statutory notice was required to be given as a preliminary to the exercise of a right of re-entry for breach of a covenant or condition in a lease—the statutory notice was necessary as a preliminary to re-entry without action, *e.g.*, peaceable entry; (2) that the trustee was entitled to the premises as far as the case depended on forfeiture for bankruptcy; (3) that the adjudication of bankruptcy did not justify the entry without notice as being or involving a breach of his covenant not to assign without the consent of the lessor.

IN RE RIGGS, EX PARTE LOVELL, [1901] 2 K. B. [16; 70 L. J. K. B. 541; 49 W. R. 624; 84 L. T. 428; 8 Mans. 233—Wright, J.

184. *Proviso for Re-entry on Liquidation Compulsory or Voluntary—Notice—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 14, *sub-ss.* 1, 6—*Conveyancing and Law of Property Act*, 1892 (55 & 56 Vict. *c.* 13), *s.* 2, *sub-s.* 2.]—A lease granted by the plaintiffs' predecessors contained a covenant against assigning

Covenant against Assigning or Under-letting— *Continued.*

or underletting without the consent of the lessors, and also a proviso for re-entry if the lessees should commit any breach of covenant, or if (*inter alia*) the lessees, being a company, should enter into liquidation, whether compulsory or voluntary. The lease was, with the consent of the lessors, assigned to the defendants, who were an individual and a limited company. The defendant company went into liquidation, not in consequence of insolvency, but for the purpose of being reconstructed, and, having agreed to sell the lease to a new company, let the new company into possession pending the completion of the purchase, the new company undertaking to pay all rents, rates, and outgoings. Within a year of the liquidation the plaintiffs commenced an action to recover possession under the proviso for re-entry.

HELD—(1) that the proviso for re-entry if the lessee company should enter into liquidation was a condition running with the land; (2) that the defendant company had entered into liquidation within the meaning of the proviso; (3) that by virtue of sect. 2, sub-sect. 2 of the Conveyancing Act, 1892, notice under sect. 14 of the Conveyancing Act, 1881, was necessary before the plaintiffs could enforce a forfeiture on the ground of the liquidation of the defendant company; and (4) that the letting of the new company into possession did not constitute a breach of the covenant against assigning or underletting.

Judgment of Hawkins, J. ([1898] 2 Q. B. 259; 67 L. J. Q. B. 747; 79 L. T. 116; 14 T. L. R. 407) reversed.

HORSEY ESTATE, LD. *v.* STEIGER, [1899] 2 Q. B. [79; 68 L. J. Q. B. 743; 47 W. R. 644; 80 L. T. 857; 15 T. L. R. 367—C. A.

Approved in *Fryer* v. *Ewart*, No. 138, *supra*.

185. *Proviso in Licence—"Not to be unreasonably or arbitrarily Withheld"—Declaration.*]—The lessee of a flat covenanted that he would not assign it without licence in writing, such licence, however, not to be unreasonably or arbitrarily withheld.

On the lessee proposing to assign the flat to one J. H. H., a licence was offered to him with the proviso: "This consent is granted upon the terms and conditions that, if in consequence of the said assignment the rateable value of the said hereditaments and premises is increased, you and the said J. H. H., or one of you, will on demand pay to the company (the lessors) any future increase of rates, taxes, charges, assessments, or impositions whatsoever assessed or imposed in consequence of the said assignment." The lessee brought an action against the company claiming a declaration.

HELD—that the company was not entitled to insist on the proviso, or any proviso to the like effect, and that the plaintiff might assign the flat to J. H. H., without any further consent: And a declaration was made accordingly.

YOUNG *v.* ASHLEY GARDENS PROPERTIES, LD., [87 L. T. 547—Joyce, J.

On appeal, HELD, that the decision of the judge was correct. The lessor is not bound to give any reason for refusing his consent; but if he chooses to give a reason, and the Court disapprove of it as being arbitrary, the Court can and will make such a declaratory order as had been made in this case.

[1903] 2 Ch. 112; 72 L. J. Ch. 520; 88 L. T. [541—C. A.

186. *Reasonable Condition of Licence—Licence not to be unreasonably Withheld — Landlord occupying Part of Building.*]—Where a landlord occupies part of a building and has let another part to a tenant who has covenanted not to assign or sublet without the landlord's consent, such consent not to be withheld unreasonably, it is not unreasonable for the landlord, before granting licence to sublet, to ask for what purpose the part sublet is to be used, and to stipulate for a similar covenant between the sub-lessee and himself.

RE SPARK'S LEASE, BERGER *v.* JENKINSON, [1905] 1 Ch. 456; 74 L. J. Ch. 318; 53 W. R. 376; 92 L. T. 537—Eady, J.

187. *Sub-letting — Sub-lease by Permission — Sub-lessee Letting without Permission—Whether Sub-lessee an "Assign" within the Covenant.*]—A tenant covenanted "for himself, his heirs, executors, administrators, and assigns" not to assign, under-let, or part with the possession of the demised premises without his landlord's consent. He under-let part of the premises with such consent, and the under-lessee again sub-let without permission.

HELD—that the under-lessee was not an assign; and that, therefore, the lessee's covenant had not been broken.

VILLIERS *v.* OLDCORN AND OTHERS, (1904) 20 [T. L. R. 11—Channell, J.

XVI. EFFECT OF ASSIGNMENT ON COVENANTS.

(a) Assignment of Lease.

188. *Covenant Running with Land — User — Covenant not to use Premises so as to be a Nuisance — Covenant to Pay fixed Sum as Liquidated Damages if Premises used for Immoral Purpose* —Scienter—*Penalty or Liquidated Damages.*]—A lessee of certain flats covenanted (*inter alia*) that "he . . . and his assigns . . . shall not do or suffer anything which shall be, or tend to the annoyance, nuisance or damage" of the reversioner or his tenants; and "that, in case the said premises shall be used as a brothel or *bagnio*, or as a disorderly house, or for any immoral purpose, the lessee, his executors, administrators or assigns shall (without prejudice to the proviso for re-entry hereinafter contained or any other remedy by way of injunction or otherwise) pay . . . the sum of £800 by way of liquidated damages for each and every case of such user, and not by way of penalty." Upon proof of user for immoral purposes:—

HELD—(1) that the covenant bound the

Effect of Assignment on Covenants—*Continued.*

assignee of the lease; (2) that it was not necessary for the lessor to prove *scienter* on the part of the lessee; and (3) that the £800 could not be regarded as a penalty.

Lord Howard de Walden *v.* Barber and [Another, (1903) 19 T. L. R. 183—Wright, J.

189. *Covenant Running with the Land—Lease and Under-lease—Covenant by Under-lessor to Perform Covenants in Lease—Covenant to Repair—Covenant to Indemnify.*]—A lease of land contained a covenant by the lessee to keep all buildings erected on the land in repair, with a proviso for re-entry on breach of the covenant. Part of the land comprised in the lease was under-let, the under-lease containing a covenant by the under-lessor, his executors, administrators, and assigns, to perform the several covenants and conditions contained in the indenture of lease so far as the same related to or affected that part of the property included in the lease but not demised by the under-lease. The under-lease also contained a proviso that the covenants on the part of the under-lessor were entered into with the intention of binding him and his representatives only while he or they continued to hold the reversion, and of binding, so far as could be, any other person or persons for the time being entitled to the reversion. Subsequently the lease became vested in the defendant, and the plaintiff became assignee of the under-lease. The defendant failed to perform the covenant in the lease to repair certain houses erected on that part of the land not comprised in the underlease, and the assignee of the reversion expectant on the lease recovered judgment for possession of the whole of the property comprised in the lease, and the plaintiff was ejected. In an action to recover damages for breach of the covenant in the underlease:—

Held—that the covenant was merely collateral, and did not run with the land, and that, therefore, the plaintiff could not recover.

Decision of Jelf, J. ([1907] 1 K. B. 612; 76 L. J. K. B. 314; 96 L. T. 364; 23 T. L. R. 225) affirmed.

Dewar *v.* Goodman, (1907) 24 T. L. R. 62—[C. A.

190. *Covenant Running with the Land—Lease by Mortgagee—Lease Granted as "Agent"—Right of Purchaser to Sue on—Covenant as to Removing Hay or Manure.*]—R. was collector of rents for B. and also mortgagee of his farm, but was not in possession of it. By an agreement under seal, R., "as agent, hereinafter called 'the landlord,'" let the farm to S. on a yearly tenancy; the latter bound himself not to sell or remove hay or manure. R., as mortgagee, subsequently sold the farm to C., who now sought to enforce the agreement as to hay and manure against S.

Held—that the lease was a lease by a mortgagee, and that the words "as agent" did not prevent its operating on his legal estate; and that, therefore, his assignee C. could enforce any term in the agreement which, like the one in question, ran with the land.

Chapman *v.* Smith, [1907] 2 Ch. 97; 76 L. J. Ch. [394; 96 L. T. 662—Parker, J.

191. *Executors of Assignee—Covenant to Repair—Breach before Assignment—Assignment by Executors "as Trustees"—Liability of Assignee of Executors on Covenant to Indemnify.*]—A lease which contained a covenant by the lessee and his assigns to keep the houses comprised therein in repair, became vested in the defendants as the executors of the assignee of the lease. The houses were out of repair, and the defendants agreed to sell them to a purchaser for the residue of the term. On the same day the plaintiff, who was entitled to the reversion on the determination of the lease, served notice upon the defendants that the houses were out of repair, giving particulars of the breaches of covenant complained of. The defendants subsequently executed, "as trustees," an assignment of the lease of the houses to the purchaser, who knew of their condition and of the service of the notice, and the purchaser covenanted that he would thenceforth pay the rent reserved by the lease, and observe and perform the lessee's covenants therein contained, and from the payment and performance thereof respectively would keep indemnified the defendants, and the estate and effects of their testator. The houses not having been put into repair, the plaintiff brought an action against the defendants to recover damages for breaches of the covenant to repair specified in the notice, and the defendants served a third-party notice on the purchaser, claiming indemnity from him under his covenant to indemnify.

Held—that the defendants were entitled to an indemnity from the assignee against their liability for the breaches of the covenant to repair.

Gooch *v.* Clutterbuck, [1899] 2 Q. B. 148; [68 L. J. Q. B. 808; 47 W. R. 609; 81 L. T. 9; 15 T. L. R. 432—C. A.

192. *Option to purchase Freehold—"Assigns"—Equitable Assignee—Possession—Waiver of Notice of Exercise of Option—Estoppel.*]

Held, by Romer, J., that an equitable assignee of the legal owner of a lease, although in possession and paying the rent reserved by the lease, is not an "assign" within the meaning of a covenant therein giving a right of pre-emption of the freehold to the lessee, his executors, administrators, or "assigns"; and therefore the plaintiff as such assignee, was not entitled in equity, as against the lessor or his assigns, to enforce such right of pre-emption.

Cox v. *Bishop* ((1857) 8 D. M. & G. 815; 26 L. J. Ch. 389; 5 W. R. 437) followed.

Held, on appeal, that, upon the facts, the defendant (an assignee of the lessor) had waived his right to receive notice of the plaintiff's option to purchase the freehold, and, therefore, was precluded from taking the objection that the plaintiff was not entitled to exercise the right of pre-emption.

Effect of Assignment on Covenants—*Continued.*

Decision of Romer, J. ([1899] 1 Ch. 86; 68 L. J. Ch. 13; 47 W. R. 93; 15 T. L. R. 23) reversed.

FRIARY, HOLROYD & HEALEY'S BREWERIES, [LD. *v.* SINGLETON, [1899] 2 Ch. 261; 68 L. J. Ch. 622; 47 W. R. 662; 81 L. T. 101; 15 T. L. R. 448—C. A.

193. *Lease—Option to Purchase Freehold—Rule against Perpetuities—Proviso running with Land.*]—A lease of land for 99 years contained a clause which provided that in case the lessee, his heirs or assigns, should at at any time during the term become desirous of purchasing the fee simple of the demised land or any portion thereof not less than one acre, for a specified sum, then upon the receipt of the amount of the purchase-money for the same, the lessor, his heirs or assigns, would execute a conveyance or other assurance of the land in favour of the lessee, his heirs and assigns.

HELD, by Warrington, J., that the above option to purchase was void as creating an executory interest in land which might arise after the period allowed by the rule against perpetuities.

London & South Western Ry. Co. v. *Gomm* ((1882) 20 Ch. D. 562; 51 L. J. Ch. 530; 30 W. R. 620; 46 L. T. 449—C. A.) followed; *Muller* v. *Trafford* ([1901] 1 Ch. 54; 70 L. J. Ch. 72; 49 W. R. 132—Farwell, J., No. 43, *supra*) discussed.

HELD, by the C. A., that such a covenant could not run with the land so as to be enforceable by the lessee's assignee, for it did not directly affect or concern the land regarded as the subject matter of a lease, and had nothing to do with the tenancy or its term; *semble*, also, the option was void for remoteness.

Decision of Warrington, J. (53 W. R. 203; 92 L. T. 292; 21 T. L. R. 78) affirmed on other grounds.

WOODALL *v.* CLIFTON, [1905] 2 Ch. 257; 74 [L. J. Ch. 555; 54 W. R. 7; 93 L. T. 257; 21 T. L. R. 581—C. A.

194. *Sub-lease by Assignee by way of Mortgage—Sub-lessee in Possession—Lessees compelled to pay Rent—Right of Action by Lessees against Mortgagee—Priority of Estate.*]—The plaintiffs, being the lessees of premises, assigned their term to P., who sub-let the premises to the defendants for the residue of the term, except the last day, by way of mortgage. The mortgage contained a covenant on the part of the defendants that, if they entered into possession of the premises under their powers, or received the rents and profits, they would pay the rent reserved by the original lease. The defendants entered into possession, and P. became bankrupt. The defendants did not pay the rent reserved by the original lease, which accrued due while they were in possession, and the lessor compelled the plaintiffs to pay it, who sued the mortgagee to recover the amount so paid by them.

HELD—that the plaintiffs were not entitled to recover from the defendants the amount so paid for rent, as there was no contract or privity of estate between them.

Moule v. *Garrett* ((1870) L. R. 5 Ex. 132; 39 L. J. Ex. 69; 22 L. T. (N.S.) 343; and (1872) L. R. 7 Ex. 101; 41 L. J. Ex. 62; 20 W. R. 416; 26 L. T. (N.S.) 367) explained.

BONNER *v.* TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY, [1899] 1 Q. B. 161; 68 L. J. Q. B. 114; 47 W. R. 161; 79 L. T. 611; 15 T. L. R. 76—C. A.

(b) Assignment of Reversion.

195. *Continued Liability of Assignor on express Covenants—Covenant to carry out Award when made*—(32 Hen. 8, *c.* 34), *ss.* 1, 2.]—A lessor, who has demised premises by a lease under seal, and then assigns his reversion, remains liable upon express covenants in such lease to his lessees and their assigns.

Where a lease contained a covenant by the lessor to carry out repairs, the amount of which was the subject of a pending arbitration under an expired lease between the same parties:—

HELD—that the lessor, though he subsequently assigned his reversion, could be sued for a breach of such covenant by assignees of the term.

Eccles v. *Mills* ([1898] A. C. 360; 67 L. J. P. C. 25; 46 W. R. 398; 78 L. T. 206—P. C., *infra*)—dictum of Lord Macnaghten approved and followed.

STUART AND OTHERS *v.* JOY AND ANOTHER, [1904] 1 K. B. 362; 73 L. J. K. B. 97; 90 L. T. 78; 20 T. L. R. 109—C. A.

196. *Covenant running with Reversion—Whether incident to Relation of Landlord and Tenant or preparatory to it.*]—The burden of a covenant in a lease incident to the relation of landlord and tenant falls on the specific devisee of the estate, but the burden of a covenant to do something preparatory to the complete establishment of that relation falls upon the general estate of the lessor.

A lease contained a covenant that the lessor would, within a year, lay down a specified quantity of land in grass; it also contained a declaration "that there shall not be implied in this lease any covenant or provision whatever on the part of either of the parties."

HELD (reversing the judgment of the Court below)—that the covenant, as qualified by the declaration, was a condition of the letting, not a condition of the lease, and did not run with the reversion, but that the general estate of the lessor was liable in damages for the breach of it.

Marshall v. *Holloway* (5 Sim. 186) discussed; *Mansel* v. *Norton* (22 Ch. Div. 769) explained.

ECCLES *v.* MILLS, [1898] A. C. 360; 67 L. J. [P. C. 25; 78 L. T. 206; 14 T. L. R. 270; 46 W. R. 398—P. C.

197. *Lease by Tenant for Life—Covenant by Lessor and Assigns—Death of Lessor—Liability of Executors—Covenant and Proviso—Construction.*]—A. a tenant for life, under the powers of

Effect of Assignment on Covenants—*Continued.*

the Settled Land Acts granted to B a lease containing the following covenant: "And the lessor hereby for himself and his assigns covenants with the lessee that he will pay the tithe rentcharge on the said premises, also that he the assignor or his assigns or the succeeding tenants will at the expiration or sooner determination of the said term take and pay for the growing crops and manure then upon the said demised premises and the unexhausted tillages and dressings according to the custom of the country at a fair valuation to be made by two valuers, one to be chosen by each party, or, in the event of their differing, then by a third person to be chosen by such valuers." . . . "Provided also that in the event of the lessor or his assigns at any time or times and from time to time desiring during the said term to resume possession of any of the lands (but not the house, garden, building, or yards) comprised in this demise for any purpose other than agriculture it shall be lawful for him and them so to do upon giving to the lessee, his executors, administrators, or assigns, or leaving upon some part of the demised premises three calendar months' notice in writing of such desire, and thereupon at the expiration of such notice a reduction of" rent should be made, "and the lessor or his assigns shall . . . pay to the lessee, his executors, administrators, or assigns, for the growing crops," &c., "and for the unexhausted tillages and dressings the like amount as he or they would be entitled to upon quitting, pursuant to the covenant of the lessor in that behalf before contained." A. having died, the owners of the fee sold a certain portion of the demised property to a company, subject to the tenancy and to the payment of compensation, &c., under the lease. The plaintiffs (B.'s executors) paid rent in respect of this portion to the company, and, notice having been given by the company to the plaintiffs that they intended to resume possession, it was agreed that the company should pay the plaintiffs £50 in respect of the unexhausted improvements. The plaintiffs could not obtain this amount, and they then sued A.'s executors on the covenant in the lease.

HELD—that, upon the true construction of the proviso, it was not a covenant binding A.'s executors to pay compensation if the owners for the time being failed to fulfil their obligations under it.

BATH *v.* BOWLES, (1906) 93 L. T. 801—Div. Ct.

198. *Mortgage by Lessor—Assignees of Mortgagor—"Assigns of a Lessor"—Action by Assignees to recover Possession for Breach of Covenants—"Notice specifying the particular Breach"—Judicature Act*, 1873 (36 & 37 Vict. *c.* 66), *s.* 25, *sub-s.* 5—*Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 14, *sub-ss.* 1, 3.]—An action was brought by the assignees of the equity of redemption to recover possession for a forfeiture and for mesne profits. The plaintiffs had since 1887 been in possession of the equity of redemption, and had received the rents and profits. The mortgagees took no actual steps, but as to the first mortgagee, who had the legal estate, an order was made at chambers that he should be joined at the trial if the judge should think it necessary, and he was so joined at the trial. The second mortgagee was also willing to be made a party.

HELD, that while sect. 25, sub-sect. 5, of the Judicature Act, 1873, gives the mortgagor legal rights which he had not before, it does not give to a mortgagor any power of re-entry or right of forfeiture which he had not before. The mortgagee alone can elect to re-enter for a forfeiture. A mortgagor, when the equity of redemption is in him, and he is in possession of land subject to a lease, cannot therefore re-enter for breach of a covenant to repair.

Judgment of Ridley, J. (68 L. J. Q. B. 988; 81 L. T. 542) reversed.

MATTHEWS *v.* USHER, [1900] 2 Q. B. 535; 69 [L. J. Q. B. 856; 49 W. R. 40; 83 L. T. 353; 16 T. L. R. 493—C. A.

And see No. 137, *supra*.

LAND TAX.

1. *Hospitals—Lands belonging to Hospitals in Hand or in Occupation of Tenants—Exemption—Land Tax Act*, 1797 (38 Geo. 3, *c.* 5), *ss.* 25–29.]—Certain lands with buildings on them were the property of St. Thomas', St. Bartholomew's, and Bridewell Hospitals. The lands had been so since 1622. From 1780 down to the present time, with the exception of the year 1835, they had been under leases to tenants. Down to 1835 the leases always contained covenants by the lessees to pay all rates and taxes. In 1835 the lands were in hand. Since 1835 the covenants had been to pay land tax specifically and all other rates and taxes. During the periods when the lands were on lease the tenants were always assessed to the land tax and paid it. In 1835 the hospitals were assessed and paid. The assessments earlier than 1780 could not be found. The defendant, as tax-collector, claimed land tax payable on January 1st, 1899.

HELD—that the lands belonged to the hospitals on or before March 25th, 1693, and the explanation of the fact that the hospitals paid tax from 1780 down to the Land Tax Act, 1797, was that when each annual Act passed there was already a covenant which properly brought the property in question under the operation of what is now sect. 27 of the Land Tax Act, 1797, and it was erroneously supposed both by the assessors and by the tenants that the section operated after the contracts existing when the Act was made perpetual had run out; that the single case of payment in 1835 could not be said to have any serious weight; and that the plaintiffs were entitled to a declaration that the lands in question were not liable to land tax, whether in the hands of the plaintiffs or in those of the tenants.

ST. THOMAS', ST. BARTHOLOMEW'S AND BRIDE-[WELL HOSPITALS *v.* HUDGELL, [1901] 1 Q. B. 364; 70 L. J. Q. B. 115; 65 J. P. 149; 83 L. T. 677; 17 T. L. R. 86—Div. Ct.

2. *Public Conveniences under Street—Whether Assessable to Land Tax—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *ss.* 44, 45—*Land Tax Act*, 1797 (38 Geo. 3, *c.* 5), *s.* 4.]—A metropolitan borough council constructed and maintained public lavatories and sanitary conveniences beneath a street under the powers conferred upon them by the Public Health (London) Act, 1891.

HELD (Mathew, L.J., dissenting) that the Council had not a mere easement over the site but such property in it as rendered them liable for land tax in respect of the conveniences (except so far as it had been redeemed), and that they were not exempt on the ground that the conveniences were designed for the use of the public.

Tunbridge Wells Corporation v. *Baird* ([1896] A. C. 434; 65 L. J. Q. B. 451; 60 J. P. 788; 74 L. T. 385—H. L.) and *Metropolitan Ry.* v. *Fowler* ([1893] A. C. 416; 62 L. J. Q. B. 553; 57 J. P. 756; 42 W. R. 270; 69 L. T. 390—H. L.) discussed.

Decision of Wright, J. ([1904] 1 K. B. 19; 73 L. J. K. B. 8; 68 J. P. 67; 52 W. R. 350; 89 L. T. 562; 20 T. L. R. 36) reversed.

WESTMINSTER CORPORATION *v.* JOHNSON; [WESTMINSTER CORPORATION *v.* FULLER, [1904] 2 K. B. 737; 73 L. J. K. B. 774; 68 J. P. 549; 53 W. R. 4; 91 L. T. 334; 20 T. L. R. 701; 2 L. G. R. 1378—C. A.

3. *Redemption — "Lands" — Unworked Minerals under Land—Minerals Worked subsequently to Redemption—Minerals Included in Redemption—Land Tax Act*, 1797 (38 Geo. 3, *c.* 5), *s.* 4—*Land Tax Redemption Act*, 1802 (42 Geo. 3, *c.* 116), *ss.* 8, 38.]—Where, by a redemption contract, land tax is redeemed in respect of "lands," the word "lands" includes everything down to the centre of the earth, unless at the time of redemption there is in existence a separate and distinct hereditament liable to be separately assessed.

In the year 1800 land tax was redeemed in respect of certain "lands" under which there existed unopened seams of coal. Subsequently to the redemption mines were opened for the purpose of working the seams of coal, and the Land Tax Commissioners claimed to be entitled to assess such mines to land tax.

HELD—that the mines were not assessable.

NEWTON, CHAMBERS & CO., LD. *v.* HALL, [1907] [2 K. B. 446; 76 L. J. K. B. 908; 71 J. P. 388; 96 L. T. 743; 23 T. L. R. 511—Bray, J.

4. *Redemption — Recovery — Limitation — Periodical Payment — "Rent" — Land Tax Redemption Act*, 1802 (42 Geo. 3, *c.* 116), *s.* 123—*Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *ss.* 1, 2—*Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *ss.* 1, 8.]—In 1874 P., the lessee, redeemed the land tax on certain property under the powers given by the Land Tax Redemption Act, 1802. A formal assignment of the benefit of the redemption was made afterwards to the plaintiff. The leases became, in 1885, vested in the defendant, who by mistake paid the land tax to the Commissioners thenceforth until the year 1900. The plaintiff, on receiving the certificate of redemption, put it away with his title-deeds, and forgot all about it until the year 1900. He brought an action to recover £9, being one annual payment, for which the tax was redeemed, due January 1st, 1900.

HELD—that the 2nd section of the Real Property Limitation Act, 1833 (read with the Real Property Limitation Act, 1874) applied; that this was a periodical payment within the meaning of sect. 1 of the Real Property Limitation Act, 1833; that the right to recover it after the lapse of twelve years had gone; and, therefore, judgment should be for the defendant.

Decision of Div. Ct. ([1901] 2 K. B. 7; 70 L. J. K. B. 556; 65 J. P. 533; 84 L. T. 684) affirmed.

SKENE *v.* COOK, [1902] 1 K. B. 682; 71 L. J. [K. B. 446; 50 W. R. 506; 86 L. T. 319; 18 T. L. R. 431—C. A.

LARCENY.

See CRIMINAL LAW AND PROCEDURE.

LAW SOCIETY.

See SOLICITORS.

LEAVE AND LICENCE.

See EASEMENTS.

LEGACIES.

See WILLS.

LEGACY DUTY.

See DEATH DUTIES.

LEGITIMACY AND LEGITIMATION.

See BASTARDY.

LETTERS.

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LIBEL AND SLANDER.

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I. LIBEL.

(a) Fair Comment on Matter of Public Interest.

1. *Criticism in Newspaper—Limits of Comment — Judge and Jury.*]—When a plaintiff complains of something which he admits to be criticism of a matter of public interest, it lies upon him to show that it is a libel, *i.e.*, that it travels beyond the limits of "fair" criticism; and it is for the judge to say whether it is reasonably capable of being so interpreted.

"Fair" in this sense has nothing to do with what "the ordinary reasonable man" would regard as a correct appreciation of the work criticised; and the jury have no right to substitute their own opinion of the merits of such work for that of the critic, or try the "fairness" of the criticism by any such standard.

Semble, in the case of a literary work there can hardly be "unfair" criticism; for in order to be "unfair" it must have passed altogether outside the domain of criticism. Thus it ceases to be criticism if it is irrelevant, or takes the form of an attack on the author's character, or imputes to him something which he never wrote.

The plaintiff, an author and actor, complained of a criticism of one of his plays; it was admitted that there was no evidence of malice, no personal imputations, and no misrepresentation as to the contents of the play. The jury awarded £100.

HELD—that, on the principles laid down above, there was no evidence to support a rational verdict for the plaintiff.

Merivale v. Carson ((1888) 20 Q. B. D. 275; 62 J. P. 261; 36 W. R. 231; 58 L. T. 331—C. A.) and *Henwood v. Harrison* ((1872) L. R. 7 C. P. 606; 41 L. J. C. P. 206; 20 W. R. 1000; 26 L. T. 938) discussed and followed.

M'QUIRE *v.* WESTERN MORNING NEWS CO. LD. [1903] 2 K. B. 100; 72 L. J. K. B. 612; 51 W. R. 689; 88 L. T. 757; 19 T. L. R. 471—C. A.

2. *Imputation of Motives.*] — If a critic imputes to the person, whose acts he is criticising, base and sordid motives not warranted by the facts, he cannot to an action for libel plead successfully the defence of "fair comment."

Campbell v. *Spottiswoode* ((1863) 32 L. J. Q. B. 185; 3 B. & S. 769; 11 W. R. 569; 8 L. T. 201) followed.

M'Quire v. *Western Morning News Co.* ([1903] 2 K. B. 100; 72 L. J. Q. B. 612; 51 W. R. 689; 88 L. T. 757; 19 T. L. R. 471—C. A., *supra*) distinguished.

JOYNT *v.* CYCLE TRADE PUBLISHING CO., [1904] 2 K. B. 292; 73 L. J. K. B. 752; 91 L. T. 155—C. A.

3. *Malice—Evidence of.*]—Where in an action for libel the defence is that the matter complained of is fair comment on a matter of public interest, extrinsic evidence is admissible to prove actual malice on the part of the writer thereof. Comment which is actuated by malice cannot be deemed fair. In this respect the defence of fair comment and the defence that the words were published on a privileged occasion stand on the same footing.

Campbell v. *Spottiswoode* ((3 B. & S. 769; 32 L. J. Q. B. 185) and *Merivale* v. *Carson* ((1888) 20 Q. B. D. 275; 52 J. P. 261; 36 W. R. 231; 58 L. T. 331—C. A.) discussed.

THOMAS *v.* BRADBURY, AGNEW & CO., LD. AND [ANOTHER, [1906] 2 K. B. 627; 75 L. J. K. B. 726; 54 W. R. 608; 95 L. T. 23; 22 T. L. R. 656—C. A.

4. *Newspaper Report of a Meeting of Shareholders—"Matter not of Public Concern"—Law of Libel Amendment Act*, 1888 (51 & 52 Vict. *c.* 64), *s.* 4.]—A report of any statement made at a meeting of shareholders of a public company, called with the object of obtaining further capital, which is strictly confined to a discussion of the company's financial position, is privileged; but where a part of a report of a meeting where the chairman expressed his opinion or impression that the plaintiff, who had been dismissed, had been guilty of criminal conduct as a servant of the company, is not privileged, as such a charge ought not to influence any reasonable man who contemplated either the buying or selling of shares or any other business transaction of the company.

PONSFORD *v.* THE "FINANCIAL TIMES," LD., [AND HART, (1900) 16 T. L. R. 248—Mathew, J.

(b) Miscellaneous.

5. *Advertisements—Use of Physician's Name in an Advertisement of a Mineral Water—Injury to Property, Business or Profession.*] — A

Libel—*Continued.*

physician sued the defendant for libel because the defendant published in a leaflet, copies of which were circulated as advertisements, an allegation that the plaintiff was prescribing the defendant's mineral water as an habitual drink, and had said that nothing had done his gout so much good. A verdict was found for the defendant.

HELD—that there was no libel, as the plaintiff had wholly failed to prove more than a user of his name by the defendant, and had failed to prove any injury done to him or his property, business or profession; and that the plaintiff's application for an injunction to restrain the defendant from continuing to publish the matter complained of must be refused.

DOCKERELL *v.* DOUGALL, (1899) 80 L. T. 55[illegible]
[15 T. L. R. 333—C. A.

6. *Illegality—Money paid under Contract—Contract to publish Libellous Pamphlet—Right to recover Money back.*]—The plaintiff, against whom a verdict and judgment were pronounced in an action for breach of promise of marriage, prepared a manuscript dealing with the action, which contained certain defamatory statements. The plaintiff entered into a contract with the defendants through their agent, whereby the defendants agreed to print a certain number of copies of the manuscript, and the plaintiff paid them £50 on account, and gave them an indemnity against any damages to which they might be liable owing to the printing of the manuscript. The plaintiff and the defendants' agent knew, but the defendants did not know, that the manuscript contained libellous matter. The defendants had the manuscript set up in type and several proofs were struck, but they refused to perform the contract upon the ground that the manuscript contained libellous matter. The plaintiff claimed the return of the £50, and the defendants counterclaimed for the cost of the printing already done.

HELD—that the contract, being one to print and publish libellous matter, was illegal, and the plaintiff was not entitled to recover back the money paid under it; and that, as the knowledge of the defendants' agent must be taken to be the knowledge of the defendants, the latter were not entitled to recover on the counterclaim.

APTHORP *v.* NEVILLE & Co., (1907) 23 T. L. R. [575—Pickford, J.

7. *Libel on a Deceased Person.*]—An action will not lie in respect of a libel upon a deceased person, *e.g.*, a statement that he committed suicide.

BROOM *v.* RITCHIE, (1905) 6 F. 942—Ct. of Sess.

(c) Practice.

And see PLEADING, Nos. 22, 28; PRACTICE AND PROCEDURE, Nos. 90–92.

8. *Costs—Pleading Justification and Privilege—Malice—Defendant's Allegations Untrue but made without Malice—Plaintiff disallowed Costs of Witnesses whose Evidence was material on Questions of Justification and Malice.*]—An action was brought for libel and slander by a hay merchant against a member of Parliament. The statements complained of were that certain hay shipped by the plaintiff for the use of the forces in South Africa was rotten and liable to spontaneous combustion. The defendant pleaded justification and privilege. The jury found against the defendant on the issue of justification, but they found that the defendant had made the allegations without malice, and judgment was entered for the defendant with costs. The plaintiff carried in a bill of costs, in which he included the expenses of witnesses who were called for the purpose of defeating the defendant's plea of justification.

HELD—that as the evidence of such witnesses was also material to the question whether or no the defendant was actuated by express malice in making the allegations, the costs of those witnesses could not be allowed.

The injustice of the rule that where a man has gone down to trial to prove untrue allegations he is to receive the costs of the witnesses whom he adduced to prove that falsehood, laid down in *Harrison* v. *Bush* ((1856) 5 E. & B. 344; 2 Jur. (N.S.) 90; 25 L. J. Q. B. 99), can be obviated by an order of the judge who tries the case.

BROWN *v.* HOUSTON, [1901] 2 K. B. 855; 70 [L. J. Q. B. 902; 85 L. T. 160; 17 T. L. R. 683 —C. A.

9. *Criminal Information — Threat to bring Action—Effect of.*]—A magistrate who had been libelled in the discharge of his duties as magistrate, and had demanded an apology, and threatened an action for damages, applied for a criminal information for libel.

HELD—that the rule *nisi* could not be granted, as the magistrate had disentitled himself to this particular remedy by choosing his forum and making the matter one of damages.

EX PARTE POLLARD, (1901) 17 T. L. R. 773— [Div. Ct.

10. *Functions of Judge and Jury.*]—Where a document is incapable of being a libel it is the duty of the judge to withdraw the case from the jury, but where the document is capable of being a libel the question of whether it is or is not fair comment, is one for the jury.

COONEY *v.* EDWAIN, (1898) 14 T. L. R. 34— [C. A.

11. *Interim Injunction—Picture Postcards—Right to restrain publication of Portrait.*]—The defendants published and sold, without the consent of the plaintiff, postcards, on which were coloured representations of the plaintiff depicting imaginary incidents in her life; and upon the plaintiff objecting, they did not withdraw them. The portraits of the plaintiff were stated to be unlike her. The plaintiff thereupon brought an action for an injunction to restrain the publication and sale of the postcards upon the ground that they were a libel upon her, or

Libel—*Continued.*

that she was entitled to restrain the publication of a portrait of herself without her authority, and applied for an interim injunction.

HELD—that the Court would not grant an interim injunction, as no sufficient case had been made out on either ground.

CORELLI *v.* WALL, (1906) 22 T. L. R. 532—[Eady, J.

12. *Joinder of Defendants—Separate Causes of Action—Damages—Apportionment of Damages by Jury—New Trial.*]—In an action for libel by the plaintiff against three defendants, A., B. and C., A., one of the joint owners, and B., the publisher of the newspaper containing the libel, delivered a joint defence traversing all the allegations in the statement of claim and pleading fair comment. C., the other joint owner of the newspaper and the writer of the libel, delivered a similar defence and counter-claimed for a libel published by the plaintiff against him. At the trial, the jury found a verdict for the plaintiff, with £110 damages, and they apportioned the damages, by permission of the judge, between the three defendants—£100 against C., and £5 each against A. and B.; they also found a verdict of sixpence damages on the counter-claim for the defendant C.

HELD, in the Q. B. Div., by Andrews and Boyd, JJ., and by the C. A., that the jury had no power to sever the damages, and that the judgments entered in accordance with the verdict should be set aside and a new trial ordered.

HELD, ALSO, by the Q. B. Div. that the damages were excessive.

DAWSON *v.* MCCLELLAND AND OTHERS, [1899] [2 Ir. R. 486, 494—A. C.

13. *Joinder of Plaintiffs—Publication in same Document of different Persons—Ord.* 16, *r.* 1.]—Where a libel is published in the same words and in the same document of different persons they cannot be joined as plaintiffs in one action of libel.

Smurthwaite v. *Hannay* ([1894] A. C. 494; 63 L. J. Q. B. 737; 43 W. R. 113; 71 L. T. 157—H. L. (E.)) followed.

Booth v. *Briscoe* ((1877) 2 Q. B. D. 496; 25 W. R. 838—C. A.) considered and explained.

PEDDIE *v.* KYLE, [1900] 2 Ir. R. 265—Q. B. [Div. Ct.

14. *Misdirection — Justification — Fair Comment.*]—In an action for libel against the proprietor of a newspaper, where the defendant pleads "justification" and "fair comment," it is a misdirection to direct the jury that the statement complained of cannot be regarded as fair comment unless the justification be made out.

It is for a judge to say, as a matter of law, whether a personal attack can be reasonably inferred from the statement of facts upon which it purports to be a comment, but it is for a jury to say whether (if the inference can be drawn) it ought to be drawn.

DAKHYL *v.* LABOUCHERE, (1907) 96 L. T. 399; [23 T. L. R. 364—H. L. (E.).

15. *Particulars—Fair Comment.*]—The plaintiff advertised in a newspaper for a partner with £250 to complete the promotion of a colliery syndicate, and in answer to an applicant he sent him certain documents relating to the matter, which the applicant forwarded to the defendants, the proprietors of a financial newspaper. The defendants in an article purported to summarise the contents of the documents and commented upon them. In an action by the plaintiff for libel, the defendants pleaded that in so far as the words complained of consisted of statements of fact they were in their natural and ordinary signification true in substance and in fact, and in so far as they consisted of comment they were fair and *bonâ fide* comment upon a matter of public interest; and they gave particulars which stated that the statements of fact in the words complained of were a true statement of matters appearing in the documents, and that the comments were fair comments upon the said facts and upon the plaintiff's public invitation for money. The plaintiff applied for further and better particulars as to whether the defendants alleged that any of the statements made in the documents were untrue, and, if so, which of them. The Master and the judge made an order for "further and better particulars of justification."

HELD—that the plea was not a plea of justification, but was only a plea of fair comment, and that the plaintiff was not entitled to the particulars asked for.

DIGBY *v.* THE "FINANCIAL NEWS," LD., (1906) [23 T. L. R. 117—C. A.

(d) Privilege.

16. *Complaint made to Stewards of Race Meetings — Publication of Decisions in the "Racing Calendar"—Hearing Person against whom Complaint made.*]—Decisions, first, of the local stewards of the Jockey Club, secondly, of the fact that the Jockey Club had investigated the matter and had remitted it to the local stewards, and, thirdly, of the local stewards on the second occasion, were published in the "Racing Calendar."

HELD—that, assuming that the decisions of the Jockey Club were *quasi*-judicial, the decisions were not of such general public interest as to make the occasion privileged; the decisions were of interest to a section of the public—those interested in racing matters—but they were not of interest to the public as a whole; that merely submitting to the jurisdiction of the local stewards does not authorise the publication of their decision in the "Racing Calendar"; and that committees of clubs, in dealing with complaints, must follow, not exactly the rules of law, but the requirements of natural justice—*e.g.*, that the person against whom a complaint is lodged

Libel—*Continued.*

should be given a full opportunity of bringing his case before the tribunal.

Hope *v.* I'Anson and Weatherby, (1902) 18 [T. L. R. 201—C. A.

17. *Judicial Proceedings—Petition for Order for Reception of Lunatic—Defamatory Statement in Particulars—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 4, 5, 6, 9, 28, 317.]—Proceedings instituted by petition under the Lunacy Act, 1890, ss. 4 and 5, for a reception and detention order, are judicial proceedings, and therefore, a defamatory statement made in the statement of particulars accompanying the petition is absolutely privileged. However, by sect. 317, a person making a wilful misstatement in a petition, statement of particulars or certificate, is guilty of a misdemeanour.

Hodson *v.* Pare, [1899] 1 Q. B. 455; 68 L. J. [Q. B. 309; 47 W. R. 241; 80 L. T. 13; 15 T. L. R. 171—C. A.

18. *Privileged Occasion — Publication — Evidence of Malice—Postcards—Plaintiff's Name not appearing on Postcard.*]—The defendant, as managing director of a limited company, employed an architect on behalf of the company to prepare plans and drawings relative to a proposed addition to the company's premises. The architect was directed to employ a quantity surveyor to make out a bill of quantities, and he instructed the plaintiff to do this. The bill of quantities was accordingly prepared by the plaintiff, and copies were sent to seven builders in order that they might tender for the work. The defendant, thinking that the amount of work indicated was much in excess of what the company desired to be done, wrote and sent by post to one of the seven builders a postcard saying that the quantities were entirely wrong, and sent by post to another a postcard saying that there were great errors in the quantities. The plaintiff thereupon brought an action for libel against the defendant.

Held—(1) that the occasion was privileged; (2) that there was no publication until the postcard got into the hands of the builder, because then for the first time could any knowledge arise as to the person to whom the postcard referred, as the name of the plaintiff did not appear on the card; (3) that there was no evidence of malice.

Sadgrove *v.* Hole, [1901] 2 K. B. 1; 70 L. J. [K. B. 455; 49 W. R. 473; 84 L. T. 647; 17 T. L. R. 332—C. A.

19. *Report of Judicial Proceedings—Fair and Accurate Report.*]—Observations made as to judging whether a report in a daily newspaper of judicial proceedings is fair and accurate.

Quære, whether a report which contains an observation made by a litigant, though not in the witness box, but made in Court in the course of the legal proceedings, thereby loses the protection which it would otherwise have as a fair and accurate report of judicial proceedings.

Hope *v.* Sir W. C. Leng & Co. (Sheffield [Telegraph), Ld., (1907) 23 T. L. R. 243—C. A.

20. *Report of Proceedings in Police Court—Charge Sheet—Minute of Memorandum of Conviction—Summary Jurisdiction Act*, 1848 (11 & 12 Vict. *c.* 43), *s.* 14.]—The privilege given to reports of proceedings in Courts is based upon this, that, as everyone cannot be in Court, it is for the public benefit that they should be informed of what takes place substantially as if they were present.

The plaintiff was summoned for a breach of sect. 1, sub-sect. 1, of the Fertilisers and Feeding Stuffs Act, 1893, and convicted. In a report of the proceedings in the police court the defendants stated in their newspaper that the plaintiff was prosecuted for "having issued a certain invoice as to the quality of manure sold by him to J. S., on January 26th, which he knew to be false." *Mens rea* formed no element of the offence, and the summons did not contain the words "which he knew to be false": but these words appeared in the abstract of the charge in the charge sheet, which was shown to the defendants' reporter, and which was a copy identical with the charge sheet subsequently signed by the chairman of the magistrates.

Held—that the entry in the charge sheet was not a minute or memorandum of the order for conviction within the meaning of sect. 14 of the Summary Jurisdiction Act, 1848, and that publication of it was not privileged.

Furniss *v.* The "Cambridge Daily News," [Ld., [(1907) 23 T. L. R. 705—C. A.

21. *Statements Made in Reply to Threat of Legal Proceedings—Malice.*]—C., a farm manager, who had been dismissed, instructed his solicitor to make a claim for damages for wrongful dismissal. The solicitor accordingly wrote to the employer and stated that, failing a settlement, he had peremptory instructions to sue. The employer replied that the reason for C.'s dismissal was "that I found him appropriating my butter to his own use, which butter he was in duty bound to deliver at my house." The solicitor again wrote intimating that, failing a settlement, he had no alternative but to proceed. In his reply the employer stated, "I do not anticipate any difficulty in proving that C. did dishonestly take my butter." C. brought an action for libel in respect of these two statements.

Held—that, the statements being made in reply to a threat of legal proceedings, and being a relevant defence to such proceedings, were privileged and not actionable in the absence of proved malice.

Watson v. *M'Ewan* ([1905] A. C. 480; 74 L. J. P. C. 151; 93 L. T. 489—H. L., No. 43, *infra*) applied.

Campbell *v.* Cochrane, (1906) 8 F. 205—[Ct. of Sess.

Libel—*Continued.*

(e) Publication.

22. *Circulating Library — Negligent Dissemination—Onus of Proof.*]—As regards communications which are not privileged, it is well settled law that a man who publishes a libel is liable to an action, although he is really innocent in the matter, and guilty of no negligence.

As regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in showing (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was *primâ facie* publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury.

The defendants, the proprietors of a circulating library, had no one in their establishment to exercise any supervision over the books in their circulating library, because it was cheaper for them to run the risk—*i.e.*, of publishing libels and being sued for those libels, of having actions brought against them, than to do so. The jury, in an action for a libel contained in a book, copies of which had been circulated and sold by the defendants, came to the conclusion that the defendants did not exercise due care to see that the books circulated by them did not contain libels, and there was sufficient evidence to justify the jury in coming to the conclusion that it was through negligence on their part that they did not find out that the book contained a libel on the plaintiff.

HELD—that the defendants were not entitled to a new trial, as they had failed to prove facts necessary to negative the presumption of malice in publishing the libel, and to show that the publication of it by them was an innocent publication.

Emmens v. *Pottle* ((1885) 16 Q. B. D. 354; 55 L. J. Q. B. 51; 50 J. P. 228; 34 W. R. 116; 53 L. T. 808—C. A.) discussed.

VIZETELLY *v.* MUDIE'S SELECT LIBRARY, LD., [1900] 2 Q. B. 170; 69 L. J. Q. B. 645; 16 T. L. R. 352—C. A.

23. *Clerk—Letter opened and read by Business Man's Clerk.*]—There is publication of a libel, where the letter containing it is addressed to the person libelled at his residence and place of business, and is opened and read by the addressee's clerk, who would, to the sender's knowledge, be a likely person to open it.

GOMERSALL *v.* DAVIES, (1898) 14 T. L. R. 430—[C. A.

24. *Clerk—Letter dictated to and copied by Clerk—Communication sent by Cable—Privilege.*]—The plaintiff was temporarily engaged as mineral manager by a company in Japan, and it was arranged with the plaintiff that the company should communicate with the defendant company, who were their correspondents in London, and that if they approved the employment should be permanent. The company in Japan accordingly communicated with the defendant company, and in reply the defendant company sent to the company in Japan a letter and a cablegram in code containing defamatory statements regarding the plaintiff, and advising them not to employ him. The letter and the cablegram were dictated by the managing director of the defendant company to a clerk in the office, who transcribed them, and they were both, with a translation of the code cablegram, copied by the clerk into the letter-book and cable-book respectively. It was proved that this was done in the reasonable and ordinary course of business. In an action against the defendant company for libel:—

HELD—that the publication to the company in Japan being on a privileged occasion, the publication to the defendant company's clerks in the reasonable and ordinary course of business was within the privilege.

Boxsius v. *Goblet Frères* ([1894] 1 Q. B. 482; 63 L. J. Q. B. 401; 58 J. P. 670; 42 W. R. 392; 70 L. T. 368—C. A.) followed.

Pullman v. *Hill & Co.* ([1891] 1 Q. B. 524; 60 L. J. Q. B. 299; 39 W. R. 263; 64 L. T. 691—C. A.) distinguished.

EDMONDSON *v.* JOHN BIRCH & CO. AND HORNER, [1907] 1 K. B. 371; 76 L. J. K. B. 346; 96 L. T. 415; 23 T. L. R. 234—C. A.

25. *Officer of Corporation publishing Libel—Scope of Authority—Liability of Corporation.*]—A limited company is liable for a libel published by one of its officers within the scope of his employment.

The plaintiff, an insurance agent, transferred his services from the defendant company to another insurance society; and, whilst canvassing persons to become members thereof, made statements derogatory thereof. A "superintendent of agents" in the employ of the defendant company issued a circular to persons who made inquiry as to such statements; and this circular contained a libel on the plaintiff.

A jury found that the superintendent in publishing the libel was acting in the course and within the scope of his employment, and awarded damages. There was evidence of express malice.

HELD—that there was evidence justifying the finding of the jury as to the scope of the superintendent's authority and that the defendants were liable for his malicious act.

Libel—*Continued.*

Abrath v. *North Eastern Ry. Co.* ((1886) 11 App. Cas. 247 ; 55 L. J. Q. B. 457 ; 50 J. P. 659 ; 55 L. T. 63—H. L., dictum of Lord Bramwell) dissented from.

CITIZENS LIFE ASSURANCE CO., LD. *v.* BROWN, [1904] A. C. 423 ; 73 L. J. P. C. 102 ; 90 L. T. 739 ; 20 T. L. R. 497 ; 53 W. R. 176—P. C.

26. *Telegraph Clerk—Publication to Amanuensis.*]—*Semble*, words alleged to be defamatory cannot be regarded as published to an amanuensis or telegraph clerk, unless they conveyed to him some defamatory meaning. It is not sufficient to allege publication to an amanuensis or clerk without further particulars.

EVANS & SONS *v.* STEIN & CO., (1905) 7 F. 65—[Ct. of Sess.

(f) Words Capable of Defamatory Meaning.

27. *Bank dishonouring Cheque—Evidence for Jury.*]—The plaintiff drew a cheque upon his bank in favour of a customer, who paid it into the defendant bank, where he kept an account, for collection. The defendant bank by some mistake did not present it for payment to the bank upon which it was drawn, and later on it was found at the defendant bank in the box in which returned cheques from the plaintiff's bank were usually left. The plaintiff had ample assets at his bank to meet the cheque. A clerk of the defendants, thinking that the cheque had been returned unpaid and not knowing for what reason, attached a slip to it on which the words "Reason assigned" were printed, and against those words he wrote "Not stated." The cheque with the slip attached was sent to the person in whose favour it was drawn, who communicated with the plaintiff and the cheque was paid. The plaintiff brought an action of libel, alleging that the words meant that the cheque had been dishonoured through want of assets.

HELD—that the words on the slip, coupled with the return of the cheque, were not in their natural meaning libellous, and that it lay upon the plaintiff to prove facts and circumstances leading to the conclusion that they would naturally be understood by reasonable persons as conveying the libellous imputation alleged ; and that, the plaintiff not having proved this, there was no case to go to the jury.

FROST *v.* LONDON JOINT STOCK BANK, LD., [(1906) 22 T. L. R. 760—C. A.

28. *Comment on an Appeal for Subscriptions—Innuendo.*]—Commenting on an appeal by A. and B. for subscriptions for a charitable home, a writer said, "What guarantee is there that the money subscribed does not go to the private profit of" A. and B.?

HELD—that the passage might bear the innuendo that B. was a person capable of appropriating to his own use funds collected for a charity.

BOAL *v.* SCOTTISH CATHOLIC PRINTING CO., [LD., (1907) S. C. 1120—Ct. of Sess.

29. *Commercial Traveller.*]—The plaintiff was employed by the defendant as a commercial traveller. The latter signed and circulated amongst his customers in unfastened envelopes cards bearing the following words :—"H. Beswick is no longer in our employ. Please give him no order or pay him any money on our account." In an action of libel the jury found that the words were libellous, and that the defendant acted maliciously in circulating them.

HELD—that the words were not capable of a defamatory meaning, and that the defendant was entitled to judgment.

BESWICK *v.* SMITH, (1907) 21 T. L. R. 169—[C. A.

30. *Dismissed for "withholding" Moneys—Letter from Secretary of Labour Association—Liability of Association—Innuendo.*]—A society, *e.g.*, a labour association, may be liable for a libel contained in a letter written by its secretary without special instructions, but within the scope of his employment. The issue in such a case is "whether the defendants by their secretary wrote and dispatched" the letter in question.

A statement that a plaintiff had been dismissed for *inter alia* "withholding moneys . . . contrary to the bye-laws of the association" is not sufficient to support an innuendo that he was charged with dishonestly appropriating moneys.

ELLIS *v.* NATIONAL FREE LABOUR ASSOCIA-[TION, (1905) 7 F. 629—Ct. of Sess.

31. "*Thief*" — *Innuendo.*] — A newspaper, referring to the conviction of two men for snaring birds illegally, said, "The mode of operation of the bird-limers is as follows : The thieves set up decoy birds. . . ." In an action for libel by the two convicted men :—

HELD—that the word "thieves" as used did not suggest that they had been guilty of the offence of "theft."

CAMPBELL AND HAY *v.* RITCHIE & CO., [1907] [S. C. 1097—Ct. of Sess.

II. SLANDER.

(a) Actionable per se.

32. *Criminal Charge against Plaintiffs — "Thieves and Swindlers"—Particulars.*—The plaintiff sued the defendant for slander, and the slander complained of was that in a speech the defendant charged the plaintiffs "with being nothing more or less than thieves and swindlers." The defendant went on to explain what he meant by that. "I mean by that thieves and swindlers in connection with the part they have played in financial operations in South Africa." The defendant justified the accusation in these terms in the defence : "The words complained of in their natural and ordinary meaning are true in substance and in fact." The defendant, therefore, was under an obligation to deliver particulars of justification. In paragraphs 3 and 5 and in part of paragraph 2

Slander—*Continued.*

of the particulars there was a series of charges that the plaintiffs were professing one thing and doing another in connection with politics.

HELD—that the said charges in the particulars must be struck out, as they were not relevant to the issues of the action and tended to embarrass the fair trial of the action; and that the defendant was bound to support his justification by facts distinctly stated and with the same particularity as in a criminal charge.

WERNHER, BEIT & Co. *v.* MARKHAM, (1903) 18 [T. L. R. 763—H. L. (E.).

33. *Imputing Criminal Offence—Charge of bringing a "Blackmailing Action" — Words Actionable per se.*]—At a meeting of the shareholders of a company the defendant stated that the plaintiff had been accused by his own counsel of bringing a blackmailing action.

HELD—that the words might reasonably have been understood by the hearers as imputing a criminal offence, and were therefore, if false, actionable *per se* without proof of special damage.

MARKS *v.* SAMUEL, [1904] 2 K. B. 287; 73 L. J. [K. B. 587; 53 W. R. 88; 90 L. T. 590; 20 T. L. R. 430—C. A.

34. *Solicitor — Reflections on Solvency.*]—To say of a solicitor in a good position that he has "been cleaned out and lost his all" may form ground for a slander action. It will be for a jury to say whether the words used had, in fact, an injurious effect on his reputation and credit.

A. B. *v.* C. D., (1905) 7 F. 22—Ct. of Sess.

35. *Solicitor — Imputing Insolvency to a Solicitor — "He is gone for thousands" — No special Damage.*]—The defendant was alleged to have said of the plaintiff, a solicitor, first: "Have you heard about our neighbour" (meaning the plaintiff) "along here? They tell me he is gone for thousands, instead of hundreds, this time." Secondly: "Have you heard anything about Mr. D——? . . . It seems to be a worse job than the other was. I was putting up a bell in Miss A.'s shop, and Miss A. told me Mr. D—— had lost thousands." The plaintiff failed to prove any special damage.

HELD—that the words could not reasonably be construed to impute impropriety or want of capacity on the part of the plaintiff to carry on his profession or business as a solicitor in a sufficient and proper manner; and that there was no case to go to the jury, as the words were not actionable without proof of special damage.

DAUNCEY *v.* HOLLOWAY, [1901] 2 K. B. 441; [70 L. J. K. B. 695; 49 W. R. 546; 84 L. T. 649; 17 T. L. R. 493—C. A.

36. *Vulgar Abuse—"Liar and fraud."*]—The slang expression "you are 'a fraud'" does not imply the commission of a fraud in the legal sense of the term, and to call a man a "liar and fraud" is not slanderous, but mere vulgar abuse.

AGNEW *v.* BRITISH LEGAL LIFE ASSURANCE [Co., (1906) 8 F. 422—Ct. of Sess.

37. *Woman—Imputation on a Woman of Want of Delicacy.*]—*Per* Ld. Kincairney: It is not *per se* actionable to write of a woman that she wanted delicacy.

A. B. *v.* BLACKWOOD, (1903) 5 F. 25—Ct. of Sess.

(b) Practice.

38. *Apology by one Defendant— Admissibility —New Trial—Improper admission of Evidence —No Substantial Wrong or Miscarriage.*]—The defendants, husband and wife, were sued for slander spoken of the plaintiff by the wife. The wife at first denied the speaking of the words; but afterwards, at the invitation of S., wrote two apologies, one to S. and another to A., a person implicated, but she did not apologise to the plaintiff. The husband was not present when the apologies were written, and there was no evidence that he was aware of the apologies. He subsequently made an offer of £10 to the plaintiff to settle the case, accompanied by a threat if the plaintiff did not accept the offer. At the trial the speaking of the words was proved by two witnesses, and neither of the defendants was examined. The judge admitted the apologies as evidence, subject to objection. The jury found for the plaintiff.

HELD—that the apologies of the wife were not admissible in evidence.

But HELD, further, that even if they were wrongly admitted there was evidence without them sufficient to sustain the verdict; that no substantial wrong or miscarriage had been occasioned; and that the verdict should stand.

Bray v. *Ford* ([1896] A. C. 44; 65 L. J. Q. B. 243; 73 L. T. 609—H. L.) considered.

TATE *v.* BEGGS, [1905] 2 Ir. R. 525—C. A.

(c) Privilege.

39. *Evidence given at Inquiry -Inquiry under Bishop's Commission—Pluralities Acts*, 1838 (1 & 2 Vict. *c.* 106), *s.* 77—*Pluralities Acts Amendment Act*, 1885 (48 & 49 Vict. *c.* 54), *s.* 3.]—A bishop, acting under the Pluralities Acts, 1838 and 1885, issued a commission for an inquiry with reference to complaints of the inadequate performance of ecclesiastical duties by an incumbent.

HELD—that the Commissioners constituted a judicial tribunal, and that, therefore, evidence given before them was absolutely privileged, and that no action for defamation would lie in respect of it.

BARRATT *v.* KEARNS, [1905] 1 K. B. 504; 74 [L. J. K. B. 318; 53 W. R. 354; 92 L. T. 255; 21 T. L. R. 212—C. A.

40. *Magistrate sitting at Petty Sessions— Words spoken in course of Judicial Duty.*]—A magistrate sitting at petty sessions is a judge within the meaning of the rule that defamatory observations made by a judge in the course of his judicial duties are not actionable.

A magistrate, in acceding to the application of a prosecutor to be permitted to withdraw a

Slander—*Continued.*

criminal charge, made certain defamatory observations concerning him.

HELD—that the observations were privileged and that it made no difference whether they were spoken before or after leave to withdraw was given.

Munster v. *Lamb* ((1883) 11 Q. B. D. 588 ; 52 L. J. Q. B. 726 ; 47 J. P. 805 ; 32 W. R. 248 ; 49 L. T. 252—C. A.) and *Hudson* v. *Pare* ([1899] 1 Q. B. 455 ; 68 L. J. Q. B. 309 ; 47 W. R. 241 ; 80 L. T. 13—C. A., No. 17, *supra*) applied.

Allardice v. *Robertson* ((1830) 1 Dow. & C. 495) distinguished.

LAW *v.* LLEWELLYN, [1906] 1 K. B. 487 ; 75 [L. J. K. B. 320 ; 70 J. P. 220 ; 54 W. R. 368 ; 94 L. T. 359—C. A.

41. *Report against Servant to Employers' Association — Register of Defaulters.*]—An association of fishing boat owners resolved that a "defaulters' register" should be kept, and that if one of the crew of a vessel belonging to a member should, when engaged to go to sea, refuse to do so, or should come on board drunk, the member should report his name to the secretary for insertion in the register. A member of the association reported an engineer to the secretary as having been drunk and having refused to proceed to sea, and the engineer's name and alleged offences were accordingly inserted in the register. Thereupon he sued the member in question for slander and for having wrongfully prevented him from obtaining employment.

HELD—(1) that the report was privileged ; and that, as it was not proved that the member had acted maliciously, he was not liable for slander : and (2) that no other cause of action was proved.

KEITH *v.* LAUDER, (1906) 8 F. 356—Ct. of [Sess.

42. *Statements as to a supposed Crime — Statement made by Defendant in presence of Plaintiff and Persons called in to identify Plaintiff.*]—Material statements made by the persons interested in the detection of a crime during their investigations, and material thereto, are privileged.

The plaintiff was accused by the defendant and his wife of theft ; and, upon her denying the charge, four boys were called in for the purpose of identifying her, and in their presence the words complained of were spoken.

The jury found that the defendant did not "reasonably" believe that the plaintiff had committed the theft, but that he had not any improper or indirect motive in uttering the words.

HELD—that there must be a new trial, and the jury must be asked whether the defendant "honestly" believed what he said to be true.

COLLINS *v.* COOPER, (1903) 19 T. L. R. 118—[C. A.

43. *Witness—Privilege extending to Proofs or Precognition.*]—The privilege, which attaches to answers made by a witness in a Court of law, and protects him from an action for slander in respect thereof, extends also to statements made by him to the litigant and solicitor in preparing his proof.

Decision of Ct. of Sess., *sub nom. A. B.* v. *C. D.* (7 F. 42) reversed.

WATSON *v.* M'EWAN ; WATSON *v.* JONES, [1905] [A. C. 480 ; 74 L. J. P. C. 151 ; 93 L. T. 489 —H. L. (Sc.).

(d) Special Damage.

44. *Remoteness.*]—The defendant was alleged to have said to the plaintiff's employer "You have a barman in your employ, named S., who has removed from his landlord's house, leaving £2 owing for a month's rent, and I cannot get the money from him."

In an action for slander based upon these words the special damage alleged was that, in consequence of such words, the plaintiff was dismissed by his employer.

HELD—that the damage relied on was too remote. The defendant could not reasonably have contemplated that his words would result in the plaintiff's dismissal ; at the most, he might have expected that the employer would endeavour to get him to pay the rent due.

SPEAKE *v.* HUGHES, [1904] 1 K. B. 138 ; 73 [L. J. K. B. 172 ; 89 L. T. 576—C. A.

III. TRADE LIBEL.

45. *Disparagement of Goods—Allegation that one Trader's Goods are better than Another's—Malicious Lawful Statement—Cause of Loss.*]—The defendant's circular stated that the defendant's white zinc was equal to, and indeed, somewhat better than, the plaintiff's.

HELD—that such a statement, even if untrue, and the cause of loss to the plaintiffs, was not a cause of action. An allegation that the statement was made maliciously is not enough to convert what is *primâ facie* a lawful into a *primâ facie* unlawful statement. It is not unlawful to say that one's goods are better than other people's.

Allen v. *Flood* ([1898] A. C. 1 ; 67 L. J. Q. B. 119 ; 62 J. P. 595 ; 46 W. R. 258 ; 77 L. T. 717—H. L. (E.), *see* TRADE, No. 53) referred to.

HUBBUCK & SONS *v.* WILKINSON, HEYWOOD & [CLARK, [1899] 1 Q. B. 86 ; 68 L. J. Q. B. 34 ; 79 L. T. 429 ; 15 T. L. R. 29—C. A.

46. *Disparagement of Goods—Libel on Persons in the Way of their Trade.*]—If the only meaning which a reasonable man can attach to an alleged libel amount to a mere criticism of machines as mechanical appliances, it is not an actionable wrong to publish such a criticism.

The plaintiffs were a company constituted apparently for the express purpose of dealing in certain machines. The machines were effective for their purpose. The defendants sent to two

Trade Libel—*Continued.*

newspapers in London a printed paragraph alleged to be defamatory. The paragraph was untrue to the knowledge of those who wrote it. The jury found that the words were not merely a disparagement of the particular machines in question, but defamatory of the plaintiffs in their business as the vendors of those machines. The jury also said that the defendants published the defamatory libel maliciously, intending to attack and injure the plaintiffs in their business. No special damage was alleged or proved.

HELD—that the application to set aside judgment entered for the plaintiffs must be dismissed.

Decision of C. A. (79 L. T. 8; 14 T. L. R. 511) affirmed.

LINOTYPE CO. *v.* BRITISH EMPIRE TYPE-[SETTING MACHINE CO., (1899) 81 L. T. 321; 15 T. L. R. 524—H. L. (E.).

47. *Interlocutory Injunction — Grounds for Granting — Danger of substantial Pecuniary Injury — Only in the clearest Cases.*]—The Court has jurisdiction to restrain the publication of statements injurious to the plaintiff's business; but it will only grant an interlocutory injunction in the clearest cases, where, if a jury found the matter not to be libellous, the Court would set aside their verdict.

Collard v. *Marshall* ([1892] 1 Ch. 571; 61 L. J. Ch. 268; 40 W. R. 473; 66 L. T. 248—dictum of Chitty, L.J.) approved.

The defendant bank sent out to all the shareholders in Lloyd's Bank, Ld., a prospectus of their own share issue, an allotment letter, and form of acceptance, intimating that the recipient was entitled to a preferential allotment of partly-paid shares in consideration of his being a shareholder in Lloyd's Bank. The documents contained no direct reference to Lloyd's Bank: but its name was put first in a list of banks quoted as prosperous, and amongst the "trustees" on the prospectus was one W. E. Lloyd. Some of the shareholders in Lloyd's Bank wrote to inquire what the connection with the defendant bank meant.

HELD—that the publication had not exposed Lloyd's Bank to any substantial pecuniary risk, and that it was not a case for an interlocutory injunction, although the Court disapproved of such a method of disposing of shares.

LLOYD'S BANK, LD. *v.* ROYAL BRITISH BANK, [LD., (1903) 19 T. L. R. 548—Byrne, J.

On appeal, the plaintiffs giving an undertaking as to damages, the defendants undertook, until judgment or further order, not to issue the allotment letter without making it clear that they had no connection with the plaintiffs.

(1903) 19 T. L. R. 604—C. A.

48. *Interim Injunction—Unfounded Statement that a Bank was in Liquidation.*]—The general rule as to cases in which an interlocutory injunction ought to be granted to restrain libel is, that it is wiser generally, and in all but exceptional cases must be, to abstain from interference until the trial and determination of the plea of justification.

Bonnard v. *Perryman* ([1891] 2 Ch. 269; 60 L. J. Ch. 617; 39 W. R. 435; 65 L. T. 506; 7 T. L. R. 153—C. A.) approved.

Where the paragraph complained of as a trade libel stated that the plaintiffs were in liquidation, and it was clear that that statement was unfounded:—

HELD—under the circumstances, that the case was so exceptional that an interim injunction to restrain publication of the trade libel should be granted.

LONDON AND NORTHERN BANK, LD. *v.* GEORGE [NEWNES, LD., (1900) 16 T. L. R. 76—North, J.

49. *Libel on Inventor — Agreement to alter Certain Passages — Statement of Claim struck out.*]—The plaintiff, who had invented valuable improvements in the machine subsequently known as a "dynamo," brought an action for libel alleging that the defendant had written passages depriving him of the credit of his invention; he also complained of the defendant using the word "dynamo" to denote a machine other than that invented by himself; and he further said that the defendant had promised to alter certain of the passages complained of, but had omitted to do so.

HELD—that the passages complained of were not libellous; that the plaintiff had no exclusive right to the word "dynamo," which he did not invent; that the alleged agreement was a mere "concession for the sake of peace"; and that the statement of claim must be struck out as being frivolous and vexatious.

Decision of Buckley, J. (20 R. P. C. 361) affirmed.

WILDE *v.* THOMPSON, (1904) 20 R. P. C. 775—[C. A.

50. *Trade Marks—Untrue Statement—Malice—Authority of Agents—Special Damage.*—In 1897, two trade marks, registered by the R. Company, of New York, were expunged from the Register of Trade Marks by the order of the Court, at the instance of W., C. & Co. Both trade marks were labels containing prominently the words "Royal Baking Powder." Shortly afterwards W., C. & Co. issued a circular referring to the said order, which circular, and the statements of travellers and agents of W., C. & Co., were alleged by the R. Company to be an intimation that the R. Company were not entitled to sell baking powder as "Royal Baking Powder," and that W., C. & Co. intended to proceed against persons using the labels to stop the use of those words. The R. Company commenced an action to restrain W., C. & Co. from representing that the plaintiffs were not entitled to sell their Royal Baking Powder in the United Kingdom, and from maliciously threatening the customers of the plaintiffs with legal proceedings in respect of their sales of the plaintiffs' said baking powder.

Trade Libel—*Continued.*

HELD—that the circular represented what was not true with regard to the plaintiffs' baking powder and trade, and was issued not in good faith in support of a claim or right really made or intended to be exercised by the defendants, but maliciously, and had caused special and substantial damage to the plaintiffs. An injunction was granted in the terms of the first part of the writ, and an inquiry as to damages was also granted, with costs up to and including judgment; the costs of the inquiry were reserved.

ROYAL BAKING POWDER CO. *v.* WRIGHT, [CROSSLEY & CO. (1898) 15 R. P. C. 677—Romer, J.

IV. CRIMINAL PROCEDURE.

51. *Obscene and Defamatory Libels—Indictment—Contents—Intent to corrupt Public Morals—Necessity of Averment—Law of Libel Amendment Act*, 1888 (51 & 52 Vict. *c.* 64), *s.* 7—*Compliance with the Provisions of.*]—The defendant was indicted for that he "contriving and unlawfully and maliciously intending to injure vilify and prejudice one E. W. and to deprive her of her good name fame credit and reputation and to cause her to be esteemed as a person of depraved and incontinent behaviour and to bring her into public contempt scandal infamy and disgrace unlawfully and maliciously did write print and publish and cause and procure to be written printed and published to one E. H. M. a false scandalous malicious and defamatory libel in the form of a type written document . . . which said document . . . contains divers lewd wicked scandalous obscene false malicious and defamatory matters and things of and concerning the said E. W. . . . to the great danger scandal and disgrace of the said E. W. to the evil example of all others in like case offending against the peace, &c."

The indictment was held bad as one for defamatory libel, because it did not set out the passages relied on; but

HELD—a good indictment for an obscene libel, although it did not contain an express averment that the libel was published to the manifest corruption of the public morals, &c. It is, however, better to follow the old form of indictment and include such an averment.

The document containing the alleged libel was put in at the hearing before the magistrate, and together with the other exhibits and depositions, was forwarded to the clerk of assize and by him handed to the judge some days before the assizes. The judge retained possession of the document up to the time of the trial. It could and would have been handed to the defendant or his counsel on request. The bill of indictment was handed by the solicitor to the prosecution to the clerk of assize engrossed and ready to go before the grand jury, but without any notice that any other document had to be attached to it. At the same time there was handed to the clerk of assize an abstract of indictment to which was pinned a paper containing the following particulars: "*R.* v. *William Barraclough.* Particulars of obscene libels. 51 & 52 Vict. c. 64, s. 7," and the particulars alleged in each count were "The entire publication." These could have been seen by the defendant or his counsel on request.

HELD—that the requirements of sect. 7 of the Law of Libel Amendment Act, 1888, had been complied with.

REX *v.* BARRACLOUGH, [1906] 1 K. B. 201; 75 [L. J. K. B. 77; 70 J. P. 14; 54 W. R. 147; 94 L. T. 111; 22 T. L. R. 41; 21 Cox, C. C. 91—C. C. R.

52. *Seditious Libel—Pleading—Omission to use the Words "Seditious," "Seditiously"—Pleading Justification—Libel Act*, 1843 (6 & 7 Vict. *c.* 96), *s.* 6—*Law of Libel Amendment Act*, 1888 (51 & 52 Vict. *c.* 64), *s.* 4.]—An information exhibited for seditious libel is not bad because the words "seditious," "seditiously," are not expressly used, if it clearly appear on the face of the indictment that the publication was with seditious intent.

To an information for seditious libel, it is not open to the defendant to plead justification under Lord Campbell's Act (the Libel Act, 1843), s. 6, nor fair comment and absence of malice, under the Law of Libel Amendment Act, 1888, s. 4.

REG. *v.* M'HUGH, [1901] 2 Ir. R. 569—Q. B. Div.

53. *Innocent Loan of Paper containing Libel—Contempt of Court—In Face of the Court.*]—The appellant, who was neither printer nor publisher, innocently and without any knowledge of the contents of a newspaper handed a copy to a friend.

HELD—that there was no obligation on the appellant to make himself acquainted with its contents, and should scandalous matter reflecting on the Court thus become known, these circumstances were not in themselves sufficient to justify a committal for contempt of Court.

Committals for contempt of Court by scandalising the Court itself have become obsolete in this country.

MCLEOD *v.* ST. AUBYN, [1899] A. C. 549; 68 [L. J. P. C. 137; 18 W. R. 173; 81 L. T. 158; 15 T. L. R. 487—P. C.

54. *Plaintiff's Name not given—Innuendo—Evidence.*]—Where a libel, on the face of it, does not expressly refer to the plaintiff, some extrinsic evidence must be given in order to connect it with the plaintiff.

FOURNET *v.* PEARSON, LD., (1898) 14 T. L. R. [82; dismissing application for new trial.—C. A.

LIBRARY.

See LOCAL GOVERNMENT.

LICENCE.

In respect of game—*See* GAME; SPORT.
In respect of land—*See* REAL PROPERTY; EASEMENTS.
In respect of patent—*See* PATENTS AND INVENTIONS.
For marriage—*See* HUSBAND AND WIFE.
In respect of minerals — *See* MINES, MINERALS AND QUARRIES.
In respect of hawkers and pedlars—*See* MARKETS AND FAIRS.
For sale of intoxicants—*See* INTOXICATING LIQUORS.
For music and dancing—*See* THEATRES, MUSIC HALLS, AND SHOWS.
For cabs, &c., and drivers—*See* STREET TRAFFIC.
To carry gun, &c.—*See* REVENUE, GAME.
Excise—*See* REVENUE.
Generally—*See* REVENUE.

LIEN.

See ADMIRALTY, 24; BAILMENT, 2; BILLS OF SALE, 8, 9; BUILDERS, 12; SHIPPING, 16, 23, 120, 212—221.

LIEN IN EQUITY.

1. *Equitable Charge on Land—No Mention of Interest—Whether Interest Allowable—From what Date—Merger of Charge in Fee—Presumption of Satisfaction—Statute of Limitations—Interest due from Person entitled to receive the Rents.*]—If a settlement, or contract, charges upon land a fixed sum of money to be paid at a fixed date, in equity such a charge bears interest, although it be not mentioned, as from the date fixed for payment.

Courts of equity lean against merger, except where it is convenient and beneficial to all parties.

An order empowered the committee of a lunatic to buy an estate, and the purchase-money was declared to be a lien on such estate in trust for the lunatic, his executors and administrators. On the lunatic's death in 1828 a married sister, his heiress-at-law and sole next of kin, took out letters of administration. On her death in 1853 her husband became tenant by the curtesy of the estate in question, and he also administered her estate and the lunatic's estate. The husband being now dead, his legal personal representatives sought to enforce the lien against the persons entitled to the estate.

HELD—(1) that there was nothing to justify the Court in presuming satisfaction.

(2) That there had been no merger, for (*a*) the object of the charge would be defeated by presuming a merger in the lunatic's lifetime; and (*b*) after his death the right to the money and to the land never coalesced in the same person on account of the sister's previous marriage, and her death in her husband's lifetime.

(3) That, as the principal ought to have been paid off on the lunatic's death, interest, though not mentioned, was payable from such date.

(4) But, that non-payment of interest had not barred the principal debt, for the obligation to pay, and the right to receive, interest were at all times united in the same person.

And that therefore the lien must be enforced with interest at 4 per cent. from the date of the husband's death.

Equity will allow interest (though not mentioned) in the case of loans upon deposit of title deeds, portions and legacies charged on land, and many other cases of equitable charges.

Decision of Joyce, J. ([1903] 1 Ch. 781; 72 L. J. Ch. 505; 88 L. T. 510) affirmed.

IN RE DRAX, SAVILLE *v.* DRAX, [1903] 1 Ch. [788; 72 L. J. Ch. 508; 51 W. R. 612; 88 L. T. 510—C. A.

2. *Vendor's Lien—Leasehold held on Trust for Sale—Mortgage of Share—Mortgagor's Lien for unpaid Purchase-money on Proceeds of Sale in Hands of Trustees.*]—The trustees of a will held the property on trust to pay the income to certain persons for life, and after their deaths on trust to sell the property and divide the proceeds of sale among specified persons, of whom the mortgagor was one. At the time of the sale of the mortgagor's interest by the mortgagee, the trustees held the property in the condition of leasehold, and subsequently to the assignment to the purchaser by the mortgagee they converted the leaseholds into money, and they held the money on trust for the persons entitled to it. The mortgagee who sold the mortgaged property under his power of sale had not been paid all his purchase-money, and he brought an action against the trustees, claiming that he was entitled to a lien on so much of the purchase-money in their hands as represented the share of the mortgagor.

HELD—that the plaintiff was in the position of an unpaid vendor, and was entitled in respect of his unpaid purchase-money to a lien upon the property which he sold.

Collins v. *Collins* ((1862) 31 Beav. 346) applied.

DAVIES *v.* THOMAS, [1900] 2 Ch. 462; 69 L. J. [Ch. 643; 49 W. R. 68; 83 L. T. 11—C. A.

3. *Vendor's Lien — Personal Property—Unpaid Purchase-money—Enforcement of—Interest—Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 42.]—A vendor's lien for unpaid purchase-money extends to personal property. The lien gives him a charge upon or interest in the property for the unpaid purchase-money, which he can enforce in the same way as if it were a charge expressly given to him in writing. Interest is, therefore, recoverable thereon, and there is no Statute of Limitations applicable to such a case.

Daries v. *Thomas* ([1900] 2 Ch. 462, *supra*); *Smith* v. *Hill* (9 Ch. D. 143); and *Mellersh*

v. *Brown* (45 Ch. D. 225) approved and followed.

In re Stucley, Stucley *v.* Kekewich, [1906] [1 Ch. 67; 75 L. J. Ch. 58; 54 W. R. 256; 93 L. T. 718; 22 T. L. R. 33—C. A.

4. *Vendor's Lien—Unpaid Purchase-money—Debenture Prospectus — Rights of Debenture Holders—Lien excluded by Terms of Prospectus.*] —A syndicate having purchased property for £13,000 sold it to a company for £3,500 in cash and £21,500 in shares: only about £2,500 of the cash had been paid to the syndicate when the company went into liquidation. Thereupon the syndicate claimed to have a lien for the unpaid £1,000 ranking prior to the security of debenture holders who had advanced £10,000 to the company.

Held—that, having regard to the terms of a prospectus issued with the approval of the syndicate, in which it was stated that the entire debenture issue of £10,000 would be available for working capital, the syndicate could not set up its lien against the debenture holders.

Re Brentwood Brick Co. ((1877) 4 Ch. D. 560) followed.

In re Darrow Brick and Tile Works Co., [[1904] 1 Ir. R. 530—C. A.

LIFE INSURANCE.

See Insurance.

LIGHT.

See Easements.

LIGHT RAILWAYS.

See Arbitration, 17; Tramways and Light Railways.

LIMITATION OF ACTIONS.

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See also Arbitration, 33; Companies, 132; Dependencies and Colonies; Fisheries, 22; Highways, 95—98, 161; Insurance, 36; Public Authorities.

I. MISCELLANEOUS.

1. *Appropriation—Solicitor's Bill of Costs—Items Statute-barred—Judgment ordering Taxation—Subsequent Attempt to Appropriate in order to avoid Statute—Not Allowable—Lien—Set-off.*] —Some limit must be set to the right of a creditor to appropriate payments; *semble*, after judgment it is too late for him to attempt to do so.

In an action on a bill of costs running from 1878 to 1899 it was held that items prior to 1893 were statute-barred, and judgment was given in favour of the solicitor for the later items subject to taxation, credit to be given "for all sums of money received for, or on behalf of, the defendant in respect of, or which ought to be treated as reducing" the bill of costs so taxed.

Upon taxation it was discovered that the solicitor had unintentionally omitted to credit a sum of £66 received in 1894 on behalf of the defendant.

Held—that the plaintiff must be surcharged in respect of this amount, and that it was too late for him to appropriate it to satisfy statute-barred items, and that there was no right of lien or set-off which he could invoke in order to avoid the surcharge.

Smith *v.* Betty, (1903) 72 L. J. K. B. 853; 89 [L. T. 258; 19 T. L. R. 602; 52 W. R. 137—C. A.

2. *Company Director — Prospectus — Untrue Statements—Action by Shareholder for Compensation—Directors Liability Act*, 1890 (53 & 54 Vict. *c.* 64), *s.* 3—*Civil Procedure Act*, 1833 (3 & 4 Will. 4, *c.* 42), *s.* 3—*Limitation Act*, 1623 (21 Jac. 1, *c.* 16), *s.* 3.]—An action for compensation for loss or damage sustained by a shareholder in a company by reason of untrue statements in a prospectus under sect. 3 of the Directors Liability Act, 1890, is not an action "for penalties, damages, or sums of money given to the party grieved" within the meaning of sect. 3 of 3 & 4 Will. 4, c. 42, and consequently need not be brought within two years after the cause of action accrued. The Directors Liability Act, 1890, does not impose a penalty, but merely a liability to make compensation for a loss sustained. In such an action the cause of action accrues, and the time begins to run from the time when the plaintiff subscribes for shares.

Semble, the period of limitation would be six years under the Limitation Act, 1623.

Miscellaneous—*Continued.*

HELD, also (on the merits of the case), that the plaintiff was entitled to succeed.

Judgment of Kekewich, J. ([1899] 2 Ch. 523; 68 L. J. Ch. 727; 48 W. R. 39; 81 L. T. 286; 15 T. L. R. 502) affirmed.

THOMSON *v.* LORD CLANMORRIS, [1900] 1 Ch. [718; 69 L. J. Ch. 337; 48 W. R. 488; 82 L. T. 277; 16 T. L. R. 296—C. A.

3. *Dividends — Arrears of Dividends on Ordinary Shares.*]—Arrears of dividends on ordinary shares in a limited company, the share certificates being under seal as required by the articles of association, are recoverable by action after the lapse of six years.

IN RE DROGHEDA STEAM PACKET CO., LD., [[1903] Ir. R. 512—M. R.

4. *Dividends and Capital—Unclaimed Dividends—Money to be returned to Shareholders on Reduction of Capital—Companies Act*, 1877 (40 & 41 Vict. *c.* 26), *s.* 3.]—Where a company's share certificates refer (as is usual) to its memorandum and articles of association, a shareholder is not barred by the Statute of Limitations till the lapse of twenty years as to—

(*a*) Dividends from the date of declaration; (*b*) capital to be returned upon a reduction from the date of notice of the confirming order.

In re Drogheda Steam Packet Co., Ld. ([1903] 1 Ir. R. 512—M. R.), *supra*, followed.

IN RE ARTIZANS' LAND AND MORTGAGE [CORPORATION, [1904] 1 Ch. 796; 73 L. J. Ch. 581; 52 W. R. 330; 12 Mans. 98 — Byrne, J.

5. *Misrepresentation — Knowledge of Facts—Life Policy.*]—The plaintiff, who had effected an insurance on his life with the defendants, brought an action on April 16th, 1898, in the county court, to recover back part of a premium which he alleged to have been wrongly charged against him and which he had paid under protest. Judgment in that action was entered for the defendants. Another policy-holder brought an action against the defendants for rescission of his contract and repayment of the premiums on the ground of misrepresentation, and in July, 1904, the House of Lords finally decided that the plaintiff in that action was entitled to succeed. The plaintiff thereupon brought the present action for rescission of the contract and repayment of the premiums paid by him upon the same grounds as the other policy-holder had done.

HELD—that, as after the decision in the county court the plaintiff knew all the facts which would have enabled him to bring an action for misrepresentation, the action was barred by the Statute of Limitations.

Decision of Eady, J. (22 T. L. R. 59) reversed.

MOLLOY *v.* THE MUTUAL RESERVE LIFE [INSURANCE CO., (1906) 94 L. T. 756; 22 T. L. R. 525—C. A.

6. *Possession of Widow as Guardian of Children — Change of Possession — Children leaving Home.*]—On P.'s death intestate his widow and four infant children remained in possession of his assets; no administration was ever taken out. Twenty-five years ago all the children having grown up left the house and never made any claim to a share of their father's property.

HELD—that originally the widow and her second husband were in possession as bailiffs for the infants as to a share of the assets, but that their position changed upon the departure of the children, and that the statute began to run against each child on his or her attaining 21 years of age.

IN RE MAGUIRE AND M'CLELLAND'S CONTRACT, [1907] 1 Ir. R. 393—C. A. (Ir.).

7. *Vendor's Lien—Personal Property—Unpaid Purchase-money—Enforcement of—Interest—Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 42.]—A vendor's lien for unpaid purchase-money extends to personal property. The lien gives him a charge upon or interest in the property for the unpaid purchase-money, which he can enforce in the same way as if it were a charge expressly given to him in writing. There is no Statute of Limitations applicable to such a case, and notwithstanding the lapse of time the debt and full interest for the whole period is recoverable.

A. was trustee of a will under which he had a life interest in £5,000, his son being entitled to the reversion. In 1874 his son sold to A. his reversion for £1,500, which was in fact never paid, although a receipt was endorsed on the deed. In 1900 A. died.

HELD—that his son had a lien enforceable against A.'s executors, and that he could recover £1,500 and interest at 4 per cent. to be paid out of the £5,000.

Davies v. *Thomas*, ([1900] 2 Ch. 462; 69 L. J. Ch. 643; 49 W. R. 68; 83 L. T. 11—C. A., *see* LIEN IN EQUITY, 2) followed.

IN RE STUCLEY, STUCLEY *v.* KEKEWICH, [1906] [1 Ch. 67; 75 L. J. Ch. 58; 54 W. R. 256; 93 L. T. 718; 22 T. L. R. 33—C. A.

II. ACKNOWLEDGMENT OF DEBT.

8. *Acknowledgment that Accounts are open—Conditional Promise—Indian Limitation Act, (XV. of 1877), s. 4; Sched. II., par. 57.*]—Within the period of limitation in respect of a debt the debtor filed a written statement in an application for probate of his creditor's will that he had for the last few years open and current accounts with the deceased.

HELD—that this was an aeknowledgment by the debtor that there was a right to have the accounts settled, from which a promise to pay the amount found due upon the accounts would be inferred so as to take the case out of the Statute of Limitations.

MANIRAM *v.* SETH RUPCHAND, (1906) 22 T. L. R. [619—P. C.

Acknowledgment of Debt—*Continued.*

9. *Admission and Promise to Pay—Limitation Act*, 1623 (21 Jac. 1, *c.* 16)—*Statute of Frauds Amendment Act*, 1828 (9 Geo. 4, *c.* 14), *s.* 1.]—Where the defendant wrote to the plaintiff, "I am really sorry to keep you so long waiting for your money," it is an admission that money is due. The addition of the sentence, "but I shall be taking some money next month, I think, without fail, and will then try to settle with you," amounts to a promise to pay next month. Such a letter, therefore, is sufficient to take the debt out of the Statute of Limitations.

Pryke *v.* Hill, (1899) 79 L. T. 738—Div. Ct.

10. *Affidavit — Statute of Limitations* (21 Jac. 1, *c.* 16), *s.* 3—*Lord Tenterden's Act*, 1829 (9 Geo. 4, *c.* 14), *s.* 1.]—In 1905 J. G. E. in proving his father's will included in his affidavit a sum of £2,000 "money lent to J. G. E."

Held—that, although the debt was *primâ facie* statute-barred, no payment of interest having been made for ten years, the item in the affidavit was a sufficient acknowledgment to take the case out of the statute.

Re Emmett, Jenkins *v.* Emmett, (1907) 95 [L. T. 755—Kekewich, J.

10a. *Agreement not to raise Statutory Defence —Submission to Arbitration—Arbitration proving abortive—Revival of Defence.*]—The plaintiff and the defendant agreed that there should be a reference of their accounts to two arbitrators, and that either should pay to the other the amount found due by the arbitrators. Both agreed not to raise the question of the Statute of Limitations. The arbitration, though held, proved abortive.

Held—that the arbitration having proved ineffective, the condition on which the admission was made had not been fulfilled, and there was, therefore, no admission to take the case out of the operation of the statute.

Fenner *v.* Lord, (1898) 14 T. L. R. 450—[Phillimore, J.

11. *Expression of Hope to Pay—Admission of Debt—Identification of Debt*—21 Jac. 1, *c.* 16.]—In order to take a debt out of the Statute of Limitations it is not necessary that the written acknowledgment should specify the debt or the matter out of which it arose.

It is a mistake to suppose that, because a man expresses a hope to pay when he acknowledges a debt, therefore the acknowledgment is to be taken as the mere expression of a hope to pay. A letter containing the following passage was held to be a sufficient acknowledgment: "I know I am at present in your debt, but my prospects are much better now than they have been for years, and will be, so that I shall be able to repay you."

Sidwell v. *Mason* ((1857) 2 H. & N. 306) followed.

Whitcombe *v.* Steere, (1903) 19 T. L. R. 697 [—Walton, J.

12. *Guarded Acknowledgment — Limitation Act*, 1623 (21 Jac. 1, *c.* 16)—*Statute of Frauds Amendment Act*, 1828 (9 Geo. 4, *c.* 14), *s.* 1.]—Where there is a general acknowledgment of a debt, then a general promise to pay may and ought to be implied; but when the party guards his acknowledgment, such an implication will not arise.

Where letters can be read as an acknowledgment of the debt and a promise to pay it, coupled with the expression of a hope that the plaintiff would name some figure less than the principal and interest, and that he would give the defendant an option of payment by instalments, the letters are not enough to take the case out of the statute.

Mowbray *v.* Appleby, (1899) 80 L. T. 805; 15 [T. L. R. 425—Bucknill, J.

13. *No sufficient Acknowledgment that whole Debt was Due—Sufficient Promise to Pay what may be found Due on taking an Account*—21 Jac. 1, *c.* 16.]—To a claim on a note for £100 the defendant pleaded the Statute of Limitations, and the plaintiff in reply thereto relied on certain letters, in which the passages most in his favour were as follows: "I will do my best to pay back what I owe . . . I did give uncle a note for £100 originally, but I subsequently gave him a cheque for £40 . . . and I am almost positive I gave him another for £20. . . . If he hunts up his old bank books he will be able to trace up the amount, and I am sure he will be satisfied that I am correct. . . . As soon as there is another 'division' I will send him some." Another "division" had in fact taken place since the date of the letter.

Held—that the letters did not constitute a sufficient acknowledgment that the whole debt was due; but that they did form a sufficient promise to pay £40, or whatever larger sum might be found due on taking an account; and that, the judge having taken the account, and found the whole sum to be still due, the plaintiff could recover it all.

Prance v. *Simpson* ((1854) Kay 678) followed.

Decision of Bruce, J. ((1902) 18 T. L. R. 658), affirmed.

Langrish *v.* Watts, [1903] 1 K. B. 636; 72 [L. J. K. B. 435; 51 W. R. 503; 88 L. T. 443; 19 T. L. R. 359—C. A.

14. *Parol Evidence to Connect—Two Letters—Admissibility of.*]—Parol evidence is admissible to show that a letter was written in answer to a former one, in order to read the two letters together that they may constitute an acknowledgment to take a debt out of the Statute of Limitations.

M'Guffie *v.* Burleigh, (1898) 78 L. T. 264; 14 [T. L. R. 319—Bruce, J.

15. *Promise to Pay when able—Conditional Promise — Statute of Limitations* (21 Jac. 1, *c.* 16).]—A debtor wrote a letter, of which the following are the material words: "I am sorry I cannot pay off anything of my account at present . . . as soon as I have the money I

Acknowledgment of Debt—*Continued.*

shall forward you a cheque . . . it is my intention to pay when I am in a position to do so, and I shall not try to get out of the debt by its becoming out-dated."

In an action for the debt the debtor pleaded the Statute of Limitations, and the plaintiffs relied on the above letter as an answer to the plea.

HELD—that the letter only amounted to a conditional promise to pay when able, and that the debtor, never having been in a position to pay any substantial sum, must succeed.

Philips v. *Philips* ((1843) 3 Hare, at p. 299, judgment of Wigram, V.-C.) approved and applied.

Decision of Phillimore, J. ((1904) 20 T. L. R. 31) affirmed.

LUSHER *v.* HASSARD, (1905) 20 T. L. R. 563—[C. A.

16. *What Sufficient—Conditional Promise.*]—A. wrote to the manager of a firm to whom he owed money: "I am willing to sell the shares that I hold in the —— Company for £816 4*s.* 6*d.*, and, in the event of my doing so will pay the calls (£314 10*s.*) due on such shares and the balance in settlement of my account with your company, amounting to £500 14*s.* 6*d.*"

HELD—that the letter amounted only to a conditional promise to pay the debt, and that, as the condition had not been performed, the letter formed no answer to the statute.

Decision of Phillimore, J. (52 W. R. 607; 90 L. T. 460; 20 T. L. R. 318) reversed.

BARRETT & SON, LD. *v.* DAVIES, (1904) 21 [T. L. R. 21; 91 L. T. 736—C. A.

III. PART PAYMENT.

17. *Payment of Instalment of Business Debt—Mortgage—Receiver and Manager of Business—Extent of Agency of Limitation Act*, 1623 (21 Jac. 1, *c.* 16), *s.* 3—*Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 24.]—A receiver appointed under the terms of a power in a mortgage deed which extends the powers conferred by the Conveyancing Act, 1881, s. 24, to manage and carry on a business, is authorised to pay business debts of the mortgagor. This authority is not affected by the death of the mortgagor, and payment by the receiver of an instalment of a business debt contracted by the mortgagor operates as an acknowledgment of the whole debt by the executrix of the mortgagor, and prevents time running under the Statute of Limitations.

Decision of Byrne, J. (47 W. R. 174; 79 L. T. 468), affirmed.

IN RE HALE, LILLEY *v.* FOAD, [1899] 2 Ch. [107; 68 L. J. Ch. 517; 47 W. R. 579; 80 L. T. 827; 15 T. L. R. 389—C. A.

18. *Simple contract Debt—Real Estate devised—Tenant for Life and Remaindermen—Part Payment by Tenant for Life—Limitation Act*, 1623 (21 Jac. 1, *c.* 16).]—The part payment by a devisee for life of a simple contract debt of his testator and of interest thereon is sufficient to keep the debt alive, notwithstanding the lapse of time, not only as against the devisees in remainder after the life estate, but also as against devisees of other real estate of the testator.

In re Hollingshead ((1888) 37 Ch. D. 651; 57 L. J. Ch. 400; 36 W. R. 660; 58 L. T. 758—Chitty, J.) followed.

Dibb v. *Walker* ([1893] 2 Ch. 429; 62 L. J. Ch. 536; 41 W. R. 427; 68 L. T. 610—Chitty, J.) applied.

IN RE CHANT, BIRD *v.* GODFREY, [1905] 2 Ch. [225; 74 L. J. Ch. 542; 53 W. R. 526; 93 L. T. 265—Warrington, J.

19. *Solicitor's Bill—Money received on Behalf of Debtor—Placing to Debtor's Account—Items already Statute-barred—Appropriation*—21 Jac. 1, *c.* 16, *s.* 3.]—A solicitor received on behalf of a client, and with his assent retained, a sum of money, which was less than the amount of costs due to the solicitor, the payment being made by a third person, in whose interests the debtor had incurred the liability.

HELD—that this was not a "payment" of the sum on account of the debt from which a promise to pay the balance could be inferred, so as to take the case out of the Statute of Limitations.

A solicitor raised money for a client to pay off outstanding debts, and retained the balance of the loan towards his general bill of costs.

HELD—that the retention did not amount to such a part payment as would imply a promise to pay statute-barred items in his bill of costs.

Semble, where a debtor pays to his creditor a sum of money on account of a debt, some of the items of which are barred by the Statute of Limitations, a promise to pay the items which are not statute-barred can alone be inferred, unless it can be shown that the payment was expressly made on account of the statute-barred items.

IN RE BOSWELL, MERRITT *v.* BOSWELL, [1906] [2 Ch. 359; 75 L. J. Ch. 234; 94 L. T. 243; 22 T. L. R. 247—Kekewich, J.

On appeal: settled [1907] 2 Ch. 331; 75 L. J. Ch. 658—C. A.

IV. JUDGMENT.

20. *Action on Judgment in Foreign Court—Foreign Judgment on Merits for Sum less than English Judgment — Election to take Foreign Judgment in Discharge—Action for Residue in England—Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 8.]—The defendant, formerly an official in the Transvaal for the then South African Republic, was domiciled there, but being temporarily in England, he borrowed money from the plaintiff, contracting to repay the loan with a very heavy bonus, recoverable in England. On his failure to pay he was sued here in the Queen's Bench Division by the plaintiff,

Judgment—*Continued.*

who recovered against him the judgment sued upon in this action, dated June 28th, 1884, for £15,067 9*s.* 11*d.*, including costs. In September, 1886, the plaintiff sought to enforce this judgment against the defendant, who had then returned to the Transvaal, in the Courts of the South African Republic. The Transvaal Court found on the merits that only £7,000 had been actually lent, and gave judgment for that sum and interest at 8 per cent. from the date of the English judgment, making a total of £9,635 4*s.* 6*d.*, which was paid in full by the curators to the plaintiff's agents, and the sequestration and insolvency proceedings which had been taken against the defendant were annulled. The plaintiff in 1890 sought to recover from the defendant the balance due for principal and interest on the English judgment.

HELD—that the Statute of Limitations (the Real Property Limitation Act, 1874) was a bar to the action, as the payment of £9,635 4*s.* 6*d.* was not on account of the English judgment, but was by way of execution of a hostile judgment and "*in invitum*"; and that the plaintiff had elected to take the judgment of the foreign country in discharge of the whole cause of action and could not afterwards sue for the residue of the debt in England.

TAYLOR *v.* HOLLARD, [1902] 1 K. B. 676; 71 [L. J. K. B. 278; 50 W. R. 558; 86 L. T. 228; 18 T. L. R. 287—Jelf, J.

21. *Judgment against Co-debtors—Part levied against One of the Co-debtors—Debt kept alive.*] — Where a judgment was obtained in 1884 against A. and B., and in 1886 part of the judgment debt was levied under an execution against A.:—

HELD—that this was sufficient to keep the debt alive against A. and B. for a further period of twelve years, and that within such period the judgment creditor was entitled to an order for liberty to issue execution against B.

BREW *v.* BREW, [1899] 2 Ir. R. 163—Q. B.

22. *Judgment by Default — Estoppel — Civil Bill Dismiss on Merits—Tithe Rent-charge—Real Property Limitation Acts*, 1833, 1874 (3 & 4 Will. 4, *c.* 27), *s.* 34; (37 & 38 Vict. *c.* 57), *s.* 1.] —In the year 1890 the plaintiff sued certain defendants for a sum of £9 11*s.*, six years' arrears of tithe rent-charge, payable in respect of certain titheable lands situate in the parish of G. and county of T. The defendants entered no appearance, and judgment was marked by default in the year 1891 for the sum claimed with costs, which the defendants subsequently paid. At the date the writ was issued and payment was made, it was now admitted that the defendants had occupied the lands for twelve years without any payment of, or acknowledgment of liability to, tithe rent-charge. In the year 1896 the plaintiffs sued the defendants in the present case (who are to be taken as representing all the estate and interest of the defendants in rent-charge), and the county court judge dismissed the case on the merits.

In the year 1899 the plaintiffs sued the defendants by civil bill for £3 3*s.* 8*d.*, being two years' arrears of tithe rent-charge issuing out of the lands of B. in the parish of G. and county of T. The county court judge dismissed the case on the merits. The plaintiffs appealed to the judge of assize, who stated a case raising two questions—(1) whether the plaintiffs' claim was barred by the Statute of Limitations; (2) whether the dismiss on the merits in 1896 estopped the plaintiffs from recovering in the present action.

HELD (by C. A.)—that the defendants were not estopped by the judgment by default recovered in 1891 from setting up the Statute of Limitations; and that the effect of the Statute of Limitations was to extinguish the right to recover the tithe rent-charge where there had been neither payment nor acknowledgment for twelve years; but that the dismiss on the merits in 1896 would not have estopped the plaintiffs.

A judgment by default may operate by estoppel; but the ground and extent of that estoppel must be found on the face of the judgment itself, and cannot be inferred or deduced from the pleadings of the party who has obtained the judgment, where the defendant has said nothing, and has merely allowed the judgment to go by default.

An unnecessary averment in a record, that is neither pleaded to nor admitted, cannot be used as an estoppel.

IRISH LAND COMMISSION *v.* RYAN, [1900] 2 [Ir. R. 565.

V. FRAUD.

23. *Concealed Fraud of Person setting up Statute—Third Person—Innocent Parties—Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 26—*Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 1.]—On September 3rd, 1884, General McC., the owner in fee of a house at Cheltenham, in which he was residing with his wife and daughter (the plaintiff), executed a deed by which he voluntarily conveyed the house to his wife in fee.

On September 30th, 1884, his wife voluntarily conveyed the house to her daughter (the plaintiff) in fee.

The plaintiff was ignorant of the existence of these deeds, which her mother retained in her possession. In 1886 her mother deposited the two deeds, which she had placed in a closed envelope, with a London solicitor, who was to take charge of the enclosed papers unopened in the events that happened.

The mother died in 1888, having by her will bequeathed all her property to the plaintiff.

The general died on August 28th, 1899, having devised all the residue of his property to the defendant.

The general had continued in possession of the house and dealt with it as his own until his death, and after his death the defendant entered into possession, and the London solicitor delivered the envelope with the deeds in it to the plaintiff, who then for the first time became aware of her title to the house.

Fraud—*Continued.*

The plaintiff on October 19th, 1899, commenced an action, claiming a declaration that she was entitled to the house for an estate in fee simple in possession, and possession thereof. The defendant pleaded the Real Property Limitation Act, 1874. The plaintiff claimed the benefit of sect. 26 of the Real Property Limitation Act, 1833, alleging that the defendant's possession had been acquired by means of a "concealed fraud."

HELD (1) (Vaughan Williams, L.J. doubting) —that however good the motive was which prompted her action there was on the part of the mother a concealed fraud within the meaning of sect. 26 of the Real Property Limitation Act, 1833, and that the general was no party to the fraud; and (2) (Rigby, L.J. dissenting) that if there had been on the part of the mother concealed fraud, then, as in order to prevent the operation of the statute, the fraud contemplated by sect. 26 must be the fraud of or in some way imputable to the person setting up the statute, or of some one through whom he claims, the plaintiff's title was barred by the Statute of Limitations.

Petre v. *Petre* ((1853) 1 Drew. 371—Kindersley, V.-C.) considered.

Decision of Kekewich, J. ((1899) 83 L. T. 718), reversed.

IN RE MCCALLUM, MCCALLUM *v.* MCCALLUM, [1901] 1 Ch. 143; 70 L. J. Ch. 206; 49 W. R. 129; 83 L. T. 717; 17 T. L. R. 112—C. A.

25. *Taking Coal tortiously—Coal Mines—Account—Submission to Arbitration—Defence—Limitation Act*, 1623 (21 Jac. 1, *c.* 16), *s.* 3.]—The mere taking of coal tortiously from another person's mine is not fraud so as to entitle the plaintiff to an account more than six years afterwards; but if the coal be taken intentionally, and steps be taken to prevent the plaintiff from discovering the wrong, this is a fraud which will take away the defendant's right to plead the Statute of Limitations.

Ecclesiastical Commissioners for England v. *North Eastern Rail. Co.* ((1877) 4 Ch. D. 845; 47 L. J. Ch. 20; 36 L. T. 174—V.-C. Malins) not followed.

Parties to a submission to arbitration are not precluded from raising the defence of the Statute of Limitations, unless a provision to that effect is drawn up and embodied in the submission.

IN RE ASTLEY AND TYLDESLEY COAL AND [SALT CO. AND TYLDESLEY COAL CO., (1899) 68 L. J. Q. B. 252; 80 L. T. 116; 15 T. L. R. 154—Div. Ct.

26. *Taking Coal tortiously — Coal Mines — Account—Value of Coal—Limitation Act*, 1623 (21 Jac. 1, *c.* 16), *s.* 3).]—Where a colliery company wilfully and secretly took coal from an adjoining property, and the fact was not brought to light for many years afterwards, and no *laches* could be attributed to the adjoining owner in not discovering the existence of the wrongful workings:—

HELD—that the Limitation Act, 1623, had no application, and that the adjoining owner was entitled to recover from the wrongdoers the value of the coal so wrongfully taken, and, in the case of a winding-up, to prove for that amount. No presumption as to pillars having been either left or worked, or the reverse, should be made. The account must be arrived at by the evidence alone.

Ecclesiastical Commissioners for England v. *North Eastern Rail. Co.* ((1877) 4 Ch. D. 845; 47 L. J. Ch. 20; 36 L. T. 174—V.-C. Malins) not followed.

BULLI COAL MINING CO. *v.* OSBORNE, [1899] [A. C. 351; 68 L. J. P. C. 49; 47 W. R. 545; 80 L. T. 430; 15 T. L. R. 257—P. C.

VI. RECOVERY OF MONEY CHARGED UPON LAND.

27. *Land Tax — Redemption — Yearly Sum payable by way of Interest—"Rent"—Periodical Sum of Money charged on Land—Land Tax Redemption Act*, 1802 (42 Geo. 3, *c.* 116), *s.* 123—*Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *ss.* 1, 8.]—In 1874, P., the lessee, redeemed the land tax on certain property under the powers given by the Land Tax Redemption Act, 1802. A formal assignment of the benefit of the redemption was in 1879 made to the plaintiff. The leases became, in 1885, vested in the defendant, who by mistake paid the land tax to the Commissioners thenceforth until the year 1900. The plaintiff, on receiving the certificate of redemption, put it away with his title-deeds and forgot all about it until the year 1900. He brought an action to recover £9, being an annual payment, by way of interest, for which the tax was redeemed, due January 1st, 1900.

HELD—that the yearly sum of £9 was a "rent" within the meaning of sect. 1 of the Real Property Limitation Act, 1874; that it was also a periodical sum of money charged on the land; and that in either case the claim came within sect. 8 of the Real Property Limitation Act, 1874, and was barred.

Decision of Div. Ct. ([1901] 2 K. B. 7; 70 L. J. K. B. 556; 65 J. P. 533; 84 L. T. 684) affirmed.

SKENE *v.* COOK, [1902] 1 K. B. 682; 71 L. J. [K. B. 446; 50 W. R. 506; 86 L. T. 319; 18 T. L. R. 431—C. A.

28. *Mortgage—Administration Action—Action not continued—Revived subsequently—Arrears of Interest—Real Property Limitation Acts*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 42; *and* 1874 (37 & 38 Vict. *c.* 57), *s.* 8.]—In 1858 A. borrowed money upon security of a charge on lands. He died in 1887, and an administration decree was made in an action brought by B. his executrix against C. his eldest son and next of kin. The lenders made no claim in this action, which by consent was not proceeded with.

Interest on the debt was paid out of the rents of the lands down to 1895 by B., and (after her

Recovery of Money charged upon Land—*Continued.*

death) by C., her executor, who was owner of the charge. The rents now proved insufficient to pay the interest.

HELD—that the administration action should be proceeded with, C. becoming plaintiff as B.'s executor, and the lenders becoming co-defendants; that the debt had been kept alive by payment of interest, but that, by reason of 3 & 4 Will. 4, c. 27, s. 42, only six years' arrears of interest was recoverable.

THOMPSON *v.* HURLEY, [1905] 1 Ir. R. 588—[M. R.

29. *Mortgage—Mortgage on Part of Testator's Property—Such Property specifically devised—Devisee paying Interest for Years—Security at length proving insufficient—Right to still claim on Covenant against rest of Testator's Estate in Hands of other Devisees—Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 8.]—L. had mortgaged part of his property, and devised this part to T. The latter duly paid interest for thirty years, when the property was sold and proved insufficient to pay off the principal.

HELD—that the mortgagee could still proceed against the specific devisees of the other unmortgaged parts of L.'s real estate, and was entitled to an administration order in respect of the whole.

Roddam v. *Morley* ((1857) 1 De G. & J. 1—Lord Cranworth) applied.

Bradshaw v. *Widdrington* ([1902] 2 Ch. 430; 71 L. J. Ch. 627; 86 L. T. 726; 50 W. R. 561—C. A., *see* MORTGAGE, No. 38) discussed.

IN RE LACEY, HOWARD *v.* LIGHTFOOT, [1907] [1 Ch. 330; 76 L. J. Ch. 316; 96 L. T. 306—C. A.

30. *Trustees — Retirement of One Trustee — Payment of Interest by continuing Trustees — Claim after Six Years—Limitation Act*, 1623 (21 Jac. 1, *c.* 16), *s.* 3—*Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. *c.* 97), *s.* 14—*Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 8.]—Sect. 3 of the Limitation Act, 1623, is not repealed by sect. 8 of the Real Property Limitation Act, 1874. The effect of the two Acts read together is, that no action for a simple contract debt, whether chargeable on land or not, shall be brought after six years, and that no action for a specialty debt chargeable on land shall be brought after twelve years.

Sutton v. *Sutton* ((1882) 22 Ch. D. 511; 52 L. J. Ch. 333; 31 W. R. 369; 48 L. T. 95—C. A.) distinguished.

Firth v. *Slingsby* ((1888) 58 L. T. 481—Stirling, J.) approved.

In 1882 the plaintiffs advanced money to the defendants, who were the three trustees of a will, the loan being secured by a transfer to the plaintiffs of mortgage securities belonging to the estate of the defendants' testator, but the defendants entered into no covenant to repay the loan. In 1883 L., one of the defendants, retired from the trusts of the will, and the other two trustees continued to pay interest on the loan until 1896. In 1897 the plaintiffs brought an action against L. and the continuing trustees to recover the loan.

HELD—that the action, being for a simple contract debt, although chargeable upon land, was barred as against L. by sect. 3 of the Limitation Act, 1623, being brought more than six years after the accrual of the plaintiffs' right of action; and that sect. 14 of the Mercantile Law Amendment Act, 1856, prevented the payment of interest by the continuing trustees operating against L.

Decision of Lord Russell, C.J. ([1898] 2 Q. B. 223; 67 L. J. Q. B. 731; 47 W. R. 13; 79 L. T. 94; 14 T. L. R. 441) reversed.

BARNES *v.* GLENTON, [1899] 1 Q. B. 885; 68 [L. J. Q. B. 502; 47 W. R. 435; 80 L. T. 606; 15 T. L. R. 295—C. A.

31. *Trust of Lands for ultimate Sale—Mortgage by Reversioners of their Reversion—Land not yet sold—Period applicable—Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 8.]—Land was devised to trustees in trust for A. for life, and after her death in trust for sale and division. The defendants, the reversioners, who had mortgaged their reversionary interests, were sued for the principal and interest, and they pleaded that the debt was statute-barred, as no interest had been paid for nineteen years. The tenant for life was still alive.

HELD—that the money due under the covenant in the mortgage deed was a sum of money "charged upon or payable out of land" within the meaning of sect. 8 of the Real Property Limitation Act, 1874; and that therefore the action became barred after the expiration of twelve years from the last payment.

Sutton v. *Sutton* ((1882) 22 Ch. D. 511; 52 L. J. Ch. 333; 31 W. R. 369; 48 L. T. 95) followed.

KIRKLAND *v.* PEATFIELD. [1903] 1 K. B. 756; 72 [L. J. K. B. 355; 51 W. R. 544; 88 L. T. 472; 19 T. L. R. 362—Wright, J.

VII. RIGHTS TO REAL PROPERTY.

32. *Chattels Real—Next of Kin remaining in Possession — Joint Tenancy — Tenancy in Common.*]—Some of the next of kin of an intestate remained on in possession of chattels real without taking out administration.

HELD—that they acquired under the Statute of Limitations a joint tenancy in the shares of other next of kin who had remained out of possession for more than twelve years, although, in respect of their own original shares, they held as tenants in common.

SMITH *v.* SAVAGE, [1906] 1 Ir. R. 469—[Barton, J.

33. *Copyholds — Intestacy — Custom of Manor — Will of Customary Heiress — Intention of Heiress to pass Copyholds—Receipt of Rents by*

Rights to Real Property—*Continued.*

Testatrix's Customary Heir for more than Thirty Years—Real Property Limitation Acts, 1833 (3 & 4 Will. 4, *c.* 27), *ss.* 16, 17, 34; *and* 1874 (37 & 38 Vict. *c.* 57), *ss.* 3, 5.]—B. died intestate in 1869 possessed of copyholds which according to the custom of the manor devolved upon his widow as his customary heiress-at-law. The widow died on January 7th, 1870, having by her will given "all and singular the share and proportion of my late husband's estate I take or to which I am entitled on his decease" to be equally divided between her two daughters share and share alike, and she also gave them £500 "in lieu of the various freehold and copyhold lands of my late husband which descend to my son on the intestacy of my late husband." She appointed H., the husband of one of her daughters, her executor. H. collected all the rents of the copyholds from the death of the widow on the son's behalf, admitted him to be entitled, and procured the enfranchisement of the copyholds in the son's favour, and no one supposed that anybody else was entitled. On September 25th, 1900, H. and his wife brought an action claiming an undivided moiety in the copyholds.

Held—that H. and his wife were barred from any claim against the copyholds by sects. 3, 5, of the Real Property Limitation Act, 1874, as more than thirty years had elapsed between the death of the intestate's widow and the commencement of the action.

Semble, that there were upon the face of the will reasons inducing the Court to infer, not only that the testatrix did not intend the copyholds to pass by the gift to her two daughters, but that there was almost enough to show that she intended them not to pass; and that they devolved upon her customary heir, her son.

Hounsell *v.* Dunning, [1902] 1 Ch. 512; 71 [L. J. Ch. 259; 86 L. T. 382—Joyce, J.

34. *Discontinuance of Possession—User of Land—Immunity of a Crown Department from Costs.*]—In 1819 a portion of the Bull of Clontarf, a sandy tract in Dublin Bay, was taken from V.'s predecessor by the Dublin Ballast Board, after an inquisition, and an award was made, containing a map on which the boundary between the land taken and V.'s land was stated. Some years afterwards three wooden posts were put up by an officer of the Board in a line considerably outside the boundary, as shown on the map. As these posts decayed two walls, 21 feet long by 8 feet high, were built on their site. These were the only physical marks of a boundary. V.'s cattle grazed beyond them without interruption. In 1865 a portion of the land between the boundary on the map and the walls, and which had been previously fenced off, was leased by the Board to the Admiralty. In 1876 and 1884 the question as to the correct boundary was raised between the Board and V. In 1884 V. commenced an action against the Board, claiming damages for trespass, and an injunction. This action was never brought to a hearing.

Held—that there had been no discontinuance of possession by V., and that he was entitled to the land between the bounday on the map and the posts, except that portion leased to the Admiralty.

Upon an objection by the Board of Trade claiming the foreshore, which was overruled:—

Held—that as the Board represented the Crown, and the case not falling within 18 & 19 Vict. c. 90, costs could not be given against them.

In re Dublin, Wicklow and Wexford Ry. Co., Ex parte Jordan ((1892) 31 L. R. Ir. 1), not followed.

In re Vernon's Estate, [1901] 1 Ir. R. 1—[Ross, J.

35. *Dispossession—Acts of Ownership—Exclusion of Rightful Owner—Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *ss.* 2, 3.]—The maintenance of piles to support a landing stage is not sufficient evidence of exclusive possession to oust an owner's title to the foreshore after only twelve years, at least if the position of such piles has been varied.

Duke of Beaufort *v.* John Aird & Co., (1904) [20 T. L. R. 602—Warrington, J.

36. *Dispossession—Acts of Ownership—Exclusion of Rightful Owner—Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *ss.* 2, 3.]—In order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to enjoy it.

Leigh v. *Jack* ((1881) 5 Ex. Div. 264; 49 L. J. Ex. 220; 44 J. P. 488; 28 W. R. 452; 42 L. T. 463—C. A.) and *Littledale* v. *Liverpool College* ([1900] 1 Ch. 19; 69 L. J. Ch. 87; 48 W. R. 177; 81 L. T. 564—C. A., No. 38, *infra*) followed and applied.

The defendant, an owner of sea-side property, had placed, replaced and maintained on the foreshore in front of it boulders and piles for the purpose of protecting his property.

Held—that such acts, though lasting over a period of thirty years, were not sufficient to enable him to defeat the title of the plaintiff to the foreshore which had been granted to him many years ago by the Crown.

The piles, &c., were only placed there by the defendant as ancillary to the use of his own property in order to protect it; and though he had acquired an easement, or right to continue doing so, he had done nothing intended to dispossess the plaintiff.

Decision of Warrington, J. (20 T. L. R. 589) affirmed.

Philpot *v.* Bath, (1905) 21 T. L. R. 634—C. A.

37. *Dispossession—Disability—Claim of Infant barred—Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57).]—Where the adverse possession of a trespasser commences as against an owner who is under no disability and is continued as against a subsequent owner who is an infant, the infancy of the subsequent owner does not arrest the operation of the statute, even if the

Rights to Real Property—*Continued.*

legal estate be in trustees; but the trespasser's title becomes absolute at the same date as it would have done had the ownership of the original owner continued.

Murray v. *Watkins* ((1890) 62 L. T. 796—Chitty, J.) followed.

GARNER *v.* WINGROVE, [1905] 2 Ch. 233; 74 [L. J. Ch. 545; 53 W. R. 588; 93 L. T. 131—Buckley, J.

38. *Dispossession of Right of Way—Intention—Occupation with Intention of excluding Owner as well as Others—Inference from Equivocal Acts—Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 3.]—In order to acquire a title to land, which has a known owner, by the Statute of Limitations that owner must have lost his right to the land by being dispossessed of it or by having discontinued his possession of it.

Such owner cannot be dispossessed unless the plaintiff, who claims under the statute, obtained possession himself, which involves an *animus possidendi—i.e.*, occupation with the intention of excluding the owner as well as other people. When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important.

Many years ago the plaintiff placed gates at the ends of a strip of land belonging to the defendants, over which the plaintiff had a right of way only; he kept those gates locked, and did various equivocal acts on the strip of land in question, which was bounded on either side by defendants' land.

HELD (Jenne, P. doubting), in the circumstances of the case and upon the evidence, that the plaintiff had failed to prove the acquisition of a title to the strip of land in dispute, and that the defendants had not been dispossessed for the statutory period.

Decision of Bigham, J. affirmed.

LITTLEDALE *v.* LIVERPOOL COLLEGE, [1900] [1 Ch. 19; 69 L. J. Ch. 87; 48 W. R. 177; 81 L. T. 564; 16 T. L. R. 44—C. A.

39. *Landlord and Tenant—Lease—Trespasser—Title against Lessee—Surrender of Lease by Lessee—Expiration of Lease—Landlord's Right of Re-entry—"Particular Estate"—"Future Estate or Interest"—Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 34—*Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 2.]—A lord of a manor demised premises to certain lessees for ninety-nine years from 1837 if "three named persons" should so long live.

In 1867 these premises were granted in fee to the defendant by one W. The defendant remained in possession up to 1902, the date of the action, without having paid any rent.

In 1884 the then lord of the manor conveyed the freehold of the manor to the plaintiff's father and predecessor in title.

In 1885 the sole surviving executor of the survivor of the lessees, so far as he could or lawfully might, but not further or otherwise, surrendered all the premises demised by the lease of 1837 to the plaintiff's father and predecessor in title.

In 1894 the plaintiff's father and predecessor in title died.

On January 2nd, 1895, the last of the three lives for which the lease of 1837 had been granted dropped.

On January 25th, 1902, the plaintiff brought an action to recover from the defendant possession of the premises.

HELD—that the Court would assume in favour of the defendant that the plaintiff's predecessor in title acquired the freehold in the premises in 1884; that by virtue of the provisions of sect. 2 of the Real Property Limitation Act, 1874, the term of years was not a "particular estate," nor the estate taken by the reversioner a "future estate or interest" under that section, and the time could not be limited to six years from the expiration of the leasehold term; that though the defendant had by twenty years' possession acquired the right to the possession of the property as against the lessees, the lessees could not by assignment or underlease deprive him of that right; that the surrender in 1885 could not operate against the persons against whom the defendant was entitled to claim possession; and that the right of the landlord to resume possession did not arise until the lease had expired, viz., 1895, when the last life dropped.

WALTER *v.* YALDEN, [1902] 2 K. B. 304; 71 [L. J. K. B. 693; 51 W. R. 46; 87 L. T. 97; 18 T. L. R. 668—Div. Ct.

40. *Landlord and Tenant—Leases—Settlement by Lessee—User by* cestui que trust *of Adjoining Land—Accretion to Demised Property—Person claiming through Trustees—Accrual of Lessor's Right of Entry—Real Property Limitation Act* 1833 (3 & 4 Will. 4, *c.* 27), *ss.* 7, 25.]—In 1819 a renewable lease of a foundry plot was granted to J. M. for ninety-nine years or three lives.

In 1831, a renewable lease by the same lessor of a stable plot adjoining the foundry was granted to the same lessee for ninety-nine years or three lives.

In 1842, J. M. assigned the foundry plot, stable plot and certain other premises to trustees to hold the foundry on one set of trusts and the residue of the property upon another set of trusts.

In 1848, J. M. died.

In 1856, new separate leases of the foundry plot and of the stable plot for ninety-nine years or three lives were granted to the trustees of the settlement.

Subsequently a Mrs. T. acquired the beneficial interests in the foundry from the other *cestui que trust*. No assignment to her was ever executed by the trustees.

On July 24th, 1890, the lease of the foundry plot was surrendered, and a new lease thereof granted by the then lessor to the *cestui que trust*, Mrs. T., who subsequently sold the lease to the defendants.

In 1894 the trustees obtained a renewal lease of the stable plot, which was in 1896 assigned to S.

In 1898, S. obtained a renewed lease of the stable plot, which lease was in 1901 sold by him to the plaintiffs.

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In all the several leases the dimensions and plans were respectively the same.

The plaintiffs on July 18th, 1901, brought an action to recover from the defendants a smith's shop and strip of land, portions of the stable plot which had been continuously occupied by the *cestui que trust* of the foundry plot and subsequently by the defendants since the death of J. M. in 1848, without any payment of rent or any acknowledgment. Each lease was renewed without any notice having been taken of the fact that the occupation did not correspond with the parcels described as demised.

HELD—that the occupation by the *cestui que trust* and the defendants could not be said to have been a trespass, but must have been by the permission in fact of the trustees, though that permission was probably given in the mistaken belief that the occupation was in accordance with the trust, though in fact it was not; that the disputed parcels were held under the trust and devolved according to the trust and were an accretion to the demised property; that the statute did not begin to run against the lessor in 1856; that Mrs. T. must be considered as a person claiming through the trustees within the meaning of sect. 25 of the Real Property Limitation Act, 1833; that the lessor's right of entry first accrued on the surrender of the stable plot in 1894, and that his leases of 1894 and 1898 were good leases; that even if the lessor's right of entry accrued in 1856 the effect of the statute running was to add the disputed pieces to the foundry lease; that in either view the Statute of Limitations did not bar the action by the plaintiffs unless the third life dropped before July 18th, 1889, or twelve years before the commencement of the action; and that there must be judgment for the plaintiffs for possession.

EAST STONEHOUSE URBAN DISTRICT COUNCIL *v.* WILLOUGHBY BROTHERS, LD., [1902] 2 K. B. 318; 71 L. J. K. B. 873; 50 W. R. 698; 87 L. T. 366—Channell, J.

41. *Leaseholds—Covenants in Lease—Whether Binding—Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 34.]—The effect of the Statutes of Limitations upon the position of a stranger (not an assignee) in possession of leaseholds is not to transfer to him the lessee's interest in the lease and to make him bound by the covenants, but merely to give him the right of possession during the remainder of the lease as against the lessee or persons claiming under him.

Tichborne v. *Weir* ((1892) 67 L. T. 735—C. A.) followed.

O'CONNOR *v.* FOLEY, [1905] 1 Ir. R. 1—M. R.

42. *Legal Estate in Trustee for private Partnership—Business turned into Limited Company—Legal Estate left outstanding—Companies Act*, 1862 (25 & 26 Vict. *c.* 89), *s.* 193—*Real Property Limitation Acts*, 1833 (3 & 4 Will. 4, *c.* 27) *and* 1874 (37 & 38 Vict. *c.* 57).]—In 1887 C. conveyed to himself and seven partners certain real estate to hold the same unto and to the use of the grantees as part of the partnership assets. Shortly afterwards the partnership was turned into a limited company, but there was no conveyance of the legal estate in the property in question from the eight grantees. In 1891 the company conveyed this property to a new company, which in 1902 agreed to sell it to L. Upon a vendor and purchaser summons:—

HELD—that the legal estate did not pass to the first company upon its incorporation under sect. 193 of the Companies Act, 1862; and was outstanding in the surviving grantees as trustees for the company; but that, as the latter were bare trustees and had not interfered for twelve years, their title was barred, and the company alone could convey the fee.

IN RE CUSSONS, LD., (1904) 73 L. J. K. B. 296; [11 Mans. 192—Kekewich, J.

43. *Yearly Tenancy—Possession—Tenant and Next of Kin—Personal Representative—Trespassers—Joint Tenancy.*]—Where some of the next of kin of a yearly tenant who died intestate continued in possession of his holding for a period sufficient to confer title under the Statute of Limitations:—

HELD—that they had thereby acquired a beneficial title under the statute; and that the character of the title was a joint tenancy.

COYLE *v.* M'FADDEN, [1901] 1 Ir. R. 298—Ross, J.

VIII. MORTGAGOR AND MORTGAGEE.

And see title MORTGAGES.

44. "*Acknowledgment of the Right*" *to the Mortgage Money—Statutory Declaration by Mortgagor—Further Charge—*"*Present Right to receive*"*—Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 8.]—A mortgage of land was executed in 1875 to secure an advance, and in 1879 a deed of further charge on the land was executed as security for a further advance. The latter deed recited the mortgage of 1875, and that the date fixed for redemption had passed, and contained a covenant by the mortgagor that he would, upon receipt of notice as mentioned in the mortgage of 1875, pay to the mortgagee the money advanced with interest, and it declared that the power of sale and other powers contained in the earlier deed should extend to and be a security for the further advance and interest thereon. No interest was ever paid on these mortgages. In 1899 the mortgagee became of unsound mind, and his next of kin petitioned for an inquiry in lunacy, and issued a summons for directions. Upon that summons the mortgagor made a statutory declaration as to the mortgage debts. The mortgagee having died, his executors sued the mortgagor to enforce the mortgages.

HELD—that the statutory declaration was not an "acknowledgment of the right" to the money within sect. 8 of the Real Property Limitation Act, 1874, it being equally consistent with the intention to show that the debt was statute-barred, nor was it given "to the person entitled thereto or his agent"; that, even if it was an acknowledgment, it was not effectual to take the case out of the statute, because at the time it

Mortgagor and Mortgagee—*Continued.*

was made both the remedy against the land and the personal remedy on the covenant were gone; and that, as regards the deed of further charge, there existed when it was executed, a "present right to receive" the mortgage money within the meaning of sect. 8; and that therefore the action was statute barred.

HERVEY *v.* WYNN, (1905) 22 T. L. R. 93—[Eady, J.

45. *Arrears of Mortgage Interest—Statute of Limitations—Proceeds of Mortgaged Realty and Personalty in Court—Application by Mortgagor for Payment out of Balance—Obligation to Account for all Arrears of Interest—Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 42.]—A mortgagee, to whom statute-barred arrears of interest are owing, is in a better position with regard to such arrears, when he is simply resisting proceedings taken by his mortgagor, than when he himself institutes proceedings. In the former case, so long as his right remains, he may enforce it by any lien or right of retainer available to him.

A reversionary interest in realty and personalty under a will was mortgaged to A.: there was an administration action, in which the testator's estate was realised, and the proceeds paid into Court; and subsequently, upon the death of the life tenant under the will, the mortgagor's representative applied for payment out of the mortgagor's share of the money in Court less the amount of the mortgage debt and six years' interest thereon. No interest had ever been paid; but it was contended that sect. 42 of the Real Property Limitation Act, 1833, entitled the mortgagor's representative to allow only six years' arrears.

HELD—that, as the mortgagees were not seeking to recover arrears of interest by "distress, action or suit," sect. 42 did not apply, and that the mortgagor's representative must allow them all arrears.

Semble, even if the mortgagees, whose title to the fund had long since become absolute, had applied for payment out of Court, they would still have been allowed all arrears.

Edmunds v. *Waugh* ((1866) L. R. 1 Eq. 421; 35 L. J. Ch. 231; 14 W. R. 257; 13 L. T. 739—Kindersley, V.-C.) approved and followed.

In re Slater's Trusts ((1879) 11 C. D. 227; 48 L. J. Ch. 473; 27 W. R. 448; 44 L. T. 184—Bacon, V.-C.) overruled.

In re Stead's Mortgaged Estates ((1876) 2 C. D. 713; 45 L. J. Ch. 634; 24 W. R. 698; 35 L. T. 465—Malins, V.-C.) queried.

IN RE LLOYD, LLOYD *v.* LLOYD, [1903] 1 Ch. [385; 72 L. J. Ch. 78; 51 W. R. 177; 87 L. T. 541; 19 T. L. R. 101—C. A.

46. *Judgment Mortgage—Statute runs from Date of Judgment and not from Date of Registration—Judgment Mortgage (Ireland) Act*, 1850 (13 & 14 Vict. *c.* 29), *s.* 7—*Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 7.]—Where a judgment creditor registers a judgment as a judgment mortgage against the lands of a judgment debtor:—

HELD (reversing the decision of the Vice-Chancellor)—that the Statute of Limitations commences to run from the date of the judgment, and not from the date of the registration of the judgment mortgage.

JOHNSON *v.* LOWRY, [1900] 1 Ir. R. 316—C. A.

47. *Mortgage to Building Society—Building Society Rules—Right to Redeem at any Time—Proviso for Possession on Default—Acknowledgment of Mortgagor's Title — Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 7.]—A mortgage by a member of a building society to the building society, provided that, if the mortgagor paid all the instalments according to the rules of the society, the society would "at any time thereafter, upon the request of the mortgagor," indorse the mortgage deed with a receipt, and that it should thereupon be vacated. It also provided that, upon default in payment of any of the instalments, the balance of the advance unpaid should immediately become due, and that the society might thereupon enter into possession. The mortgagor being in default, the society entered into possession, and received the rents for a period of over twelve years. Within the period of twelve years, before action brought, the mortgage and the amount outstanding had been included, under the heading of mortgages in balance-sheets of the society signed by the auditors, and delivered to the committee.

HELD—that the title of the mortgagor was barred under sect. 7 of the Real Property Limitation Act, 1874, and that the committee were not the mortgagor's agents to receive acknowledgments of his title contained in the balance-sheets.

WILSON *v.* WALTON AND KIRKDALE PER-[MANENT BUILDING SOCIETY, (1903) 19 T. L. R. 408—Walton, J.

48. *Notional Payment — Owner of Part of Mortgaged Lands entitled to the Interest on Mortgage Debt — Presumption of Payment.*]—Where lands are mortgaged and the owner of a share of such lands is entitled to the interest on the mortgage debt, a notional payment of interest presumed to have been made by him to himself is not sufficient to prevent the Statute of Limitations from running in favour of a third party, owner of the other share in the lands.

IN RE FINNEGAN'S ESTATE, [1906] 1 Ir. R. 370—[Ross, J.

49. *Possession adverse to Mortgagor—Entry by Mortgagee within Twelve Years after Last Payment of Interest—Real Property Limitation Act*, 1837 (7 Will. 4 & 1 Vict. *c.* 28).]—In 1876 the father of the plaintiff and defendant mortgaged by subdemise a lease, which was to expire in 1922, to secure certain sums of money advanced to him. In 1882 he mortgaged by assignment the lease subject to the first mortgage. In 1885 the mortgagor died, having bequeathed the lease to trustees to secure an annuity to his wife, and after her death to his

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daughter, the plaintiff, and subject thereto in trust for the defendant. After the testator's death the widow resided in the house with the daughter until July, 1899, and the daughter until December, 1899. In December, 1888, the defendant obtained to himself a transfer of the second mortgage, and in January, 1893, he obtained a transfer of the first mortgage. In 1894 the defendant purchased and had conveyed to him the reversion, subject to the lease, in the leasehold premises. In December, 1899, the defendant took possession, and excluded the plaintiff, who thereupon brought an action to recover possession of the house and premises. It was admitted that, up to the dates of the transfers of the mortgages to the defendant, interest on the mortgages respectively had been duly paid by the mortgagor and his assigns within the meaning of the Real Property Limitation Act, 1837, so that twelve years had not elapsed since the last payment of interest when the defendant took possession. The plaintiff claimed to have acquired a good title under the Real Property Limitation Act, 1837.

HELD—that the mortgages were still in existence, and had not been merged or extinguished; that even if the defendant did not originally intend to take possession as mortgagee, it was open to him to justify the taking of possession in his capacity of mortgagee as against the plaintiff; and that there were no circumstances existing which prevented the defendant from claiming the benefit of the Real Property Limitation Act, 1837, as against the plaintiff, even if the plaintiff had acquired a good title as against the mortgagor and those claiming under the mortgagor.

LUDBROOK *v.* LUDBROOK, [1901] 2 K. B. 96; [70 L. J. K. B. 552; 49 W. R. 465; 84 L. T. 485; 17 T. L. R. 397—C. A.

50. *Realty and Personalty—Indivisible Security—Right to redeem Realty barred—Right to redeem Personalty also barred—Real Property Limitation Act,* 1833 (3 & 4 Will. 4, *c.* 27), *s.* 40—*Real Property Limitation Act,* 1874 (37 & 38 Vict. *c.* 57), *s.* 7.]—Where by a mortgage deed realty and a policy of insurance were conveyed and assigned respectively to the mortgagee as one indivisible security for the mortgage debt, and subject to one and the same proviso for redemption, then, when the mortgagor's right to redeem the realty has been barred by the Statute of Limitations, his right to redeem the policy has also gone, because the security being one and indivisible, he cannot redeem part without redeeming the whole.

The Statutes of Limitations which refer to legal interests in realty, although applicable by analogy to equitable interests in realty cannot be applied by analogy to property of an entirely different nature—viz., to personalty.

CHARTER *v.* WATSON, [1899] 1 Ch. 175; 68 [L. J. Ch. 1; 47 W. R. 250; 79 L. T. 440—Kekewich, J.

51. *Second Mortgagee—Future Estate or Interest — First Mortgagee taking Possession — Whether Period of Limitation suspended—Real Property Limitation Acts,* 1833 (3 & 4 Will. 4, *c.* 27), *s.* 3; *and* 1874 (37 & 38 Vict. *c.* 57), *ss.* 1, 2.] —In the case of a second mortgage of real property, the existence of the prior mortgage does not make the mortgagor's interest a "future estate or interest" for the purpose of determining when the period of limitation begins to run against the second mortgagee. The fact that the first mortgagee enters into possession while the period is running does not suspend its running.

Dictum of Romer, J. in *Kibble* v. *Fairthorne* ([1895] 1 Ch. 219; 64 L. J. Ch. 184) not followed.

SAMUEL JOHNSON & SONS *v.* BROCK, [1907] [2 Ch. 533; 76 L. J. Ch. 602; 97 L. T. 294—Parker, J.

52. *Settlement of Mortgaged Property—Payment of Interest by Trustees—Right of Mortgagee to sue Mortgagor.*]—The defendant conveyed to the trustees of his daughter's marriage settlement property which he had mortgaged to the plaintiff. The trustees paid the interest. On the plaintiff suing for the principal and interest, the defendant contended that as he had not paid any interest for upwards of twelve years the action was statute-barred.

HELD—that the payments made by the trustees were sufficient to take the case out of the statute.

ALSTON *v.* MINEARD, [1907] 51 Sol. Jo. 132—[Darling, J.

IX. ACTIONS AGAINST EXECUTORS.

And see title EXECUTORS, 201.

53. *Action to Recover Legacy—From what Date Statute runs.*]—In an action to recover a legacy the period of limitation is twelve years from the death of the testator, not from the expiration of one year after his death.

WADDELL *v.* HARSHAW, [1905] 1 Ir. R. 416—[C. A.

54. *Action to Recover Legacy—Express Trust—Share of Testator's Estate—Duty of Executor to give Notice of Legacy—Real Property Limitation Act,* 1874 (37 & 38 Vict. *c.* 57), *s.* 8.]—M., who died in 1856, appointed his wife executrix, and left all his property to her and his two infant children. During the infancy of one child, the present plaintiff, she married again, and lent all the testator's estate to her second husband on insufficient security. She died in 1885, leaving all her property away from the plaintiff, who now made a claim against it in respect of her rights under her father's will.

HELD—that the action was one to recover a legacy, that the mother was not an express trustee, and that the claim was statute-barred.

Quære, whether, when the plaintiff came of age, her mother was under any legal obligation to inform her of her rights under the will.

IN RE MACKAY, MACKAY *v.* GOULD, [1906] [1 Ch. 25; 75 L. J. Ch. 47; 54 W. R. 88; 93 L. T. 694—Kekewich, J.

Actions against Executors—*Continued.*

55. Devastavit — *Action on a Guarantee — Executor honestly paying away Estate—Statute of Limitations* (21 Jac. 1, *c.* 16).]—An executor against whom an action of *devastavit* is brought can plead the Statute of Limitations.

A testator guaranteed to the plaintiffs the payment by his son of the premiums on a life policy which had been deposited with them as security for an advance. The testator died in 1897, having appointed the defendant and one of his sons, who was also the residuary legatee, his executors. After the executors had paid all debts and legacies, the defendant in 1898 joined in paying over the residue to the residuary legatee. The residuary legatee paid the premiums on the policy until 1903, when he got into financial difficulties and ceased paying them. In 1905 the plaintiff sued the defendant on a *devastavit* to recover the premiums due under the guarantee, and obtained a judgment *de bonis propriis*.

HELD—that the action was barred by the Statute of Limitations, more than six years having elapsed between the paying away of the assets and the bringing of the action, and that the defendant could not be held personally responsible.

LACONS AND OTHERS *v.* WARMOLL, [1907] [2 K. B. 350; 76 L. J. K. B. 914; 97 L. T. 379; 23 T. L. R. 495—C. A.

56. *Equitable Mortgage — Foreclosure — Arrears of Interest—Acknowledgment by One Executor and Devisee in Trust—Whether binding on Real Estate—Statute of Limitations* (3 & 4 Will. 4, *c.* 27), *s.* 42.]—M. S., deceased, deposited deeds with the plaintiff to secure the repayment of £50 and interest. She died in 1887, having by her will appointed the defendants executors and devisees in trust of the real estate.

In 1897 one of the defendants executed a document by which he acknowledged the deposit, and that the whole debt and interest to date were due and owing.

On a summons for foreclosure the other defendant claimed the benefit of the Statute of Limitations.

HELD—that, although one executor might possibly be able to bind his testator's personalty without the consent of his co-executor, no such right existed in the case of trustees, and therefore that the acknowledgment could not be regarded as a valid act on the part of the trustees with reference to the real estate. That, having regard to *Bolding* v. *Lane* (1 De G. J. & S. 122), an acknowledgment by an executor was not effectual to keep alive a debt against a devisee of the real estate, and that consequently only six years' arrears of interest were recoverable.

ASTBURY *v.* ASTBURY, [1898] 2 Ch. 111; 67 [L. J. Ch. 111; 67 L. J. Ch. 471; 78 L. T. 494; 46 W. R. 536—Stirling, J.

57. *Money charged on all Testator's Estate—Contribution between Specifically Devised and Residuary Real Estate—Presumption of Payment of Interest—Tenant for Life of Specifically Devised Estate also entitled to Income from Proceeds of Sale of Residue — Locke King's Act* (17 & 18 Vict. *c.* 113)—*Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 8.]—A. by will, dated in 1845, before Locke King's Act, devised all his real estate upon trust for sale, with power to postpone, and to pay his debts and invest the residue and pay the income to his wife for life, and after her death for all his children in equal shares.

By a codicil, dated January 30th, 1855, after the commencement of Locke King's Act, but before the amending Acts, A. specifically devised a part of his real estate to his wife for life with remainder to his two sons. He died in 1855, leaving sons and daughters. His only real estate was at the date of his will and of his death in reversion. It was subject to certain charges created by A., and to £3,000 charged thereon by a previous owner, under whose will A. took his reversionary interest. This interest fell into possession in 1864, and in 1865 the trustees of A.'s will sold a part of his residuary real estate, and out of the proceeds paid all the charges above mentioned. A.'s widow lived until 1895, and during that time received the rents of the specifically devised real estate, no claim for contribution to the charges having been made. After her death the trustees of A.'s will took out a summons for the determination of the question whether the specifically devised real estate ought to have contributed to the payment of the charges, and whether the right of the persons interested in the residuary estate to such contribution was barred by the Statute of Limitations.

HELD—(1) that the direction to pay debts contained in the will (which was confirmed by the codicil, and so brought under the operation of the original Locke King's Act) expressed a "contrary intention" within the meaning of that Act, and the testator's mortgage debts were charged on his residuary estate; but as to the £3,000, which was not the testator's debt, the specifically devised estates ought to have contributed; but (2) that the widow, as tenant for life of the specifically devised estate, was under no obligation to pay the interest on any part of the £3,000, and therefore there could be no presumption of payment of interest, and the right to contribution was barred by the statute.

RE ALLEN, BASSETT *v.* ALLEN, [1898] 2 Ch. [499; 67 L. J. Ch. 614; 79 L. T. 107; 47 W. R. 55—North, J.

58. *Personal Estate of Intestate — "Present Right to Receive the same"—Right to Recover by Action at Law—Executor unable to Sue Co-executor at Law—Law of Property Amendment Act*, 1860 (23 & 24 Vict. *c.* 38), *s.* 13.]—A person "capable of giving a discharge" has not "a present right to receive" money within the meaning of sect. 13 of the Law of Property Amendment Act, 1860, unless he is in a position to recover it by an action at law as distinguished from a suit in equity.

Actions against Executors—*Continued.*

Binns v. *Nicholls* ((1866) L. R. 2 Eq. 256; 35 L. J. Ch. 635; 14 W. R. 727) followed.

As, therefore, one executor cannot at law sue his co-executor to recover money received on behalf of their testator's estate, he is not a person with a present right to receive it, and the statute does not run.

In re Pardoe, McLaughlin *v.* Penny, [1906] [1 Ch. 265; 75 L. J. Ch. 161; 54 W. R. 210; 94 L. T. 88—Kekewich, J.

On appeal: reversed on a question of fact, [1906] 2 Ch. 340; 75 L. J. Ch. 748; 95 L. T. 512—C. A.

X. **TRUSTEES.**

59. *Principal and Agent—Money Remitted to Agent for Special Purpose— Express Trust— Action for Account.*]—Where money is remitted to an agent for investment in a specified manner, he is an express trustee thereof, and cannot plead the Statute of Limitations to a claim for an account.

In 1883 the plaintiffs instructed the defendant, their agent in America, to buy lands, and remitted him money for the purpose. In 1901 they discovered that he had resold the lands to them at a higher price than he had paid; and they thereupon brought an action claiming an account, and payment of the balance.

Held—that the action was not statute-barred.

Bardick v. *Garrick* ((1870) L. R. 5 Ch. 233; 39 L. J. Ch. 369; 18 W. R. 387) and *Soar* v. *Ashwell* ([1893] 2 Q. B. 390; 42 W. R. 165; 69 L. T. 585—C. A.) followed.

Watson v. *Woodman* ((1875) L. R. 20 Eq. 721; 45 L. J. Ch. 57; 24 W. R. 47) and *Friend* v. *Young* ([1897] 2 Ch. 421; 66 L. J. Ch. 737; 46 W. R. 139; 77 L. T. 50—Stirling, J.) distinguished.

North American Land and Timber Co., Ld. [*v.* Watkins, [1904] 1 Ch. 242; 73 L. J. Ch. 117; 52 W. R. 360; 89 L. T. 602; 20 T. L. R. 81—Kekewich, J.

Affirmed on other grounds, [1904] 2 Ch. 233; 73 L. J. Ch. 626; 91 L. T. 425; 20 T. L. R. 642—C. A.

60. *Trust Money—Receipt of Trust Fund—Knowledge — Husband and Wife — Breach of Trust — Statute of Limitations — Accounting Party—Interest.*]—The wife of O. was entitled under the will of her mother M. to a life interest for her separate use in a certain business and trade assets, with remainder on her death (in the events which happened) to the persons who would be beneficially entitled to her personal estate if she had died intestate and unmarried. The business and trade assets were vested in trustees under the will of M., and with their consent O. carried on the business as manager for his wife. The wife died in 1890. From 1890 till his death in 1899 O. remained in possession and dealt with the business and trade assets as if they were his own. He had full notice and knowledge of the trusts of the will of M. By his own will he left a legacy and a share of the residue of his estate to each of the persons who would have been sole next-of-kin of his wife, if she had died unmarried and intestate, coupled with a condition that each of them should execute a release of all claims he or she might have against the assets of M. under the provisions of her will.

Held—that O., having retained possession of the business and trade assets after his wife's death, with full knowledge of the trust attaching thereto, and having dealt with the property as if it were his own his estate was liable to the estate of M. without regard to lapse of time or the Statute of Limitations.

Held, also, that in the exercise of the discretion of the Court, and in the circumstances, 4 per cent. per annum should be allowed as the rate of interest chargeable against O.'s estate from his wife's death till his own death in respect of the amount invested in or represented by the furniture on the business premises and the stock-in-trade and debts due to the business.

M'Ardle *v.* Gaughran, [1903] 1 Ir. R. 106—[M. R.

LIMITATION OF LIABILITY.

See Admiralty, 10, 11, 12.

LIQUIDATED DAMAGE.

See Damages.

LIQUIDATION.

See Companies.

LIS PENDENS.

See Sale of Land.

LITERARY PROPERTY.

See Copyright and Literary Property.

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LIVERPOOL COURT OF PASSAGE.

See COURTS.

LIVERY STABLE KEEPERS.

See BAILMENT; NEGLIGENCE.

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LOCAL GOVERNMENT.

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I. IN GENERAL.

(a) Accounts and Audit.

1. *Elective Auditor of Borough—Remuneration—Duty—Report—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 246—*Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *s.* 25.]—The plaintiff claimed against the defendant corporation (1) for what he said was his proper remuneration in regard to work which he did in his character of elective auditor of the corporation, and (2) remuneration as auditor of the urban sanitary authority.

HELD—that the plaintiff had no claim at all against the corporation in respect of his services as elective auditor; that he was entitled to remuneration at the rate of not less than two guineas a day in respect of the days properly occupied in the work; that an elective auditor is entitled, justified, and bound by fair and reasonable examination of the vouchers to see that there are not amongst the payments so made payments which are not authorised by the duty of the authority, or contrary to the duty of the authority, or in any other way illegal or improper. If he discovers that any such improper or illegal payments appear to have been made, his duty will be to make it public by report to the authority itself, and the burgesses who create that authority.

THOMAS *v.* DEVONPORT CORPORATION. [1900] [1 Q. B. 16; 69 L. J. Q. B. 51; 48 W. R. 89; 81 L. T. 427; 16 T. L. R. 9—C. A.

2. *District Council—Bill in Parliament—Opposition—Costs and Expenses—Application of Rates—Consent of Ratepayers—Municipal Corporations (Borough Funds) Act*, 1872 (35 & 36 Vict. *c.* 91), *ss.* 2, 4, 8, 10—*Local Authorities (Expenses) Act*, 1887 (50 & 51 Vict. *c.* 72), *s.* 3.]—Motion for an injunction by the Attorney-General on the relation of the Rickmansworth Gas Light and Coke Company to restrain the defendants from applying any part of the general district fund or rate in payment of the costs or expenses incurred in opposing a Bill in Parliament.

HELD—that the council were not entitled to throw the expenses of opposing the Bill on the rates, without first obtaining the consent of the ratepayers.

ATTORNEY-GENERAL *v.* RICKMANSWORTH [URBAN DISTRICT COUNCIL, (1902) 66 J. P. 410; 86 L. T. 521; 18 T. L. R. 481—Kekewich, J.

3. *Expenses—Repairs of Omnibus to take Members about District when performing ordinary Duties—Disallowance of.*]—The Court affirmed the disallowance of the district auditor of expenses of the repairs of an omnibus which had been purchased by the urban district council of East Ham for the purpose of conveying the members of the council about the district when performing their ordinary duties as members. The district was a large and growing one, and members had frequently to go from one part of it to the other.

REX *v.* DOLBY, EX PARTE NORTHFIELD AND [OTHERS. (1902) 66 J. P. 521; 87 L. T. 27; 18 T. L. R. 434—Div. Ct.

4. *Audit—Disallowance and Surcharge—Appeal to Local Government Board—Determination of Appeal—Limit of Time for enforcing*

Accounts and Audit—*Continued.*

Certificate—Public Health Act, 1875 (38 & 39 Vict. *c.* 55), *s.* 247—*Poor Law Amendment Act*, 1849 (12 & 13 Vict. *c.* 103), *s.* 9.]—The determination, within the meaning of sect. 9 of the Poor Law Amendment Act, 1849, of an appeal to the Local Government Board from a disallowance and surcharge by a district auditor, means the final determination, and the Board may, with the consent of all parties, reconsider their determination, and the time for enforcing the auditor's certificate runs from the determination upon the reconsideration.

BROOKS *v.* DOLBY; SAVAGE *v.* DOLBY; TOMLINSON *v.* DOLBY, (1902) 66 J. P. 532—Div. Ct.

5. *Accounts of Urban District Council — Inspection of Accounts before Audit—"Persons Interested"—Bankrupt — Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 247 (4).]—The appellant was a member of the urban district council of Fleetwood, and chairman of the finance committee of that authority till April, 1901, when he became disqualified for membership of the council through being adjudicated bankrupt. He was not a ratepayer or property owner within the area of the urban authority; but, while chairman, he had signed cheques, and so was liable to be surcharged. In due course a copy of the accounts for the year 1901, together with all the documents mentioned or referred to in such accounts, was deposited in the office of the council for the inspection of all "persons interested" before the audit in compliance with sect. 247 of the Public Health Act.

HELD, notwithstanding his bankruptcy, that the appellant was a "person interested" within the meaning of the section, and entitled to inspect the accounts.

MARGINSON *v.* TILDSLEY, (1903) 67 J. P. 226; [1 L. G. R. 333—Div. Ct.

6. *Accounts of Urban District Council — Inspection of Accounts—"Person interested"—Bankrupt—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 247 (4).] —One M. was a member of an urban district council till November, 1901, when he became disqualified through bankruptcy. The accounts for the said council were made up to March, 1902. The clerk to the council having refused him inspection, M. laid an information against him, and it was decided on appeal that the appellant was a person interested and was entitled to inspect the accounts (*Marginson* v. *Tildsley*, (1903) 67 J. P. 226). In the meantime the audit began in May, 1902. M. attended such audit and saw the books. The audit was closed in December, 1902. In July, 1903, M. applied for inspection of the books. He was refused, and in November, 1903, he moved for a *mandamus* to compel the clerk to allow him inspection.

HELD—that no substantial reason having been put forward for seeing the books, the Court would, in their discretion, refuse the *mandamus*.

REX *v.* FLEETWOOD URBAN DISTRICT COUNCIL, [(1904) 68 J. P. 314; 2 L. G. R. 1209—Div. Ct.

7. *Surcharge—Acceptance of Tenders—Checking of Quantities*—Certiorari *to Quash—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 247 (7), (8).]—Where an auditor acting in pursuance of sect. 247 of the Public Health Act, 1875, disallows items of account as being contrary to law and surcharges them on the person making or authorising the payment, the Court has power to review his decision not only when it is erroneous in point of law, but also if the Court is of opinion that the auditor has gone wrong on the merits and that on the balance of evidence he was not justified in making the surcharges.

A district auditor, under sect. 247 of the Public Health Act, 1875, disallowed and surcharged certain payments made by the finance committee of a local authority for shingle, and by the highways committee in respect of a contract for the supply of certain goods, upon the grounds that the shingle as delivered by the contractors must have been short in weight, the deliveries not having been, in his opinion, properly checked, and that the tender for the supply of the goods which was accepted was not the lowest tender, and he disallowed the amount which he estimated as the loss to the ratepayers therefrom. The highways committee stated that they had accepted the tender which they considered the most advantageous. Upon an application for a writ of *certiorari* to bring up and quash the disallowance :—

HELD—that with regard to the shingle there was no evidence of short delivery or of anything beyond possibly a lax method of keeping a check upon the amount delivered, and there was no evidence that the payments were illegal; and with regard to the contract for the supply of goods, inasmuch as the highways committee had *bonâ fide* come to the conclusion that the tender accepted was the most advantageous one, the disallowance was also wrong.

R. v. *Haslehurst* ((1887) 51 J. P. 645—Div. Ct.) followed.

Decision of Div. Ct. ([1907] 2 K. B. 878; 76 L. J. K. B. 1113; 71 J. P. 288; 96 L. T. 733; 23 T. L. R. 491; 5 L. G. R. 1017) affirmed.

REX *v.* CARSON-ROBERTS, EX PARTE LAWRENCE, [1908] 1 K. B. 407; 77 L. J. K. B. 281; 72 J. P. 81; 24 T. L. R. 226; 6 L. G. R. 268—C. A.

(b) Areas and Boundaries.

8. *Local Government—Transfer of Part of Parish—Board School situate in Part transferred—Adjustment of Property and Liabilities—Arbitration—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 68.]—An order by the Local Government Board for the transfer to another parish of part of the parish of L., on which part was situate the board school, provided that the powers, duties, and liabilities of the school board of L. in respect of the part transferred should cease, and that the school should vest in the school board of the other parish, and all contracts and liabilities attaching to the L. school board in respect of such school should vest in and attach to the school board of the other parish.

Areas and Boundaries—*Continued.*

The order further provided that any question between the two school boards with regard to their interests in the school, or in any debts and liabilities, whether on account of capital or income incurred by the L. school board in respect of the school, and any other question between them, arising in consequence of the order, should be dealt with in an adjustment under sect. 68 of the Local Government Act, 1894 (56 & 57 Vict. c. 73).

The L. school board claimed compensation for the cost of having enlarged the school out of income in several years.

HELD, on a case stated by an arbitrator, that the order had not effected an adjustment, but that there was a question pending proper for adjustment by the arbitrator.

IN RE LLANWONNO SCHOOL BOARD AND [YSTRADYFODWG SCHOOL BOARD, (1898) 62 J. P. 644; 14 T. L. R. 432—Div. Ct

9. *Transfer of Part of one Union to another Union—Adjustment of Property and Liabilities—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *ss.* 36, 68.]—Where an alteration is made in the boundaries of two poor law unions by the transfer, by an order of the county council, under sect. 36, sub-sect. 6, of the Local Government Act, 1894, of part of a parish from one union to another, an adjustment of the property, debts, and liabilities can be obtained under sect. 68 as between the two unions, and not as between the union from which the transfer is made and the part of the parish so transferred.

Any consideration which bears on the question whether and to what extent a union has been damaged financially by the change of boundaries is properly taken into consideration on a question of adjustment.

Judgment of Div. Ct. ([1898] 2 Q. B. 206; 67 L. J. Q. B. 846; 62 J. P. 678; 78 L. T. 563; 14 T. L. R. 437) affirmed.

IN RE ROCHDALE UNION AND HASLINGDEN [UNION, [1899] 1 Q. B. 540; 68 L. J. Q. B. 531; 47 W. R. 322; 80 L. T. 146; 15 T. L. R. 223—C. A.

Overruled in *In re Caterham Urban District Council and Godstone Rural District Council*, No. 15, *infra*.

10. *Transfer of one Part of one County to another County—Adjustment of Property and Liabilities—Main Roads and County Bridges—Compensation—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 62.]—Part of the county of B. was transferred to the county of H., under an order of the Local Government Board. In this part so transferred there were no county bridges and no main roads.

HELD—that in the adjustment of the property, income, and liabilities between the two counties under sect. 62 of the Local Government Act, 1888, the arbitrator appointed by the Local Government Board had power to award, and was right in awarding, to the county of B. a sum in respect of main roads and county bridges, upon the ground that the county of B. was losing an area which had contributed towards the cost of their main roads and county bridges, while it cost the county nothing for main roads or bridges.

IN RE BUCKINGHAMSHIRE COUNTY COUNCIL [AND HERTFORDSHIRE COUNTY COUNCIL, [1899] 1 Q. B. 515; 68 L. J. Q. B. 417; 63 J. P. 356; 80 L. T. 85; 15 T. L. R. 138—Div. Ct.

11. *Transfer of Part of District—Liability of Rating Area—Arbitration—Costs of Arbitration.*]—Differences arose between two district councils with respect to the liabilities of a rating area and the amount which ought to be paid by one of the parties in respect of them. These differences were referred to arbitration under sect. 62 of the Local Government Act, 1888. The arbitrator directed the costs of the award to be divided, but his award was silent as to the costs of the reference.

HELD—that as the arbitrator had made no order with regard to the costs of the arbitration the Court had no power to order them to be paid.

SOUTH MIMMS RURAL DISTRICT COUNCIL *v.* [BARNET URBAN DISTRICT COUNCIL, (1900) 82 L. T. 421—Grantham, J.

12. *Alteration of Areas—Pending Action—Interpretation of Provisional Order—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *ss.* 54, 59.]—Where a provisional order had transferred a portion of land within the jurisdiction of a rural district council to the jurisdiction of the corporation of a borough, and the same order had provided that any action then pending against the rural district council might be continued against the corporation, and that all liabilities attaching exclusively to the added area should be transferred to the corporation as urban sanitary authority, it was held that in regard to an action brought against the rural district council prior to the provisional order and pending at the time, for a nuisance caused by sewage, all liability attached to the corporation, and that the corporation must pay the costs of the plaintiff and the rural district council.

JACKSON *v.* PLYMPTON ST. MARY RURAL DIS- [TRICT COUNCIL, (1900) 64 J. P. 168.—Cozens-Hardy, J.

13. *Transfer of Part of Rural District—Formation of new Urban District—Adjustment of Liabilities—Agreement between Councils—Arbitration—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 57—*Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *ss.* 54, 68 (1).]—A county council, under sect. 57 of the Local Government Act, 1888, made an order severing a part from a rural district and constituting the severed part into a new urban district, and providing that all necessary adjustments should be made in accordance with sect. 68 of the Local Government Act, 1894; and an agreement entered into between the councils as to certain matters therein specified, and certain sums were paid in respect of these matters. The rural council afterwards found that the severance was a pecuniary loss

Areas and Boundaries—*Continued.*

to them, but the councils were unable to agree as to such loss, and an arbitrator was appointed to adjust the loss sustained by the rural district by the severance in so far as such loss was not determined by the former agreement.

HELD—(1) that the fact that the severed part was constituted a new and separate district of itself, and was not added to an existing district, did not prevent the adjustment claimed by the rural council from being an adjustment within sect. 68 of the Local Government Act, 1894; and (2) that the claim to such adjustment was not barred by the previous agreement entered into between the councils as to the adjustment of the matters therein specified.

ST. THOMAS (DEVON) RURAL DISTRICT COUNCIL [*v.* HEAVITREE (DEVON) URBAN DISTRICT COUNCIL, (1902) 66 J. P. 597; 86 L. T. 153—Wright, J.

14. *Alteration of Parish Boundaries—Effect on Areas of Poor Law Unions—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 57.]—Although sect. 57 of the Local Government Act, 1888, gives no express power to a county council, or to the Local Government Board, to alter the area of the poor law unions, yet an order made under that section by a county council, and confirmed by the Local Government Board, adding a part of a parish situated in one union to another parish situated in another union, has the automatic effect of transferring such added area from the one union to the other, even though the areas of the union and rural district will not in such a case be coterminous.

BOOTLE UNION *v.* WHITEHAVEN UNION, [1903] [2 Ch. 142; 72 L. J. Ch. 582; 67 J. P. 325; 51 W. R. 550; 89 L. T. 237; 19 T. L. R. 453; 1 L. G. R. 585—Byrne, J.

15. *Conversion of Part of a Rural District into a new Urban District—Adjustment of Property and Liabilities — Highways — Loss of Income from Rates—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 62.]—A parish forming part of a rural district was converted into an urban district under an order of the county council, confirmed by the Local Government Board. Before such order was made the rural district received from rates levied in the parish for highway purposes sums greater than those expended in respect of the maintenance and repair of the highways in the parish.

HELD—that the loss of the surplus of the rates received over the sums expended upon the maintenance and repair of the roads within the parish was not a matter requiring adjustment under sect. 62 of the Local Government Act, 1888. The loss of income referred to in such section refers only to present income, and not to that to be derived from future rates.

In re Rochdale Union and Haslingden Union ([1899] 1 Q. B. 540; 68 L. J. Q. B. 531; 47 W. R. 322; 80 L. T. 146, *supra*, No. 9) overruled.

Decision of C. A. ([1903] 1 K. B. 554; 72 L. J. K. B. 279; 67 J. P. 116; 51 W. R. 353; 88 L. T. 414; 19 T. L. R. 290) reversed.

IN RE CATERHAM URBAN DISTRICT COUNCIL [AND GODSTONE RURAL DISTRICT COUNCIL, [1904] A. C. 155; 73 L. J. K. B. 589; 68 J. P. 429; 52 W. R. 625; 90 L. T. 653; 20 T. L. R. 481; 2 L. G. R. 596—H. L. (E.).

16. *Creation of new Urban District—Adjustment of Property and Liabilities—Power to Compromise—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 62—*Costs—Public Authorities Protection Act*, 1893 (56 & 57 Vict. *c.* 61).]—In 1900 a district which had previously formed part of a rural district was constituted a separate urban district. After considerable negotiations between the councils of the rural and urban districts as to the adjustment of the property, income, debts, liabilities, and expenses affected by the separation, under sect. 62 of the Local Government Act, 1888, an agreement was come to whereby a considerable sum was to be paid by the urban council to the rural council in settlement of (among other claims) an estimated annual loss in income owing to the transfer of rateable area from the rural district to the urban district.

The urban council now brought an action against the rural council in which they alleged that the agreement was *ultra vires* and not binding upon them, as, according to a recent decision of the House of Lords, the rural council was not entitled to any payment as compensation for loss of area.

HELD—that the agreement having been made *bonâ fide* between the councils in settlement of their respective claims, the fact that one of the claims put forward *bonâ fide* by one of the parties was not well-founded in law was no ground for setting aside the compromise, and that the action failed.

HELD, also, that the defendants were not entitled to costs as between solicitor and client, under the Public Authorities Protection Act, 1893, the action not being brought by the plaintiffs for any act done by the defendants.

HOLSWORTHY URBAN DISTRICT COUNCIL *v.* [HOLSWORTHY RURAL DISTRICT COUNCIL, [1907] 2 Ch. 62; 76 L. J. Ch. 389; 91 J. P. 330; 23 T. L. R. 452; 5 L. G. R. 791—Warrington, J.

17. *Creation of New County Borough—Adjustment of Financial Relations—Compensation—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *ss.* 32, 62.] — A borough forming part of a county was separated from the county and constituted a county borough under a Provisional Order and Confirmation Act. Thereupon the liability of the borough to contribute towards the maintenance of main roads and county bridges, and towards certain other county expenses, ceased. On the other hand, an increased burden was thrown upon the borough in respect of the maintenance of children in industrial schools and reformatories; the borough ceased to receive contributions from the county in respect of the subsidised roads, and the

Areas and Boundaries—*Continued.*

borough ceased to receive a sum in respect of fines which was in excess of the fines levied within the borough.

HELD—that an arbitrator appointed to adjust the financial relations between the county and the county borough under sect. 32 of the Local Government Act, 1888, had no power to award compensation in respect of these matters.

Caterham Urban District Council v. *Godstone Rural District Council* ([1904] A. C. 171; 73 L. J. K. B. 589; 68 J. P. 429; 52 W. R. 625; 90 L. T. 653; 20 T. L. R. 481—H. L., No. 15, *supra*) followed and applied.

Decision of C. A. ([1906] 2 K. B. 186; 75 L. J. K. B. 803; 70 J. P. 465; 94 L. T. 688; 22 T. L. R. 671; 4 L. G. R. 845) reversed.

WEST HARTLEPOOL CORPORATION *v.* DURHAM [COUNTY COUNCIL, [1907] A. C. 246; 76 L. J. K. B. 859; 71 J. P. 385; 97 L. T. 114; 23 T. L. R. 576; 5 L. G. R. 854—H. L. (E.).

See also Nos. 18, 19.

(c) Burial.

18. *Powers of Burial Board transferred to Council — Incidence of Rights, Powers, and Obligations—Poor Rate—General District Rate —Burial Act*, 1852 (15 & 16 Vict. *c.* 85)—*Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *ss.* 7, 62, 67.]—The ordinary scheme of legislation is that, where the powers of a local body are transferred under an Act of Parliament, the rights, powers, and obligations transferred continue to have the same incidence and effect in the hands of the authority to whom the transfer is made as they had before it was effected.

An urban district council had become the burial board by virtue of the operation of the powers of the Local Government Act, 1894, s. 62, and they had, as a burial board, made a demand upon the overseers of the poor of that parish to pay out of the poor rate the money which would have been so payable under the Burial Acts. The overseers refused to comply with the demand on the ground that the money ought to be paid out of the council's general rate. A rule was obtained on behalf of the council for a *mandamus*.

HELD—that the rule should be made absolute.

REX *v.* CONNAH'S QUAY OVERSEERS, [1901] 2 [K. B. 174; 70 L. J. K. B. 651; 65 J. P. 500; 49 W. R. 463; 84 L. T. 601—Div. Ct.

19. *Areas—Burial Board—Urban District—County Borough—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *ss.* 21, 54, 57, 62.]—The township of K. was situate within the city of L., which, under the Local Government Act, 1888, was a county borough. The city included other parishes, some of which had appointed burial boards and provided burial grounds, and others had not. The city proposed, under sect. 62 of the Local Government Act, 1894, to take over the powers, duties, property and liabilities of the K. Burial Board.

HELD—that the area of the county borough of L. was an urban district within the meaning of the Local Government Act, 1894, and that the proposal was therefore *intra vires* the city council.

KIRKDALE BURIAL BOARD *v.* LIVERPOOL COR- [PORATION, [1904] 1 Ch. 829; 73 L. J. Ch. 529; 68 J. P. 289; 52 W. R. 427; 91 L. T. 28; 20 T. L. R. 406; 2 L. G. R. 763—Eady, J.

(d) Bye-laws (other than Building Bye-laws) and Local Acts.

20. *Validity—Music in Streets—Annoyance—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 182, 184—*Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 16.]—The Kent County Council under sect. 16 of the Local Government Act, 1888, made a bye-law as follows: "No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable or by an inmate of such house personally or by his or her servant to desist."

HELD (*dissentiente* Mathew, J.)—that the bye-law was not unreasonable or *ultra vires*.

KRUSE *v.* JOHNSON, [1898] 2 Q. B. 91; 62 J. P. [469; 67 L. J. Q. B. 782; 78 L. T. 647; 14 T. L. R. 416; 46 W. R. 631; 19 Cox, C. C. 103 —Div. Ct.

21. *Public Health—Public Walks and Esplanade—Reasonableness—Public Health Act*, 1875, *s.* 164.]—A bye-law, made by an urban district council, affecting only a limited and special area of the district, *e.g.*, the sea beach or esplanade, may be reasonable, and therefore valid, having regard to the special nature of the place to which it applies, which would be unreasonable, and therefore *ultra vires*, if applied to the whole district; for it is one thing to make a bye-law for the regulation of an esplanade or foreshore, and quite another to make one for the good government of a town.

GRAY *v.* SYLVESTER, (1898) 61 J. P. 807; 14 [T. L. R. 10; 46 W. R. 63—C. A.

22. *County Council—Validity—Using Streets for Betting—No Obstruction.*]—The S. County Council, under sect. 16 of the Local Government Act, made a bye-law as follows: "No person shall frequent any street or public place, and use the same for the purpose of betting or wagering, or agreeing to bet or wager, either on behalf of himself or any other person.

HELD—that the bye-law was one properly made for the good rule and government of the administrative county, and was therefore not *ultra vires* or invalid.

JONES *v.* WALTERS, (1898) 62 J. P. 374; 78 L. T. [167; 14 T. L. R. 265; 19 Cox, C. C. 1— Div. Ct.

23. *County Council — Validity — Music in Streets — No Annoyance.*] — The K. County Council, under sect. 16 of the Local Government

Bye-Laws—*Continued.*

Act, 1888, made a bye-law as follows: "No person shall sound or play upon any musical or noisy instrument, or sing in any public place or highway, within fifty yards of any dwelling-house, after being required by any constable or by an inmate of such house personally or by his or her servant to desist."

HELD (*dissentiente* Mathew, J.)—that the bye-law was not invalid or *ultra vires*.

BROWNSCOMBE *v.* JOHNSON, (1898) 62 J. P. 326; [78 L. T. 265; 14 T. L. R. 328; 19 Cox, C. C. 25—Div. Ct.

24. *Depositing Offensive Matter — Railway Truck containing Manure in Goods Yard—Liability of Railway Company.*]—By a bye-law of an urban district council no person was to deposit upon any place within the district any offensive matter. Manure was carried in a truck by a railway company in the ordinary course of their business as carriers. On Sunday evening verbal notice was given to the consignee of its arrival. Pending the removal by the consignee the truck of manure was placed in the goods yard at the station, which was within the urban district. The truck was emptied by the consignee on the following Monday. A most offensive smell had proceeded from the contents of the truck.

HELD—that the justices were wrong in considering that the railway company had committed a breach of the bye-law.

LONDON, BRIGHTON AND SOUTH COAST RY. [CO. *v.* HAYWARD'S HEATH URBAN DISTRICT COUNCIL, (1899) 80 L. T. 266; 19 Cox, C. C. 255—Div. Ct.

25. *Bathing Machines — Conditional Licence—Revocation at any Time—Subsequent Regulations.*]—A condition attached to a licence to let bathing machines for one year on the beach, providing that the licensing authority may revoke it at any time, is unreasonable.

Grantham, J., granted an injunction restraining an urban district council (the licensing authority) from revoking such a licence where the ground for such revocation is an infringement on the part of the licensee of the provisions of a regulation made subsequently to the granting of his licence.

PELHAM *v.* LITTLEHAMPTON URBAN DISTRICT [COUNCIL, (1899) 63 J. P. 88—Grantham, J.

26. *Betting — Validity — "Place of Public Resort" — Private Grounds — Permission of Owner.*]—The corporation of Middlesborough made the following bye-law under the powers granted to them by the Middlesborough Improvement Act, 1877 (40 & 41 Vict. c. xxx.), s. 25:—

"Any person who shall frequent and use any street, passage, recreation ground, or other place of public resort within the borough of Middlesborough, either on behalf of himself or of any other person, for the purpose of bookmaking or betting, or wagering or agreeing to bet or wager, with any person, shall be liable to a penalty not exceeding £5 for each offence."

Section 25 was as follows:—

"The corporation from time to time may make such bye-laws as they think fit for the prevention of betting . . . in the *public streets*, passages, *Albert Park* and recreation grounds, and other places of public resort within the borough, . . . and may impose penalties for the breach and non-observance thereof not exceeding £5 for each offence."

HELD—that the bye-law was not *ultra vires*, and that a place to which the public in fact habitually resorted, although without any right to do so or any permission from the owner, was a place of public resort within the meaning of the Act and bye-law.

KITSON *v.* ASHE, [1899] 1 Q. B. 425; 68 L. J. [Q. B. 286; 63 J. P. 325; 80 L. T. 323; 15 T. L. R. 172; 19 Cox, C. C. 257—Div. Ct.

27. *Mechanical Musical Instruments — Validity.*]—Sect. 44 of the Southend-on-Sea Corporation Act, 1895, provides, "The powers conferred upon the corporation by the Municipal Corporations Acts to make and enforce bye-laws for the good rule and government of the borough shall be deemed to include the power to make and enforce bye-laws to regulate, or if the council think fit, to prohibit, the use of any organ or other musical instrument worked by steam or other mechanical means, or any steam whistle or horn within the borough: Provided always that this section shall not apply to any locomotive or steam engine in use on any railway within the borough."

The bye-law was in similar words with the addition of the following words: nor to any steam whistle or steam trumpet within the meaning of the Factories (Steam Whistles) Act, 1878.

The respondent was a travelling showman, and erected in a field within the borough a round-about worked by steam, to which was attached an organ, also worked by steam. The justices held that the bye-law was unreasonable and invalid, and on that ground refused to convict the respondent.

HELD—that the case must be remitted to the justices, with the opinion that the bye-law was valid.

SOUTHEND-ON-SEA CORPORATION *v.* DAVIS, [(1900) 16 T. L. R. 167—Div. Ct.

28. *Betting—County Council—Rural District—Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 16—*Vagrant Act Amendment Act*, 1873 (36 & 37 Vict. *c.* 38), *s.* 3.]—A bye-law that "no person shall frequent and use any street or other public place, on behalf either of himself or of any other person, for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager with any person, or paying or receiving or settling bets," was held valid in *Thomas* v. *Sutters* ([1900] 1 Ch. 10; 69 L. J. Ch. 27; 63 J. P. 724; 48 W. R. 133; 81 L. T. 469; 16 T. L. R. 7—C. A. *see* METROPOLIS, 52), when made by the London County Council as applicable to London.

Bye-laws—*Continued.*

HELD—that the bye-law was valid when made by a county council as applicable to a rural district.

HICKEY *v.* HAY, (1901) 65 J. P. 232; 17 T. L. R. [52—Div. Ct.

29. *Regulation of Sale of Articles on Beach and Foreshore—Sale Forbidden except under Agreement with Corporation—Validity—Local Government Board's Provisional Orders Confirmation (No. 10) Act*, 1890 (53 & 54 Vict. *c.* clxxix.), *s.* 1, *and Sched.*]—The respondents made a bye-law under the Local Government Board's Provisional Orders Confirmation (No. 10) Act, 1890, that "a person shall not on the said beach and foreshore sell or hawk, or offer or expose for sale any article, commodity, or thing, except in pursuance of an agreement with the corporation, and in such part or parts of the beach and foreshore as the corporation shall, by notice affixed or set up thereon, from time to time appoint for the purpose."

HELD—that the bye-law was bad, because it withdrew altogether from those who might have to interpret it and consider its validity any question as to whether the agreement referred to in it was a reasonable one or not; that it was not a good bye-law, as it gave the corporation the power to make any agreement they liked, and it reserved to the corporation the right of refusing any particular person, and that the provisional order did not warrant the bye-law.

PARKER *v.* BOURNEMOUTH CORPORATION, [(1902) 66 J. P. 440; 86 L. T. 449; 18 T. L. R. 372—Div. Ct.

30. *Using Indecent Language "to the Annoyance of Inhabitants or Passengers"—Evidence—Bristol Improvement Act*, 1840 (3 & 4 Vict. *c.* lxxvii.), *s.* 77.]—Sect. 77 of the Bristol Improvement Act, 1840, makes it an offence to use any profane, indecent, or obscene language to the annoyance of the inhabitants or passengers.

A person used indecent language inside his house which was heard by two police constables outside. There was no evidence that any inhabitant or passenger was annoyed. The magistrates having convicted:

HELD—that there was ample evidence on which the magistrates could convict, and that they were justified in convicting.

Gentel v. *Rapps* ([1902] 1 K. B. 160; 71 L. J. K. B. 105; 66 J. P. 117; 50 W. R. 216; 85 L. T. 683; 18 T. L. R. 72—Div. Ct., *see* TRAMWAYS, 2) applied.

BRABHAM *v.* WOOKEY, (1902) 18 T. L. R. 99— [Div. Ct.

31. "*Wilfully annoy Passengers*"—*Uncertainty—Validity—Municipal Corporations Act*, 1835, (5 & 6 Will. 4, *c.* 76), *s.* 90.—A bye-law to be valid must, among other conditions, have two properties—it must be certain, that is it must contain adequate information as to the duties of those who are to obey, and it must be reasonable.

A bye-law made by a municipal corporation under sect. 90 of the Municipal Corporations Act, 1895, for the good rule and government of the borough, provided that "No person shall wilfully annoy passengers in the streets."

Other bye-laws of the corporation dealt with particular annoyances.

HELD—that the bye-law was void for uncertainty.

Rule laid down by Mathew, J., *Kruse* v. *Johnson* ([1898] 2 Q. B. 91, 108; 67 L. J. Q. B. 782; 62 J. P. 469; 46 W. R. 630; 78 L. T. 647, No. 20, *supra*) followed.

NASH *v.* FINLAY, (1902) 66 J. P. 182; 85 L. T. [682; 18 T. L. R. 92; 20 Cox, C. C. 101— Div. Ct.

32. *Drainage—Local Act—Construction—Compulsory Substitution of Water Closets for Ashpits and Privies—Manchester Corporation Acts.*]—Upon the true construction of the Manchester Corporation Acts, 1867, 1869, 1881, 1891, the corporation have power to insist upon an owner substituting water closets for ashpits or privies.

AGNEW *v.* MANCHESTER CORPORATION, (1903) [67 J. P. 174; 1 L. G. R. 9—Div. Ct.

See No. 85, *infra*.

33. *Petty Sessions—Cost of Providing in Stipendiary District*—(6 & 7 Vict. *c.* xliv.)—*Petty Sessions Act*, 1849 (12 & 13 Vict. *c.* 18.]—A local Act passed in 1843 provided for the appointment of a stipendiary justice for a certain district, and empowered the quarter sessions of the county to provide "a suitable office or offices for transacting the magisterial business of the district included within the limits of this Act." The salary of the justice and the expenses of providing the office or offices were to be paid out of rates levied under the Act upon the district. In 1845 an office was provided which was used as a petty sessional court-house. By subsequent local Acts of 1868 and 1894 the district was extended, and the justice was required to sit in different parts of the added areas, the powers of the Act of 1843 being applied to the whole district.

HELD—that the words "office or offices" in the Act of 1843 included courts for the justice to act in, and that the enactment for the provision of such courts was not impliedly repealed by the Petty Sessions Act, 1849; and, therefore, that the cost of providing additional petty sessional court-houses required for the district was chargeable upon the district within the limits of the local Acts and not upon the county generally.

REX *v.* HUNTON, EX PARTE GLAMORGANSHIRE [COUNTY COUNCIL, (1904) 68 J. P. 453; 2 L. G. R. 917—C. A.

34. *Hoarding used for Advertising Purposes—"Abutting" on a Street—Ilfracombe Improvement Act*, 1900, *s.* 87.]—With reference to land, to "abut" means to actually touch. Sect. 87 (2) of the Ilfracombe Improvement Act, 1900, provides that "it shall not be lawful . . . to erect any hoarding or similar structure to be

Bye-laws—*Continued.*

used either wholly or partly for advertising purposes in or abutting on or adjoining any street without the consent of the council . . ." The respondent, without the consent of the Ilfracombe Urban District Council, erected a hoarding in a field on a hedge bank running parallel to a street. The distance from the hoarding to the edge of the street was from two feet to three feet four inches, a continuous strip of land being between the hoarding and the street. On an information against the respondent for erecting a hoarding for advertising purposes "abutting on a street," the justices at petty sessions dismissed the information, being of opinion that the hoarding did not "abut" on the street.

HELD, on appeal, that the justices were right.

BARNETT *v.* COVELL, (1904) 68 J. P. 93 ; 90 L. T. [29 ; 20 T. L. R. 134 ; 2 L. G. R. 215—Div. Ct.

35. *Reasonableness — Newspapers giving "Racing Tips"—Sale of in Streets—Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *s.* 23 *—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 16.]—A county council made the following bye-law for the good rule and government of the county under sect. 23 of the Municipal Corporations Act, 1882 :—"No person shall frequent and use any street or public place, either on behalf of himself or of any other person, for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions." Penalty for infringement, £5.

HELD—(Phillimore, J., *dissentiente*) that the byelaw was unreasonable and therefore invalid: it was wide enough to cover the sale of papers in general giving information which it was perfectly legal to give.

SCOTT *v.* PILLINER, [1904] 2 K. B. 855 ; 73 L. J. [K. B. 998 ; 68 J. P. 518 ; 20 T. L. R. 662 ; 53 W. R. 138 ; 91 L. T. 678 ; 20 Cox, C. C. 731—Div. Ct.

36. *Reasonableness — Whirligigs.*]—A local authority purporting to act under the Public Health Act made a bye-law, subsequently confirmed by the Local Government Board, that no person should cause or suffer any whirligig or swing to be set in motion or driven on any land immediately adjoining or abutting upon any street or road within the district unless such whirligig or swing was placed at a distance of not less than twenty yards from any road or street, and separated from any street or road by a wall not less than fourteen inches in thickness, and carried up to a height of not less than four feet above the level of the street or road.

HELD—that the bye-law was unreasonable and void, inasmuch as it required a structure of a permanent character involving large expense, to provide against a temporary danger, which could as effectively be provided against by a temporary structure.

ENNISCORTHY URBAN COUNCIL *v.* FIELD, [1904] [2 Ir. R. 518—K. B. D.

37. *Conditions attached to Licence* — Ultra vires—*Ice Cream Vendor's Licence—Edinburgh Corporation Act*, 1900 (63 & 64 Vict. *c.* cxxiii.), *s.* 80—*Edinburgh Corporation Order Confirmation Act*, 1901 (1 Edw. 7, *c.* clxxxiv.), *s.* 57.]—The effect of the above-mentioned local Acts is to subject to a penalty any person selling ice cream (except in an hotel) without having obtained a "licence from the magistrates who are hereby empowered to grant the same for the house, building or premises." Such licences are to run for a year "unless the same shall be sooner forfeited, revoked or suspended." Penalties are imposed on any licensed vendor "who shall sell ice cream, except during the hours between 8 a.m. and 11 p.m. on any lawful day or at such extended hour at night as the magistrates may by special regulation . . . permit."

The magistrates proposed to issue licences purporting to be subject to the following conditions : (1) Licensee not to keep open the premises, or sell ice cream therein on Sunday or any other day set apart for worship by lawful authority ; (2) not to keep open the premises, or sell ice cream therein before 8 a.m. or after 11 p.m. ; (3) the magistrates or any of them may at any time revoke or suspend the licence.

HELD—that these conditions were not warranted by the statute and were *ultra vires.*

Decision of the Ct. of Sess. ((1903) F. 480) reversed.

ROSSI *v.* EDINBURGH CORPORATION, [1905] [A. C. 21 ; 91 L. T. 668—H. L. (Sc.).

38. *Imposing Liability upon Owner for Act of Servant — Lights on Vehicles — Validity.*] —A bye-law requiring the owner of every vehicle to cause a light to be attached thereto when in use between certain hours in public streets is not unreasonable or void as making a master liable for the *quasi*-criminal act or default of a servant.

St. Helens District Tramway Co. v. *Wood* ((1891) 60 L. J. M. C. 141 ; 56 J. P. 70—Div. Ct.) followed.

HEITON & Co. *v.* M'SWEENEY, [1905] 2 Ir. R. 47 [—K. B. D.

39. *Repugnancy* — Ultra vires — *Bye-law of County Council—Throwing down and leaving Waste Paper and Shavings in Street.*] — A bye-law of the London County Council made under sect. 23 of the Municipal Corporations Act, 1882, and sect. 16 of the Local Government Act, 1888, provides (*inter alia*) : "Waste paper, refuse, advertising bills, broken glass, &c.—No person shall sweep or otherwise remove from any shop, house, or vehicle into any street any waste paper, shavings, or other refuse, or, being a costermonger, newsvendor, or other street trader, throw down and leave in any street any waste paper, shavings, or other refuse. . . . Any person who shall offend against any of these bye-laws shall be liable for each offence to a fine not exceeding forty shillings." A metropolitan police court magistrate dismissed an information for contravening this provision on the ground that this part of the bye-law was *ultra vires* as dealing with a nuisance already punishable

Bye-laws—*Continued.*

when the bye-law was made, under sect. 60 of the Metropolitan Police Act, 1839.

HELD—that this part of the bye-law was good.

BATCHELOR *v.* STURLEY, (1905) 69 J. P. 398 ; 93 [L. T. 539 ; 3 L. G. R. 1056 ; 21 Cox, C. C. 35—Div. Ct.

40. *Publication—Proof—"Making and Existence of Bye-law"—Production of Written Copy authenticated by Corporate Seal — Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *ss.* 23, 24.]—The respondent was summoned for contravention of a bye-law made by the corporation of the borough under sect. 23 of the Municipal Corporations Act, 1882. The prosecution produced a copy of the bye-laws authenticated by the corporate seal.

HELD—that this was *primâ facie* evidence of the operative existence of the bye-law, and that the conditions of the statute as to making and publication had been duly complied with.

ROBINSON *v.* GREGORY, [1905] 1 K. B. 534 ; 74 [L. J. K. B. 367 ; 69 J. P. 161 ; 92 L. T. 171 ; 3 L. G. R. 308 ; 20 Cox, C. C. 781—Div. Ct.

See also Nos. 64, 91.

(e) Contracts.

41. *Urban Authority — Contract under Seal—Alterations and Variations not under Seal—Agreement to compromise Disputes not under Seal—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 173, 174.]—Where an urban authority enters into a contract in writing, sealed with the common seal of such authority, pursuant to sects. 173 and 174 of the Public Health Act, 1875, with a contractor for the construction by him, *e.g.*, of sewerage works, and the contract contains the usual power for the engineer, who has the control and supervision of the works, to vary, alter, enlarge, or diminish any of them, all variations and alterations coming within the terms of the power conferred on the engineer can be validly made without being under the common seal of the urban authority.

An agreement between an urban authority and a contractor employed to construct works for them, as a compromise and in full settlement of all claims by him against the urban authority, is not a contract within sect. 173 of the Public Health Act, 1875, necessary for carrying that Act into execution, so as to require to be sealed with the common seal of the urban authority under sect. 174 ; and, therefore, such agreement, though not under seal, is capable of being enforced against the urban authority.

Decision of Lawrance and Collins, JJ. affirmed.

WILLIAMS *v.* BARMOUTH URBAN DISTRICT [COUNCIL, (1897) 77 L. T. 383—C. A.

42. *Troops—Expenses—Suppression of Riots—Liability of County Fund* — Mandamus.]—The justices of a county, having applied to the military authorities to send soldiers into the county for the purpose of suppressing riots, made arrangements with tradesmen for the housing and lodging of the soldiers at certain agreed rates of payment, and pledged the credit of the county for such payment.

HELD—that the tradesmen were not entitled to a writ of *mandamus* to the county council to make such payment out of the county fund.

Decision of Div. Ct. ([1899] 2 Q. B. 26 ; 63 J. P. 470 ; 15 T. L. R. 342) affirmed.

REG. *v.* GLAMORGAN COUNTY COUNCIL, EX [PARTE MILLER, [1899] 2 Q. B. 26 ; 68 L. J. Q. B. 1047 ; 64 J. P. 115 ; 48 W. R. 112 ; 81 L. T. 372 ; 15 T. L. R. 536—C. A.

43. *Solicitor — Retainer by Resolution not under Seal—Subsequent Confirmation under Seal* —Ultra vires—*Transfer of Liabilities of Urban District Council to Borough Council by Inclusion —Borough Funds Act*, 1872 (35 & 36 Vict. *c.* 91), *ss.* 2, 4, 8—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 174, 297, 298—*Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 62 — *Torquay (Extension) Order*, 1900 (63 & 64 Vict. *c.* clxxxiii.).]—The borough of Torquay presented a memorial to the Local Government Board asking for the extension of their borough by the inclusion within it of the whole or part of the urban district of Cockington. The district council of Cockington resolved to oppose this memorial, and the plaintiffs were retained to act as solicitors and parliamentary agents for them for the purpose of this opposition. In spite of this opposition the bill was passed, and received the Royal assent on July 30th, 1900. The plaintiffs' bill of costs in respect of the parliamentary opposition was delivered to Cockington on November 8th, 1900, and a copy of it was delivered to the defendants on November 26th, 1900. Resolutions—not sealed—of the district council of Cockington were passed from time to time from May 18th, 1900, and communicated to the plaintiffs. On September 6th, 1900, a resolution was passed by the district council that the seal of the council should be, and it was, affixed to each of these resolutions. The plaintiffs' claim included items for work done and disbursements made after the sealed retainers were received by the plaintiffs.

HELD—that the confirmation by the council under their seal of the original retainers created an obligation binding upon the council without any new consideration ; that it was not *ultra vires* for them to bind themselves to pay by an instrument under seal ; that the confirmation under seal on September 6th, 1900, of the earlier unsealed retainers was sufficient to satisfy the requirements of sect. 174 of the Public Health Act, 1875, and of the common law ; that the costs in question were authorised by sect. 298 of the Public Health Act, 1875, and were not subject to the requirements of the Borough Funds Act, 1872 ; that subject to taxation and to the sanction of the Local Government Board (under sect. 298 of the Public Health Act, 1875), the district council of Cockington, if it had continued to exist, would have been liable to the plaintiffs for the costs in question in this action, and the liability of Cockington had been transferred to

Contracts—*Continued.*

the defendants; and that the amounts of their respective liabilities were a matter for adjustment under sect. 62 of the Local Government Act, 1888.

Brooks, Jenkins & Co. *v.* Torquay Corporation and Newton Abbot Rural District Council, [1902] 1 K. B. 601; 71 L. J. K. B. 109; 66 J. P. 293; 85 L. T. 785; 18 T. L. R. 139—Walton, J.

44. *Electric Lighting—Purchase of an Undertaking from a Company — Capital Expenditure since Purchase but before Completion—Arbitration—Title to Property — Inquiry — Time for Completion.*]—Under an Electric Lighting Confirmation Order Act, it was directed that a company should sell, and a local authority might and should purchase that part of the undertaking and business of the company which was situate in the area of the local authority. After a notice to treat had been given the company incurred a considerable amount of further capital expenditure in respect of the undertaking. The purchase price having been left to arbitration and the arbitrators referring it to an umpire, the umpire in fixing the purchase price considered that the adjustment of the rights of the parties in respect of such capital expenditure, did not come within the award, and fixed the price without considering it. On an action brought by the company for specific performance, it was submitted by the local authority that the company could not show a good title to certain property comprised in the purchase. At the time of the hearing of the action the local authority were endeavouring to obtain leave to borrow the purchase-money on the security of their rates.

Held—(1) that the High Court in this action was the proper party to adjust the rights of the parties as to the additional capital expenditure; that an inquiry must be directed on the matter of the additional expenditure, the local authority being entitled to the undertaking of the company, as it was at the date of purchase subject to necessary fluctuations before completion, and that it could not have thrust on it an unduly enlarged undertaking. (2) That there must be an inquiry as to the title of the company to the property sold, for the purpose of seeing if the local authority were entitled to any compensation. (3) That a decree for specific performance would be made in favour of the company, and a date fixed for completion, with liberty to apply to extend the date.

Metropolitan Electric Supply Co., Ld. *v.* [Marylebone Corporation, (1903) 67 J. P. 382; 1 L. G. R. 673—Buckley, J.

45. Ultra vires—*Power to bind Successors—Right to make Tramways at a Future Date.*]—A municipal corporation entered into an agreement whereby (*inter alia*), if they should desire a certain length of tramway laid at any future time, they were bound to offer the construction of it to the other party upon certain terms; and such other party was bound to accept the offer. A ratepayer sought to have the agreement declared void.

Held—(1) that it was not forbidden by the local Act relied upon by the plaintiff; (2) that it was not void at common law; the corporation was the highway authority, and such a provision might be very valuable to it.

Attorney-General *v.* Corporation of [Hastings, (1903) 67 J. P. 165; 19 T. L. R. 9; 1 L. G. R. 41—Buckley, J.

46. *Use of Seal—Contract of Rural District Council—Employment of Engineer to prepare Plans for Sewerage Scheme.*]—A rural district council, by an agreement under their seal, employed the plaintiff as an engineer to prepare plans and do other work in connection with a sewerage scheme for a certain area. Subsequently the council instructed the plaintiff, though not under their seal, to prepare plans and do other work as engineer in respect of an extension of the sewerage scheme to another area. The plaintiff duly did the work. In an action to recover remuneration for his services in connection with these latter works, the council pleaded the want of a sealed contract. The C. A. reviewed the conflicting decisions upon the point, and

Held—that the plaintiff could recover. The requirements of sect. 174 of the Public Health Act, 1875, do not apply to rural district councils; and though at common law any corporation must contract under seal, yet there are three recognised exceptions to the rule: (1) where the work done is of a trivial nature; (2) matters of frequent occurrence; (3) where work done, or goods supplied, are accepted by a corporation, and the whole consideration is executed. The present case came within the last exception.

Clarke v. *Cuckfield Union* ((1852) 21 L. J. Q. B. 349; 16 J. P. 257; 16 Jur. 686) and *Nicholson* v. *Bradfield Union* ((1866) L. R. 1 Q. B. 620; 35 L. J. Q. B. 176; 30 J. P. 549; 13 W. R. 731; 14 L. T. 830) approved.

Judgment of Darling, J. (88 L. T. 317; 18 T. L. R. 507) reversed.

Lawford *v.* Billericay Rural District [Council, [1903] 1 K. B. 772; 72 L. J. K. B. 554; 67 J. P. 245; 51 W. R. 630; 88 L. T. 317; 19 T. L. R. 322; 1 L. G. R. 535—C. A.

47. *Tender—Acceptance under Seal—Acceptance Cancelled before Execution of Contract.*]—In March, 1901, the defendant council advertised for tenders for the carrying out of certain sewerage works. One of the conditions was that the person tendering should undertake to execute a contract for the due performance of the works and enter into a bond with two responsible sureties for the due and satisfactory completion of the works. The plaintiff tendered for the work, and on May 10th, 1901, the council resolved that the plaintiff's tender should be accepted, and they instructed their clerk to write to the plaintiff to that effect, and to affix the seal of the council to the letter. Such letter was duly sent.

Contracts—*Continued.*

HELD—that the acceptance of the tender did not conclude a contract between the parties.

BOZSON *v.* ALTRINCHAM URBAN DISTRICT [COUNCIL, (1903) 67 J. P. 397; 1 L. G. R. 639—C. A.

48. *Churchwardens and Overseers—Whether liable in Representative Capacity*—59 Geo. 3, *c.* 12, *s.* 17.]—The churchwardens and overseers of a parish are not liable to be sued in their representative capacity in respect of a contract entered into by the vestry of the parish.

Decision of Darling, J. (68 J. P. 321) affirmed.

KLENCK *v.* FARRIS AND OTHERS, (1905) 69 J. P. [41; 3 L. G. R. 89—C. A.

49. *Contract of Urban Authority—Statutory Requirements—Not under Seal—Total Amount exceeding £50—Instalments of Goods delivered—Each under £50 in Value—Goods sold and delivered—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 174 (1), (4).]—The plaintiffs tendered for the supply to the defendants of coal which it was thought would exceed in value £100. The tender contained stipulations that if it was accepted a formal contract should be executed, and that a bond with two sureties be entered into. The tender was accepted, subject to the formal contract and bond being duly executed. The contract and bond were forwarded to the plaintiffs, but were never executed. The plaintiffs afterwards, from time to time, supplied to the defendants quantities of coal which were accepted, the value of the coal supplied not amounting, in any one instance, to £50, but amounting in the aggregate to over £50.

HELD—that the defendants were bound to pay, under an implied contract, for each lot of coal so supplied and accepted.

SPENCER WHATLEY AND UNDERHILL *v.* SOUTH- [ALL-NORWOOD URBAN DISTRICT COUNCIL, (1905) 69 J. P. 308; 3 L. G. R. 641—Warrington, J.

50. *Contract of Urban Authority—Statutory Requirements—No Penalty Clause—Validity—Agreement by the Authority to supply Water—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 174 (2).]—Section 174 (2) of the Public Health Act, 1875, provides that every contract whereof the value or amount exceeds £50, "shall specify some pecuniary penalty in case the terms of the contract are not duly performed."

HELD, by Eady, J. ([1905] 1Ch. 53; 74 L. J. Ch. 116; 69 J. P. 19; 53 W. R. 250; 91 L. T. 800; 21 T. L. R. 71; 3 L. G. R. 512) that this provision does not apply where the contract is to be performed by the urban authority, *e.g.*, where they agree to supply water to another (non-urban) authority.

HELD, by C. A., that the provision is directory only and not imperative, and that a contract is not invalidated by the omission of a penalty clause.

SOOTHILL UPPER URBAN DISTRICT COUNCIL [*v.* WAKEFIELD RURAL DISTRICT COUNCIL, [1905] 2 Ch. 518; 74 L. J. Ch. 703; 69 J. P. 447; 21 T. L. R. 753; 3 L. G. R. 1208; 93 L. T. 711—C. A.

51. *Right to see Documents — Agreement between Corporation and Harbour Company—Councillor's Right to See—Reasonable Conduct—* Mandamus.]—The applicant, a member of the corporation, was present at a meeting at which the corporation confirmed a resolution to give to the harbour company an option to lease certain corporation lands. The agreement with the harbour company was read at the meeting, and formed part of a scheme under which an amending Provisional Harbour Order was being promoted by the corporation. The scheme was opposed by the applicant, and on his demanding information as to the contents of the agreement, the corporation resolved that the town clerk be instructed to afford him no further information, as he was likely to use it in a way antagonistic to the policy of the council.

HELD—that as the applicant had not acted in a reasonable way in order to enforce his right to see the document, though the corporation had acted unreasonably in refusing him information, the Court would not issue a *mandamus* to compel the corporation to show the document to the applicant, on an undertaking by the corporation to supply him with a copy.

REX *v.* SOUTHWOLD CORPORATION, (1907) 71 [J. P. 351; 97 L. T. 431; 5 L. G. R. 888—Div. Ct.

(f) Meetings.

52. *Ratepayers, &c.—Power to withdraw Demand after Meeting—Seconding Demand equivalent to another Demand—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *Sched. II., r.* 6—*Borough Funds Act*, 1872 (35 & 36 Vict. *c.* 91), *s.* 4.]—At a meeting of owners and ratepayers A. demanded a poll; B., also a duly qualified voter, said, "I second the demand, if necessary"; after the termination of the meeting, A. purported to withdraw his demand, and the question now arose whether or not a poll should be taken.

HELD—that a *mandamus* must go ordering the mayor to take a poll on the ground that B. had himself made an effective demand for one by seconding A.'s demand; *semble*, also, that a valid demand cannot be withdrawn after the meeting, for other persons might have abstained from themselves asking for a poll upon hearing such demand made.

REX *v.* MAYOR OF DOVER, EX PARTE BRADLEY, [(1903) 72 L. J. K. B. 210; 67 J. P. 81; 88 L. T. 296; 19 T. L. R. 255; 1 L. G. R. 266—Div. Ct.

53. *Borough Council—Public Right to Attend—Reporter of Newspaper—Burgess.*]—In a municipal borough neither the public nor the burgesses

Meetings—*Continued.*

nor reporters for newspapers have the right to attend the meetings of the borough council.

TENBY CORPORATION *v.* MASON, (1907) 24 [T. L. R. 123—Kekewich, J.

Affirmed [1908] 1 Ch. 457 ; 72 J. P. 89 ; 24 T. L. R. 254 ; 6 L. G. R. 233—C. A.

(g) Officers and Servants.

(*a*) *In General.*

54. *Rural District Council succeeding Rural Sanitary Authority and Highway Board—Position of Clerks.*]—The East Kerrier Rural District Council were the successors to a rural sanitary authority and a highway board. The plaintiff, as clerk to the guardians, acted as clerk to the rural sanitary authority, and, on the rural district council coming into office, became clerk to the council in their capacity as sanitary authority. J. was clerk to the highway board, and, on the council succeeding to the duties of the highway board, became their clerk as highway authority. The district council subsequently directed that several of the duties formerly done by the plaintiff as clerk should be done by J., but they did not modify, and did not propose to modify, the plaintiff's salary or remuneration as clerk in any way. The plaintiff claimed an injunction to restrain the council from preventing him acting as clerk to the rural district council so long as he was able and willing to perform the duties attaching to the office of clerk to the guardians. The injunction was refused.

GENN *v.* EAST KERRIER RURAL DISTRICT [COUNCIL, (1898) 62 J. P. 215—Jeune, P.

55. *Costs of Quarter Sessions—Borough having a Population less than* 10,000*—Salary of Clerk to Borough Justices—Payment out of Borough Funds—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *ss.* 35, 38, *and* 84.]—In the case of a borough which has a separate court of quarter sessions, and which, according to the census of 1881, contained a population of less than 10,000, there is nothing in the Local Government Act, 1888, to throw upon the county council the payment of the salary of the Recorder :

Ex parte The Kent County Council and the Councils of the Boroughs of Dover and Sandwich ((1891) 1 Q. B. 389) overruled.

Or the payment of the salary of the clerk to the borough justices :

The County Council of Cornwall v. *The Town Council of Truro* (70 L. T. R. 354) and *Re The Herefordshire County Council* ([1895] 1 Q. B. 43) overruled.

Decision of Wills, J. ([1898] 1 Q. B. 141 ; 62 J. P. 100 ; 67 L. J. Q. B. 55 ; 77 L. T. 498 ; 14 T. L. R. 35) varied.

THETFORD CORPORATION *v.* NORFOLK COUNTY [COUNCIL, [1898] 2 Q. B. 468 ; 62 J. P. 724 ; 67 L. J. Q. B. 907 ; 79 L. T. 315 ; 14 T. L. R. 541 ; 47 W. R. 1—C. A.

56. *Borough—No separate Commission of the Peace—Petty Sessional Division of the County—Appointment of Clerk to Justices—Fines and Fees—Salary of Clerk—Justices' Clerks Act*, 1877 (40 & 41 Vict. *c.* 43), *s.* 5—*Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *ss.* 154 – 159].—Sect. 159 of the Municipal Corporations Act, 1882, enabling the justices of a borough to appoint a clerk, has no application except in the case of boroughs with a separate commission of the peace.

The power of appointment of a salaried clerk rests with the justices of a county usually acting for the petty sessional division. Those justices who are the justices of the petty sessional division may appoint a second clerk for the division if the appointment is within the power given by sect. 5 of the Justices' Clerks Act, 1877, but not otherwise.

All unappropriated fines and penalties and fees imposed and received by and in the special and petty sessional courts should be paid to the county treasurer, as the county justices are alone entitled to appoint the clerk, and the county council pays the salary of the clerk by virtue of sect. 84, sub-sect. 2, of the Local Government Act, 1888.

HUNTINGDON CORPORATION *v.* HUNTINGDON [COUNTY COUNCIL, [1901] 2 K. B. 257 ; 70 L. J. K. B. 755 ; 65 J. P. 675 ; 85 L. T. 26 ; 17 T. L. R. 521—Div. Ct.

57. *Pension — "Annual Pay" — Residence, Fuel, Gas, and Water free—Appeal by Special Case—Point of Law—Police Act*, 1890 (53 & 54 Vict. *c.* 45), *Sched. I., rr.* 1, 11.]—A divisional inspector of police received £139 15*s.* a year, and he was required to live at the police station, where he resided with his family free of rent and rates, and had fuel, gas, and water free. These matters were agreed to be of the annual value of £30. On his retirement he was entitled by the Police Act, 1890, to receive a pension of two-thirds of his "annual pay" at the date of his retirement.

HELD—that the matters which were agreed to be of the value of £30 a year were not part of his "annual pay" within the meaning of the Police Act, 1890, and that, therefore, the pension should be calculated at two-thirds of £139 15*s.*

An appeal lies by way of special case upon a point of law from the decision of quarter sessions under sect. 11 of the Police Act, 1890.

Reg. v. *Bridge* ((1890) 24 Q. B. D. 609 ; 56 L. J. M. C. 49 ; 54 J. P. 629 ; 38 W. R. 464 ; 62 L. T. 297 ; 17 Cox, C. C. 66—Div. Ct.) followed.

GOODWIN *v.* SHEFFIELD CORPORATION, [1902] [1 K. B. 629 ; 71 L. J. K. B. 492 ; 66 J. P. 533 ; 86 L. T. 682 ; 18 T. L. R. 441—Div. Ct.

58. *Existing Officer—Increase of Remuneration—Increase of Duties—County Surveyor—Assistant Surveyor—Sealed Order of Local Government Board*—Certiorari—*Judicial Act—Jurisdiction of Local Government Board—Local Government (Ireland) Act*, 1898 (61 & 62 Vict. *c.* 37), *s.* 115, *sub-s.* 18 (*Compare English Local Government Act*, 1888 (51 & 52 Vict.

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c. 41), *s.* 120).]—Sect. 115, sub-sect. 18, of the Local Government (Ireland) Act, 1898, enacts that if any existing officer transferred to the county council has his duties increased or diminished by reason of the Act, he shall be bound to perform those duties, and shall receive such increase or diminution of remuneration in proportion to the increase or diminution of his duties as the Local Government Board may determine. It appeared from the statements of the Local Government Board that in the case of two existing officers—a county surveyor and an assistant surveyor—the Board, in purporting to determine what their increase of remuneration was to be under this section, recast their old salaries, giving not merely increase of remuneration in respect of the increase of duties, but fixing a scale of remuneration for all the officers' duties, old as well as new.

HELD—that the determination of the Local Government Board was so far a judicial act, that it was not exempt from *certiorari*, and that, as their decision was based on a wrong principle, a writ of *certiorari* should issue for the purpose of quashing it.

REG. *v.* LOCAL GOVERNMENT BOARD, [1902] 2 [Ir. R. 349—C. A.

59. *Pension—"Annual Pay"—Allowance for Special Service—To be Disregarded—Police Act*, 1890 (53 & 54 Vict. *c.* 45), *ss.* 15, 16, *Sched. I., Parts I.* (1), *III.* (11).]—The Police Act directs that the pension of a constable shall be calculated according to the amount of his "annual pay" at the date of his retirement.

HELD (Lord Davey dissenting)—that this means the annual pay of the rank to which he belongs; and that no regard ought to be paid to an additional allowance in respect of permanent special duties, *e.g.*, at the Houses of Parliament.

Per Lord Davey: This allowance is within the words "annual pay"; but the appellant had lost his right by signing weekly pay-sheets which, in the "amount of pay" column, included only the ordinary pay of his rank.

Decision of C. A. ([1901] 1 K. B. 384; 70 L. J. K. B. 249; 84 L. T. 18; 17 T. L. R. 187) affirmed.

UPPERTON *v.* RIDLEY, [1903] A. C. 281; 72 [L. J. K. B. 535; 67 J. P. 349; 88 L. T. 642; 19 T. L. R. 522; 20 Cox, C. C. 453—H. L. (E.).

60. *Head Constable of City Police—Police Act* 1890, *s.* 13 (1) *and* (2).]—The salary of A., head constable of the city of Liverpool, was raised from £1,400 to £1,650 a year on condition that his pension should be calculated only on £1,400. He resigned that appointment and accepted that of commissioner of police of the city of London at £1,250 a year.

HELD—(1) that the pension payable by the city of Liverpool should be calculated under sect. 13 (2) of the Police Act, 1890, at £850, being the difference between £1,250 (A's present salary), and £2,100 (one-and-a-half times his salary at Liverpool); (2) that the provisions of sect. 13 as to reduction of pensions applied; but (3) that a resolution to suspend the payment of part of his pension during his service in London, purporting to have been passed under sect. 13 (1) of that Act by the city council of Liverpool, was invalid, the watch committee, and not the council, being the police authority for Liverpool within the meaning of that sub-section.

NOTT-BOWER *v.* LIVERPOOL CORPORATION, [(1904) 68 J. P. 243; 20 T. L. R, 261; 2 L. G. R. 494—Buckley, J.

61. *Pension — Twenty-five Years' Service — Break in Service—Certificate of "Approved Service"—"Sufficient Evidence"—"Diligent and Faithful Service"—Police Act*, 1890 (53 & 54 Vict. *c.* 45), *ss.* 1, 4.]—The appellant, a police constable, served in a police force for three periods, amounting together to over twenty-five years. Between the periods of service there were breaks of about four months and seven weeks respectively, caused in each case by the resignation of the constable.

HELD (Lord Davey doubting)—that the service to entitle a constable to a pension under sect. 1 (a) of the Police Act, 1890, need not be continuous service, and that, as far as the length of his service was concerned, the appellant was entitled to a pension under that section upon retirement.

HELD, further, that a certificate signed by the chief officer of a police force under sect. 4 (2) of the Act as to the period of a constable's "approved service" is not conclusive evidence that the service has been "diligent and faithful service" within the meaning of sect. 4 (1). Such officer can certify as to length of service; but the character of the service is a matter for the police authority.

Decision of C. A. ((1904) 68 J. P. 487) reversed.

GARBUTT *v.* DURHAM STANDING JOINT COM- [MITTEE, [1906] A. C. 291; 75 L. J. K. B. 459; 70 J. P. 265; 54 W. R. 596; 94 L. T. 525; 22 T. L. R. 444; 4 L. G. R. 647—H. L. (E.).

62. *Decision of Quarter Sessions—"Order shall be Final"—Case stated for Opinion of High Court—Police Act*, 1890 (53 & 54 Vict. *c.* 45), *s.* 11.]—By the Police Act, 1890, *s.* 11: "Where a constable . . . claims a pension . . . as of right, and the police authority do not admit the claim, the constables . . . may apply to the police authority for a re-consideration of the claim to the pension . . . and if aggrieved by the decision upon such reconsideration may apply to . . . quarter sessions . . . and that Court, after inquiry into the case, may make such order in the matter as appears to the Court just, which order shall be final. . . ."

HELD—that a court of quarter sessions may state a case for the opinion of the High Court of Justice upon a question of law arising in an appeal under the section.

Officers and Servants—*Continued.*

Westminster Corporation v. *Gordon Hotels, Ld.* ([1907] 1 K. B. 910; 76 L. J. K. B. 482; 71 J. P. 200; 96 L. T. 535; 23 T. L. R. 387; 5 L. G. R. 545—C. A., *see* METROPOLIS, 63) distinguished.

KYDD *v.* LIVERPOOL WATCH COMMITTEE. [[1907] 2 K. B. 591; 76 L. J. K. B. 1155; 97 L. T. 453; 71 J. P. 408; 23 T. L. R. 624; 5 L. G. R. 1168—C. A.

63. *Dismissal—Power to dismiss at Pleasure—Alleged Malicious Dismissal.*]—A statute authorised a chief constable to appoint constables, and to remove or suspend them at his pleasure.

HELD—that an allegation that in dismissing a constable summarily he had been actuated by malicious motives disclosed no ground of action.

BROWN *v.* EDINBURGH MAGISTRATES, (1907) [S. C. 256—Ct. of Sess.

64. *Compensation to Officers — Solicitor — Whether "Officer" — Bristol Corporation Act*, 1904 (4 Edw. 7, *c.* ccxxiii.), *ss.* 18, 53, 57—*Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *ss.* 100, 120.]—A solicitor acted for many years for the guardians of a union and for a district council. He was appointed by resolution to act as solicitor in each matter as it arose, and was paid costs and charges upon the usual scale for the work actually done by him. He was never formally appointed solicitor to the guardians or district council, but he was retained on every occasion when the services of a solicitor were required.

By a local Act, which abolished the union and dissolved the district council, it was provided that any officer who suffered direct pecuniary loss by virtue of the Act should be deemed to be an officer entitled to compensation within the meaning of sect. 120 of the Local Government Act, 1888.

HELD—that the solicitor was not an "officer" within the definition contained in sect. 100 of the Local Government Act, 1888, and was therefore not entitled to compensation under sect. 120 of that Act.

IN RE CARPENTER AND BRISTOL CORPORATION, [1907] 2 K. B. 617; 76 L. J. K. B. 1145; 97 L. T. 461; 71 J. P. 417; 23 T. L. R. 654; 5 L. G. R. 977—C. A.

(*b*) *Disqualification.*

And see title MAGISTRATES.

65. *Twelve Months' Residence in District—Temporary Absences — Local Government Act*, 1894 (56 & 57 Vict. *c.* 73).]—A person was held to have "resided in the district" during the whole of the twelve months preceding the day of his election as vestryman, notwithstanding he did not reside there during the whole time, being absent during August, and for two or three weeks during January, and for six weeks when he visited America.

STANFORD *v.* WILLIAMS, (1899) 80 L. T. 490; [15 L. T. 316—Div. Ct.

66. *Alderman of Borough — Resignation of Office—Declaration by Council—Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *s.* 36 (1), (2); *s.* 60 (3).]—An alderman in a borough, who would otherwise, under sect. 14 (6) and (7) of the Municipal Corporations Act, 1882, have had to retire on November 9th, sent in, on November 8th, to the town clerk, a notice of his resignation of office, and at the same time paid the fine. Being elected mayor at the quarterly meeting on November 9th, he voted, and also gave casting votes for three aldermen for the coming year.

HELD—that in the absence of the declaration by the council of the vacancy of his office required by sect. 36 (2), he continued to be an outgoing alderman, and was therefore prohibited by sect. 60 (3) from voting in the first instance for the new aldermen.

PEASE *v.* LOWDEN, [1899] 1 Q. B. 386; 68 L. J. [Q. B. 239; 63 J. P. 56; 79 L. T. 672—Div. Ct.

67. *Composition with Creditors — Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 46 (1) (c).]—The disqualification enacted by sect. 46 (1) (c) of the Local Government Act, 1894, is not limited to compositions and arrangements made under the Bankruptcy Acts, but applies also to arrangements and compositions entered into by debtors with creditors by deeds registered under the Deeds of Arrangement Act, 1887.

Ward v. *Radford* ((1895) 59 J. P. 569—Div. Ct.) followed.

CORRIGAN *v.* ALLISON, (1900) 64 J. P. 678— [Div. Ct. Ir.

68. *School Board—Member concerned in the Profits of "Work done under the Authority of" the Board — Elementary Education Act*, 1870 (33 & 34 Vict. *c.* 75), *s.* 34.]—The respondent, who was chairman of a school board, supplied sand and gravel to a contractor who was building schools under a contract with the board. There was no allegation that the price charged was more than the ordinary price.

HELD—that the respondent was concerned in "work done under the authority of the board," for he supplied goods for doing the work, and that though no blame attached to the respondent, he ought to have been convicted under sect. 34 of the Elementary Education Act, 1870.

BARNACLE *v.* CLARK, [1900] 1 Q. B. 279; 69 [L. J. Q. B. 15; 64 J. P. 87; 48 W. R. 336; 81 L. T. 484—Div. Ct.

69. *Disqualification — Administration Order by County Court — "Adjudged Bankrupt"—Bankruptcy Act*, 1883 (46 & 47 Vict. *c.* 52), *ss.* 32, 122.]—A person whose total indebtedness does not exceed £50, and whose estate is being

Disqualification—*Continued.*

administered by an order of a county court under sect. 122 of the Bankruptcy Act, 1883, is not "adjudged bankrupt" within the meaning of sect. 32, sub-sect. 1 of the Act, and is not therefore disqualified from being elected to the office of mayor, alderman, or councillor.

LOWE AND OTHERS *v.* LOWRIE, (1902) 18 T. L. R. [553—Div. Ct.

70. "*Disqualification*"—*Member duly elected, but not having made the required Declaration.*]—The Local Government (Ireland) Order, 1898, renders liable to a fine any member of a board of guardians who acts "when disqualified."

HELD—not to apply to a member who had been duly elected, but elected before making the required declaration.

REX *v.* LONGFORD JJ., [1903] 2 Ir. R. 677—[K. B.

71. *Borough Council—Action for Penalties—Contract fulfilled—Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *ss.* 12, 41.]—In an action for penalties under sect. 41 of the Municipal Corporations Act, 1882, it appeared that the defendant was a town councillor and trustee of a Wesleyan chapel. A non-provided school was attached to the chapel; but the school building was also used for other purposes than those of the non-provided school. Fuel for warming the building was supplied by the trustees under an arrangement with the town council by which the latter paid the trustees for such of the fuel as was used for the purpose of warming the building during the times when it was used as a non-provided school. It was the habit of the trustees to procure from the defendant the fuel required by small orders given from time to time. An order of this kind had been given on January 4th, 1904, and fulfilled on January 11th; another on January 23rd and fulfilled on January 25th; another on February 2nd and fulfilled on February 3rd. The votes complained of were given on February 1st and 5th. On these dates the fuel ordered had not been paid for.

HELD—that there was a contract between the town council and the trustees; that the defendant had at times an interest in that contract, but that he had not such an interest at the time when the votes complained of were given.

HELD, therefore, that he was not disqualified from voting on the dates alleged.

COX *v.* TRUSCOTT, (1905) 69 J. P. 174; 92 L. T. [650; 21 T. L. R. 319; 3 L. G. R. 431—Darling, J.

72. *Member acting while concerned in Contract with Council — Contract completed on First Occasion of acting—Disqualification for Election—Irish Local Government Order*, 1898, *Sched., Art.* 12.]—In November, H. agreed with an urban council to do the printing required for a forthcoming election of councillors. On January 16th the election took place, and H. was elected a councillor. On January 18th he completed his part of the contract by printing a notice of the result of the election. On January 23rd he attended a council meeting and signed a declaration of acceptance of office. Before leaving he was paid the amount of his bill.

HELD—that H. had acted as a member of the council while disqualified, and was liable to a penalty.

Royse v. *Birley* ((1869) L. R. 4 C. P. 296; 38 L. J. C. P. 203; 17 W. R. 827; 20 L. T. 786) and *Cox* v. *Truscott* (*supra*) discussed.

O'CARROLL *v.* HASTINGS, [1905] 2 Ir. R. 590—[K. B. D.

73. *Absence for more than Six Months—Alderman—Office Declared Void—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 46 (6)—*London Government Act*, 1899 (62 & 63 Vict. *c.* 14), *s.* 2 (3).]—The disqualification of a member of a borough council by reason of absence "for more than six months consecutively," as provided by sect. 46 (6) of the Local Government Act, 1894, can only take effect where he has been absent for that period reckoning from the date of the first meeting from which he has been absent, and not from that of the last meeting at which he has been present.

KERSHAW *v.* SHOREDITCH BOROUGH COUNCIL, [(1906) 70 J. P. 190; 95 L. T. 55; 22 T. L. R. 302; 4 L. G. R. 302—Warrington, J.

74. *Composition or Arrangement by Guardian with his Creditors—Administration Order by County Court—Guardian—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 46 (1) (c)—*Bankruptcy Act*, 1883 (46 & 47 Vict. *c.* 52), *s.* 122.]—A guardian of the poor of the borough of C., after judgment had been obtained against him in the county court, applied for an order under sect. 122 of the Bankruptcy Act, 1883, for the administration of his estate, and stated in his application that he proposed to pay 10*s.* in the pound. The Court made the order asked for, and the guardians thereupon contended that he had become disqualified for office, and declared his seat vacant.

HELD—that the guardian had made a composition or arrangement with his creditors within the meaning of the Local Government Act, 1894, s. 46 (1) (c), and was therefore disqualified.

Lowe v. *Lowrie* ((1902) 18 T. L. R. 553—Div. Ct., *supra*, No. 69) commented on.

BRADFIELD *v.* CHELTENHAM GUARDIANS, [1906] 2 Ch. 371; 75 L. J. Ch. 618; 70 J. P. 371; 54 W. R. 611; 95 L. T. 78; 22 T. L. R. 639; 4 L. G. R. 961; 13 Manson, 207—Buckley, J.

75. *Interest in Contract—Time of Removal of Disqualification — Guardian* — Quo warranto—*Delaying in Applying for Order* nisi—*Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 46 (1), (7).]—A member of a board of guardians collected rents for the board and claimed to be entitled to retain commission. At a meeting of the board on December 22nd, 1905, the board decided that such member was disqualified, and an opportunity was afforded him of sending in

Disqualification — *Continued.*

his resignation. On the same day the member either before or after the meeting paid over the sum which he had retained as commission and terminated the contract. On January 5th, 1906, the board declared his seat to be vacant, and notice of the vacancy was given him on the following day. Notice of an election to fill the vacancy was subsequently given and a fresh member elected, who took up his duties on February 16th, 1906. On April 27th an order *nisi* for a *quo warranto* was granted, calling on such member to show cause why he should remain a guardian.

HELD—that the payment to the board of the sum claimed for commission and the termination of the contract did not remove the disqualification, and that the office therefore became vacant, and the new member was properly elected.

Quære, also, whether there had not been undue delay in moving for the rule.

REX *v.* ROWLANDS, [1906] 2 K. B. 292 ; 75 L. J. [K. B. 501 ; 70 J. P. 463 ; 95 L. T. 502 ; 4 L. G. R. 983—Div. Ct.

76. "*Knowingly interested in Contract*"—*Penalty — Sydney Corporation Act*, 1902 (2 Edw. 7, *No.* 35), *s.* 24.]—By sect. 24 of the Sydney Corporation Act, 1902, "Any person who, while holding any civic office under this Act, continues to be or becomes directly or indirectly by means of partnership with any other person or otherwise howsoever knowingly engaged or interested in any contract, agreement, or employment with or on behalf of the council, except as a shareholder, but not being a director in any joint stock company, shall be liable to a penalty . . . and shall be for three years thereafter disqualified from holding any civic office."

T., a member of the firm of A., T. & Co., was a town councillor of Sydney. In 1902 the council invited tenders for an electric light installation. In the same year, while T. was in London, H. & Co. asked several firms to quote prices for timber ; T.'s partners gave a quotation without T.'s knowledge, this quotation was the lowest, and was accepted.

In 1903 H. & Co. tendered for and obtained the council's contract, and at the end of that year A., T. & Co. began to supply timber to them under the quotation.

HELD—that T. was not liable to a penalty as being "knowingly engaged or interested in" a contract with the council.

NORTON *v.* TAYLOR, [1906] A. C. 378 ; 75 L. J. [P. C. 79 ; 70 J. P. 433 ; 94 L. T. 591 ; 22 T. L. R. 450—P. C.

(h) Powers.

77. *Tithe Map—Custody—Order of County Council—Power of Justices to enforce—Tithe Act*, 1836 (6 & 7 Will. 4, *c.* 71), *s.* 64—*Tithe Act*, 1846 (9 & 10 Vict. *c.* 73), *s.* 17—*Tithe Act*, 1860 (23 & 24 Vict. *c.* 93), *s.* 28—*Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 17 (8).—The appellant L. was the chairman of the parish council of West Meon, and was interested in the tithe apportionment and map of that parish. In 1894 these documents were in the custody of one A., and kept at his house. In March, 1895, the parish meeting passed a resolution that he should still retain the custody of these documents. He died in May of that year, and they still remained in the possession of his family till August, when the respondent, who was the rector of the parish, obtained them. In October of the same year the parish council passed a resolution that they should be handed over to them for custody, but the respondent refused to part with them. In April, 1896, the parish council applied to the county council under sect. 17 (8) of the Local Government Act, 1894, and they ordered that these documents should be placed in such custody as the parish council might direct. In February of the present year the order was drawn up, sealed, and served on the respondent, but he refused to comply with it. The appellant then moved before the justices under sect. 28 of the Tithe Act, 1860, for an order that these documents should be moved from the custody of the respondent and deposited in the custody of the parish council. The magistrates refused to make the order on the ground that they had no power.

HELD—that the magistrates had power to make such an order.

LEWIS *v.* POOLE, [1898] 1 Q. B. 164 ; 61 J. P. [776 ; 67 L. J. Q. B. 73 ; 77 L. T. 369 ; 14 T. L. R. 15 ; 46 W. R. 93—Div. Ct.

78. *Municipal Corporation—Opposing Bill in Parliament — Charging Borough Fund with Expense of Opposition—Rights of Corporation—Price of Gas in Borough—Municipal Corporations (Borough Funds) Act*, 1872 (35 & 36 Vict. *c.* 91), *ss.* 2, 4, 8.]—A gas company which supplied, among other consumers, the corporation of a borough at a price which, in the absence of agreement between the company and the corporation, was settled by arbitration by reference to the prices charged to private consumers according to the provisions of sect. 24 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), promoted a bill in Parliament the provisions of which would enable the company to increase the prices charged to private consumers.

The corporation opposed the bill without first observing the formalities prescribed by sect. 4 of the Municipal Corporations (Borough Funds) Act, 1872, on the ground that it affected the rights of the corporation, since by enabling the company to increase the prices charged to private consumers it would have the effect of raising the price payable by the corporation which was settled by reference to those prices.

The corporation did not possess any surplus funds.

On a motion for an interlocutory injunction in an action by the Attorney-General at the relation of the gas company, for an injunction to restrain the corporation from applying the borough funds in payment of the expenses incurred in opposing the bill :—

HELD—that the fact that the provisions of he bill, which left untouched the right of the

Powers—*Continued.*

corporation to have the price of the gas supplied to it settled by arbitration under sect. 4 of the Municipal Corporations (Borough Funds) Act, 1872, might have the effect of increasing that price by increasing the prices charged to private consumers, did not entitle the corporation to apply the borough funds in payment of the expenses of its opposition to the bill without having first observed the formalities prescribed by sect. 4 of the Municipal Corporations (Borough Funds) Act, 1872.

ATTORNEY-GENERAL *v.* SWANSEA CORPORATION, [1898] 1 Ch. 602; 62 J. P. 408; 67 L. J. Ch. 356; 78 L. T. 412; 46 W. R. 534—North, J.

79. *Public Works—Compulsory Powers to take Lands—Engineering—Financial—Re-selling or Letting for Raising Money.*]—An Act of Parliament empowered a corporation to construct street, tramway, quay, and other works, and to make better provision for the health and good government of the borough, and for other purposes. The Act did not give the corporation any power to take lands, described in books of reference and shown on deposited plans, for "financial" as distinguished from "engineering" purposes.

HELD—that the corporation under the Act had no power to take the whole or any part of the lands, which were shown on the deposited plans, not for the purpose of making or widening streets, or for any engineering purposes connected with the works which they were empowered to make, but for the purpose either of re-selling or of letting on building leases, or of otherwise utilising them for raising money so as to diminish the cost to the corporation of the works which they were empowered to construct.

DONALDSON *v.* SOUTH SHIELDS CORPORATION, [(1899) 68 L. J. Q. B. 162; 79 L. T. 685—C. A.

80. *Borough Fund—Burgh—Cost of opposing Private Bill in Parliament—Rates*—Ultra vires *—Public Health (Scotland) Act*, 1867 (30 & 31 Vict. *c.* 101), *s.* 95.]—The appellants were the magistrates and council of Leith. Besides the ordinary legal powers which attach to them as the municipality of the burgh, they have been entrusted by the Legislature with the execution of a variety of statutory trusts. A private bill in Parliament which was promoted by the corporation of the city of Edinburgh, aimed at the destruction of the municipal corporation of Leith. It had not for its object the destruction, alteration, or impairment of any one of the numerous statutory trusts administered by the Leith corporation, beyond the abolition of the latter body. The appellants incurred costs and expenses in opposing the bill.

HELD—that the appellants could not lawfully charge the expenses of resisting the bill on the rates leviable by them under the Public Health (Scotland) Act, 1867.

Attorney-General v. *Mayor of Brecon* ((1878) 10 Ch. D. 204; 48 L. J. Ch. 153; 27 W. R. 332; 40 L. T. 52—M. R.) distinguished.

LEITH COUNCIL *v.* LEITH HARBOUR AND [DOCKS COMMISSIONERS, [1899] A. C. 508; 68 L. J. P. C. 109; 81 L. T. 98; 15 T. L. R. 492; 64 J. P. 180—H. L. (Sc.).

81. *Borough Fund—Licensing Appeals—Payment of Costs of Chief Constable in opposing—Municipal Corporations (Borough Funds) Act*, 1872 (35 & 36 Vict. *c.* 91), *s.* 2 —*Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *ss.* 140, 141, *Sched. V.*]—A town council has no power under the Municipal Corporations Act, 1882, or the Borough Funds Act, 1872, to pay out of the borough fund—where there is no surplus—the expenses incurred by the chief constable in appearing by counsel at quarter sessions to oppose licensing appeals.

The effect of sect. 140 of the Municipal Corporations Act, 1882, and Sched. V. thereto, does not extend to expenses incurred by the chief or head constable of a borough in discharging duties outside the functions of the town council or the functions of the chief constable as their officer. The administration of the licensing laws is outside the functions of a town council.

An improper payment by the order of the town council may be called in question by injunction at the suit of the Attorney-General, on the relation of a person interested, as well as by *certiorari* under sect. 141 of the Municipal Corporations Act, 1882.

The only proper respondents to a licensing appeal are the licensing justices. If any other person appears to oppose such an appeal, he can only be heard by the permission of the bench, and can neither receive nor be ordered to pay costs.

Decision of C. A. ([1898] 1 Q. B. 604; 67 L. J. Q. B. 489; 62 J. P. 292; 14 T. L. R. 281) affirmed.

TYNEMOUTH CORPORATION *v.* ATTORNEY-[GENERAL, [1899] A. C. 293; 68 L. J. Q. B. 752; 63 J. P. 404; 15 T. L. R. 370—H. L. (E.).

82. *Statutory Powers—Streets — Nuisance — Electrical Tramway—Roadway and Pavement—* Bona fides.]—A corporation had power to make an electric tramway along a certain street, and their Act empowered them to execute in any street all such works as might be "necessary or expedient." The corporation erected a pole and a fuse-box in the pavement close to the principal entrance of the plaintiffs' premises. The plaintiffs objected to this erection, and they brought an action to compel the defendants to remove the pole and fuse-box.

HELD—that the power of the corporation extended to the pavement as distinguished from the roadway for the purpose of doing that which was necessary for making the tramway an electrical tramway; that the Act authorised a nuisance, and unless the plaintiffs could prove that the powers had been abused they had no remedy; that as the defendants and their

Powers—*Continued.*

engineer had acted *bonâ fide* the action must be dismissed.

GOLDBERG & SON, LD. *v.* LIVERPOOL CORPORATION, (1900) 82 L. T. 362; 16 T. L. R. 320—C. A.

83. *Compulsory Purchase of Land—Original Purpose—Application to Purpose inconsistent with Original Purpose — Local Government Board's Direction—Injunction—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 175, 176.]—By sect. 175 (1) of the Public Health Act, 1875, "any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired shall (unless the Local Government Board otherwise direct) be sold."

HELD—that the language of sect. 175 was not sufficient to enable a local authority to apply such land permanently to a purpose different from that for which it was originally acquired, notwithstanding that the Local Government Board had directed that the land need not be sold and should be applied permanently to a purpose inconsistent with the original purpose.

Decision of Kekewich, J. ([1900] 1 Ch. 51; 69 L. J. Ch. 39; 63 J. P. 824; 48 W. R. 69; 81 L. T. 504; 16 T. L. R. 10) affirmed.

ATTORNEY-GENERAL *v.* HANWELL URBAN [DISTRICT COUNCIL, [1900] 2 Ch. 377; 69 L. J. Ch. 626; 48 W. R. 690; 82 L. T. 778; 16 T. L. R. 452—C. A.

84. *Right of Way — Obstruction—Duty of District Council to protect Public Right of Way —Instituting or defending Legal Proceedings— Surveyor or Private Individual—Transfer of such Powers and Duties to County Council— Contributions to Costs—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 26.]—Sect. 26, sub-sect. 1, of the Local Government Act, 1894, imposes upon every district council the duty of protecting all public rights of way, and preventing as far as possible the stopping or obstruction of any such rights; sub-sect. 3 provides that "a district council may, for the purposes of carrying into effect this section, institute or defend any legal proceedings, and generally take such steps as they deem expedient"; and sub-sect. 4 provides that if a district council refuses or fails to take proceedings upon a representation from a parish council the latter may petition the county council, and if that council so resolve, the powers and duties of the district council under the section shall be transferred to the county council.

HELD—that under sect. 26, the county council could defend an action brought against the surveyor of the district council, or could defend an action brought against private individuals, if they thought it a proper action to be defended; and that the county council could contribute towards the defendant's costs in the action.

REX *v.* NORFOLK COUNTY COUNCIL, [1901] [2 K. B. 268; 70 L. J. K. B. 575; 65 J. P. 454; 49 W. R. 543; 84 L. T. 822; 17 T. L. R. 437—Div. Ct.

85. *Committees—Corporation — Delegation of Powers to Committee — Recommendation of Committee Adopted by Council — Validity — Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *s.* 22.]—On November 20th a report as to insufficiency of sanitary appliances was presented at a meeting of the "Unhealthy Dwellings Sub-Committee" of a municipal corporation; the sub-committee thereupon resolved to instruct the surveyor to prepare plans of the work required, and to request the property owners to attend the meeting at which such plans would be considered.

On November 28th, at a meeting of the sanitary committee, the minutes of the sub-committee were read and adopted without discussion.

On December 5th, at a meeting of the city council, the proceedings of the sanitary committee were read and approved without discussion.

Subsequently, the sub-committee resolved to recommend that notices specifying the necessary improvements be served on the various owners; and this resolution was adopted without discussion by the sanitary committee, and the clerk was ordered to serve the notices.

The minutes of the sanitary committee were then adopted without discussion by the council.

HELD—that there was evidence to justify a finding of fact that the order was made after separate consideration of each case; and that the adoption of the minutes by the council was intended to be an adoption of the acts of the committees, and that the order was valid.

Wood v. *Widnes Corporation* ([1898] 1 Q. B. 463; 67 L. J. Q. B. 254; 62 J. P. 117; 46 W. R. 293; 77 L. T. 779—C. A., *see* PUBLIC HEALTH, 43) and *Cook* v. *Ward* ((1877) 2 C. P. D. 255; 41 J. P. 439; 25 W. R. 593; 36 L. T. 893—C. A.) distinguished.

AGNEW *v.* MANCHESTER CORPORATION, (1903), [67 J. P. 174; 1 L. G. R. 9—Div. Ct.

See No. 32, *supra*.

86. *County and County Borough Councils— Joint Committee—West Riding of Yorkshire Rivers Board—Applications of Moneys contributed by Councils—Costs of Promotion of Bill in Parliament—Injunction.*]—By a Provisional Order of the Local Government Board made in pursuance of sect. 14 of the Local Government Act, 1888, and confirmed by the Local Government Board's Provisional Orders Confirmation Act, 1893, a joint committee called the West Riding of Yorkshire Rivers Board, consisting of members of the county and county borough councils, was constituted for the purpose of enforcing the provisions of the Rivers Pollution Prevention Act, 1876, and the expenses incurred by the board were to be defrayed out of a common fund to be contributed by the constituent authorities.

The Board proposed to bring into Parliament a bill to extend their powers.

HELD—that an injunction must be granted to restrain them from applying any moneys produced by contributions levied under their statutory powers towards the payment of any costs or

Powers—*Continued.*

expenses in or in relation to the preparation, introduction, or promotion of the Bill, unless and until authorised by lawful authority so to do, and from employing at the expense or upon the credit of the board any of the servants or officers of the board or other person for the purposes of the promotion of the bill.

ATTORNEY-GENERAL *v.* WEST RIDING OF [YORKSHIRE RIVERS BOARD, (1905) 69 J. P. 177; 3 L. G. R. 764—Buckley, J.

87. *Approval by Borough Council required by private Act—Power to Demand Payment—Baker Street and Waterloo Railway Companies Act*, 1900 (63 & 64 Vict. *c.* ccxxv.), *s.* 30.]—By a private Act no advertisements were allowed to be exhibited upon certain private premises in the metropolis within view of any public street without the approval in writing of the Vestry.

HELD—that a metropolitan borough council, who were the successors of the vestry, had no power to demand payment for giving their permission to exhibit advertisements on the premises in question, but were bound to exercise their authority in the matter without any consideration.

R. v. *Bowman* ([1898] 1 Q. B. 663; 67 L. J. Q. B. 463; 62 J. P. 374; 78 L. T. 230—Div. Ct., *see* INTOXICATING LIQUORS, 7) applied.

SOUTHWARK CORPORATION *v.* PARTINGTON [ADVERTISING CO., (1905) 69 J. P. 183; 3 L. G. R. 505—Warrington, J.

88. Ultra vires—*General Powers—Statutory Powers—Tramways—Incidental Powers—Common Carriers—Manchester Corporation Tramways Act*, 1899 (62 & 63 Vict. *c.* cclix.)—*Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50).]—The defendants were incorporated by Royal charter and are empowered by their private statutes to run carriages and take tolls on their city tramways and other tramways (outside the city) which for the time being belong to or are in lease to them or on which they have power to place or run carriages and to use such tramways for the purpose of carrying passengers, and of conveying and delivering animals, goods, minerals, and parcels. They proposed to put into operation a comprehensive scheme of parcels delivery and collection, and as part of this scheme to accept "cash on delivery" parcels, "express delivery" parcels, and to insure parcels. They also proposed to act as agents for all railway companies for the receipt of parcels. They proposed, further, to collect and deliver parcels outside the radius of their tramway lines altogether, between places having no connection with their trams; and to collect and deliver goods which had never travelled, and were not intended to travel, by their trams at all. This action was brought by the Attorney-General on the relation of certain Manchester ratepayers, to restrain the carrying on of such a business.

HELD—that the defendants were not entitled to expend any part of the city fund or the receipts of their tramway undertaking, or the proceeds of any city rate, or any other moneys of the defendants, or of the city, for the purpose of establishing or maintaining or carrying on the business of carriers, except as part of and in connection with their tramway undertaking, and in respect of articles carried along all or part of the tramways for the time being belonging to or in lease to the corporation, or on which they have power to place or run carriages.

HELD, also, that though, theoretically, a corporation by charter could lawfully run tramways or carry on such a business as was proposed, they could not do so in practice without the expenditure of money, which would be a contravention of the provisions of the Municipal Corporations Act, 1882, and that therefore the defendants were not entitled under their general powers as a corporation by charter to carry on that part of the business proposed which was in excess of their statutory powers.

ATTORNEY-GENERAL *v.* MANCHESTER COR- [PORATION, [1906] 1 Ch. 643; 75 L. J. Ch. 330; 70 J. P. 201; 54 W. R. 307; 22 T. L. R. 261; 4 L. G. R. 365—Farwell, J.

89. *Electric Lighting—Land acquired for Generating Station—Use of for Dust Destructor in connection therewith—Incidental Purposes*—Ultra vires—*Electric Lighting Act*, 1882 (45 & 46 Vict. *c.* 56), *s.* 10.]—A local authority who had acquired land under an electric lighting order, granted pursuant to the Electric Lighting Acts, 1882 and 1888, for the purpose of a generating station for the supply of electricity to their district, proposed to erect on the land a refuse destructor in conjunction with the generating station, with the object of using the refuse as additional fuel for the generation of electricity.

HELD—that the erection of the refuse destructor was not necessary or incidental to the supply of electricity within sect. 10 of the Electric Lighting Act, 1882, and that the user of the land for that purpose was *ultra vires*.

Per Romer, L.J.: Whether a local authority having powers to acquire land under two different statutes for two different purposes can, by an exercise of their combined powers, acquire land as a whole, partly for the one purpose and partly for the other, without distinguishing what part is acquired for the one purpose and what part for the other, *quære*.

Decision of Farwell, J. ([1905] 2 Ch. 441; 74 L. J. Ch. 716; 69 J. P. 459; 54 W. R. 61; 21 T. L. R. 770; 3 L. G. R. 1259) affirmed.

ATTORNEY-GENERAL *v.* PONTYPRIDD URBAN [DISTRICT COUNCIL, [1906] 2 Ch. 257; 75 L. J. Ch. 578; 70 J. P. 394; 95 L. T. 224; 22 T. L. R. 576; 4 L. G. R. 791—C. A.

90. *Borrowing Powers—Overdrafts—Municipal Corporation—Illegal Borrowing by means of Overdrafts—Interest thereon—Illegal Payment from Borough Funds—Audit of Accounts—Borough Treasurer's Duties and Liabilities*—Certiorari—*Injunction—Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *ss.* 18–21, 25–28, 106, 119, 139–144, 240, *Sched. V. Part I., Sched.*

Powers—*Continued.*

VIII.—Public Health Act, 1875 (38 & 39 Vict. *c.* 55), *ss.* 6, 189, 198, 209, 210, 233–237, 245–247, 265—*Public Authorities Protection Act* (1893, 56 & 57 Vict. *c.* 61), *s.* 1.]—A municipal corporation, subject to the Municipal Corporations Act, 1882, were also the urban authority under the Public Health Act, 1875. They had exhausted their statutory borrowing powers and overdrawn their banking account, which was in the name of the borough treasurer, who was the defendant and also the manager of the bank where the borough funds were kept. They directed the bank to honour all cheques drawn on the treasurer, and the bank charged interest on the overdrafts. The treasurer, in his accounts with the borough, debited the borough with such interest, and credited himself as manager of the bank therewith. His accounts were audited by the borough auditors, who passed them, and the borough council approved them as audited.

HELD—that the corporation were not necessary parties to an action brought by the Attorney-General against the treasurer in respect of the charges for interest; that the overdraft and payment of interest thereon were *ultra vires;* that the defendant could not debit the borough funds nor credit himself with interest on the overdrafts; that the treasurer was in a fiduciary position to the burgesses and not merely a servant of the corporation; that the orders of the borough council were not available as a defence; that the audit was not conclusive on the borough and the burgesses; and that the remedy by *certiorari* provided by the Municipal Corporations Act and an appeal against the rates were not the only remedies, and that the Attorney-General on the relation of a ratepayer might obtain an injunction to restrain the payment of money being made under an illegal order of the council.

ATTORNEY-GENERAL *v.* DE WINTON, [1906] 2 [Ch. 106; 75 L. J. Ch. 612; 70 J. P. 368; 54 W. R. 499; 22 T. L. R. 446; 4 L. G. R. 549—Farwell, J.

91. *Early Closing—Order of Local Authority—Contents of—"Class" of Shops—Injunction—Shop Hours Act*, 1904 (4 Edw. 7, *c.* 31), *ss.* 1, 2, 3.] —Where a local authority have duly made an early closing order under the Shop Hours Act, 1904, and such order has been approved by the Home Secretary, the authority are *functi officio*, and cannot be restrained by injunction from enforcing the order.

Such an order may fix a closing hour on one day only in the week.

"Barbers and hairdressers" may be treated as one "class of shop" for the purposes of the Act, though they serve different sections of the public.

ATTORNEY-GENERAL *v.* BRIGHTON CORPORA- [TION, (1907) 71 J. P. 535; 24 T. L. R. 33—Joyce, J.

See also Nos. 43, 45.

(i) Practice.

92. *Right to Sue—Well situate in Main Road—Interference with—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *ss.* 8, 11, 25.]—A parish council cannot sue on behalf of the inhabitants for an interference with a well situate on a piece of land abutting on a main road, from which the inhabitants claim to take water, as main roads are vested in the district council under sect. 25 of the Local Government Act, 1894, and if the right is a public one, the Attorney-General must be joined as plaintiff.

STOKE PARISH COUNCIL *v.* PRICE, [1899] 2 Ch. [277; 68 L. J. Ch. 447; 63 J. P. 502; 47 W. R. 663; 80 L. T. 643—North, J.

93. *Early Closing—Form of Summons—Order of Local Authority—Breach of—Evidence—*Ultra vires*—Shop Hours Act*, 1904 (4 Edw. 7, *c.* 31), *ss.* 1, 3, 5.]—The effect of sect. 3 (3) of the Shop Hours Act, 1904, is, that objection cannot be taken by a person prosecuted for breach of a closing order on the ground that the required preliminary steps were not taken before the order was made, if it has been confirmed by the central authority.

A closing order applied to grocers and provision merchants; the defendant was a grocer, provision merchant and dairyman. He was prosecuted for selling a loaf of bread after closing hours.

HELD—that the summons need not allege that bread was groceries or provisions, or that it could only be sold by grocers or provision merchants.

HAMILTON *v.* FYFE, [1907] S. C. (J.) 79—Ct. of [Justy.

94. *Appeal to Local Government Board—New Streets—Determination of Level—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 268—*Portsmouth Corporation Act*, 1883 (46 & 47 Vict. *c.* cexi.), *ss.* 16, 31.]—By the Portsmouth Corporation Act, 1883, s. 31, any person deeming himself aggrieved by any order, determination, or decision of the corporation under the Act may appeal to the quarter sessions for the borough in the same manner and subject to the same provisions as in the case of an appeal from the decision of a Court of summary jurisdiction under sect. 269 of the Public Health Act, 1875, or to the Local Government Board under the provisions of sect. 268 of the same Act.

HELD (Buckley, L.J., dissenting)—that the right of appeal to the Local Government Board was not limited to the class of cases mentioned in sect. 268 of the Public Health Act, 1875, but extended to any order, determination, or decision of the corporation under the local Act, including a refusal to approve street plans. The Local Government Board were ordered to pay the costs of the appeal.

Decision of Div. Ct. (71 J. P. 132; 5 L. G. R. 136) reversed.

REX *v.* LOCAL GOVERNMENT BOARD, EX PARTE [STREET, (1907) 71 J. P. 297; 96 L. T. 651; 5 L. G. R. 844—C. A.

See also Nos. 57, 62, 81, 96

In General—*Continued.*

(j) Tort.

95. *Negligence—Employment of Contractor—Contractor's Negligence—Obligation of District Council.*]—The making up of a road casts upon the district council making it up the duty of taking care that no obstruction—at least, no dangerous obstruction—shall be offered to the public passing along the road. The public body cannot evade such duty by employing a contractor to make up the road.

Penny v. *Wimbledon Urban District Council* ([1898] 2 Q. B. 212; 67 L. J. Q. B. 754; 62 J. P. 582; 78 L. T. 748; 14 T. L. R. 477—Bruce, J., *see* PRACTICE, 81) followed.

HILL *v.* TOTTENHAM URBAN DISTRICT COUNCIL, [(1899) 79 L. T. 495; 15 T. L. R. 3—Bruce, J.

96. *Nuisance Abatement—Absence of Special Damage—Claim for a Declaration—Action not at Suit of Attorney-General.*]—The plaintiffs claimed an injunction to restrain the defendant from emptying noxious matter down one of their storm water gullies, and for a declaration that those gullies were the property of the plaintiffs.

HELD—that if the proceedings were taken for a nuisance, and no special damage was alleged, they ought to be brought in the name of the Attorney-General. But as the plaintiffs not only alleged an improper use of the storm-water gullies, but claimed a declaration, and the defendant had continued trespassing beyond the time admitted by the defendant, the plaintiffs were entitled to a clear admission as to their rights as prayed, and to 40*s.* damages.

HARWICH CORPORATION *v.* BREWSTER, (1901) [17 T. L. R. 274—Lord Alverstone, L.C.J.

97. *Negligence — Misfeasance — Highway Authority—Laying Sewer in Road—Excavations filled in—Road thrown open to Public when not Safe for Traffic—Heap of Rubbish deposited upon Road by Wrong-doer — Driver crossing Road to avoid Dangerous Part and running into Heap — Liability of Local Authority.*] — The defendants, who were both the highway and sanitary authority, dug a trench along a road under their control for the purpose of laying a sewer. When the sewer was laid they filled in the trench and opened the road for traffic. About a week after the road was thrown open the plaintiff was driven along it in a cab. The cab driver found that the part of the road where the trench had been filled in was soft: he crossed to the off-side to avoid that danger, and ran into a heap of rubbish which had been deposited by a wrong-doer upon that side of the road, with the result that the cab was overturned and plaintiff suffered injuries. The defendants knew that the heap of rubbish had been deposited upon the road. The jury found that at the time of the accident the part of the road that had been filled in was dangerous for traffic.

HELD—that the defendants were liable on the ground that they were guilty of misfeasance in throwing open the road when it was not fit for traffic, and that that misfeasance was the cause of the accident.

Semble, the capacity in which the defendants were acting was immaterial.

Decision of C. A. (19 T. L. R. 64) affirmed.

SHOREDITCH CORPORATION *v.* BULL, (1904) 68 [J. P. 415; 90 L. T. 210; 20 T. L. R. 254—H. L. (E.).

98. *Nuisance — Offensive Trade — Abatement — Precautionary Measures — Injunction.*]—The defendants had brought and deposited on their land a quantity of house refuse which caused a nuisance to adjoining occupiers by offensive smells and flies, particularly in the summer time and in certain states of the atmosphere and wind. The defendants' evidence was to the effect that at other times no nuisance was occasioned. The Court granted an injunction, restraining the defendants from bringing refuse on their land, so as to occasion a nuisance, and intimated that if the defendants' evidence was correct it was possible to bring the refuse on the land at certain times, but that this must be done at the defendants' own responsibility, and that the injunction would not hinder them from doing this, so long as they did not occasion a nuisance.

ATTORNEY-GENERAL (AT THE RELATION OF [THE CHAILEY RURAL DISTRICT COUNCIL) *v.* KEYMER BRICK AND TILE CO., LD., (1903) 67 J. P. 434; 1 L. G. R. 654—Joyce, J.

99. *Nuisance—Causing Nuisance from Sewage — Injunction — Disobedience — Application to Sequestrate—Costs.*]—Costs as between solicitor and client may sometimes be given to the party moving, by way of indemnity, instead of committing the respondent.

In July, 1901, an injunction was granted restraining a sanitary authority from allowing sewage to flow into a certain stream so as to be a nuisance to the plaintiff. In July, 1902, the latter applied for leave to sue out a writ of sequestration on the ground of the authority's disobedience, and the Court directed an expert to report upon their sewage works. On the presentation of this report the Court made an order for sequestration; but directed the writ to lie in the office for six months on the authority undertaking to carry out the works recommended by the expert, and on their paying the costs of and incidental to the motion, including the fees of the plaintiff's expert and of the expert appointed by the Court.

LEE *v.* AYLESBURY URBAN DISTRICT COUNCIL, [(1903) 19 T. L. R. 106—Buckley, J.

100. *Notice to abate Nuisance — Refusal to admit Members of District Council to Premises — Entering Premises without Permission—Trespass — Obstructing Local Authority — Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 102, 306.]—A notice having been served by an urban council upon the owner of premises requiring him to abate a nuisance thereon, certain members of the council went to the premises, and, without

Tort—*Continued.*

the permission of the owner, some of them entered the premises to make an inspection, the rest remaining outside. The owner thereupon locked the door of the premises, thus preventing the members who were outside from entering, and those who were inside from getting out. Upon an information charging the owner with having wilfully obstructed the members in the execution of the Public Health Act, 1875 :—

HELD—that the members had no power under sect. 102 of the Act to enter premises except by permission of the owner, or by an order of a magistrate, and that therefore they were not lawfully there, and the owner was not guilty of obstructing them in the performance of their duty.

CONSETT URBAN DISTRICT COUNCIL *v.* CRAWFORD, [1903] 2 K. B. 183 ; 72 L. J. K. B. 571 ; 67 J. P. 309 ; 51 W. R. 669 ; 88 L. T. 836 ; 19 T. L. R. 508 ; 1 L. G. R. 558 ; 20 Cox, C. C. 481—Div. Ct.

See also No. 12.

II. BUILDINGS AND BUILDING BYE-LAWS.

(a) Building Line.

101. *Consent of Local Authority—Proceedings for Penalties—Jurisdiction to grant Injunction or make Declaration in restraint of such proceedings—Public Health (Buildings in Streets) Act* (57 & 58 Vict. *c.* 52), *s.* 3—*Ord. XXV., r.* 5—*Grand Junction Waterworks Act* (57 Geo. 3, *c.* clxix. ; 15 & 16 Vict. *c.* cxlvii.)]—The plaintiffs, a waterworks company, purporting to act under their local Act, proposed to erect a new pumping station on a piece of their land abutting on a street. The defendants, the local authority, gave them notice that as the proposed new building would extend beyond the building line they objected, and should proceed before the magistrates for penalties under the Public Health Act. The plaintiffs thereupon brought an action for a declaration that they were entitled to build without interference by the defendants. The defendants pleaded that there was no jurisdiction to make such a declaration, and alternatively that, assuming jurisdiction, it was discretionary, and the discretion ought not to be exercised.

HELD—that on the authorities there might be jurisdiction to make such a declaration, but that the cases were limited to injunctions against apprehended trespass. That an injunction against merely proceeding before magistrates ought to be granted if at all under very special circumstances which did not exist in this case. And accordingly *a fortiori* that the declaration asked for ought not to be made.

GRAND JUNCTION WATERWORKS *v.* HAMPTON [URBAN DISRICT COUNCIL (NO. 1) [1898], 2 Ch. 331 ; 62 J. P. 566 ; 67 L. J. Ch. 603 ; 78 L. T. 673 ; 14 T. L. R. 467 ; 46 W. R. 644—Stirling, J.

102. *Information—Bench equally Divided—Dismissal—Second Information—Conviction.*]—A. was summoned for an offence under sect. 3 of the Public Health (Buildings in Streets) Act, 1888, in building a house, the front wall of which projected beyond the building line. At the hearing the justices were equally divided in opinion, and on the advice of their clerk the chairman dismissed the information. A second information was subsequently laid in precisely the same terms, save that the period for which penalties were claimed was different from that in the first. The justices convicted.

HELD—that the dismissal of the first information was a good dismissal, although the justices were equally divided.

HELD, further, that such dismissal decided that the erection of the house was not an offence under sect. 3, and that the continuing of that erection could therefore not be an offence.

KINNIS *v.* GRAVES, (1898) 67 L. J. Q. B. 583 ; 78 [L. T. 502 ; 46 W. R. 480—Div. Ct.

103. *Plans approved as regards Bye-law, but disapproved as regards Building Line*—Mandamus—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 157, 158—*Public Health (Building in Streets) Act* 1888 (51 & 52 Vict. *c.* 52), *s.* 3.]—The prosecutor submitted plans of a proposed building for the approval of the Eastbourne corporation as required by bye-laws made by them. The corporation approved such plans as being in compliance with the bye-laws, but disapproved them as regarded the building line shown thereon on the ground that the proposed building would contravene sect. 3 of the Public Health (Buildings in Streets) Act, 1888. The prosecutor obtained a rule *nisi* calling upon the corporation to show cause why a writ of *mandamus* should not issue commanding them to approve the plans as regarded the building line shown thereon.

HELD—that the Court would not order a *mandamus* to issue commanding a local authority to approve plans which they honestly considered showed a contravention of the provisions of an Act of Parliament.

Smith v. *Chorley Rural District Council* ([1897] 1 Q. B. 678 ; 66 L. J. Q. B. 427 ; 61 J. P. 340 ; 45 W. R. 417 ; 76 L. T. 637 ; 13 T. L. R. 327—C. A.) followed.

REG. *v.* EASTBOURNE CORPORATION, (1900) 64 [J. P. 724 ; 83 L. T. 338 ; 16 T. L. R. 546—C. A.

104. *Erecting House beyond House on Either Side—Purchaser of House maintaining House in same State after Notice—Offence by Purchaser—Public Health (Buildings in Streets) Act*, 1888 (51 & 52 Vict. *c.* 52), *s.* 3.]—Sect. 3 of the Public Health (Buildings in Streets) Act, 1888 provides that it shall not be lawful without the consent of the urban authority to erect or bring forward any house or building beyond the house on either side.

The respondent was the purchaser of a house from a builder who had in building it committed an offence against sect. 3 of the said Act. The

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justices held that the respondent had not committed an offence under sect. 3.

HELD—that the respondent did not commit an offence against the section by maintaining the house after notice from the urban authority in the same state as it was in at the time he bought it, and that the justices were right.

BLACKPOOL CORPORATION *v.* JOHNSON, [1902] [1 K. B. 646; 71 L. J. K. B. 485; 87 L. T. 28; 18 T. L. R. 494; 20 Cox, C. C. 276—Div. Ct.

105. *Removal of Stone Window Sill—Part of Front Wall "taken down to be Rebuilt or Repaired"—Liability of Owner for Work done by Builder without his Orders or Knowledge—Bristol Improvement Act*, 1847 (10 & 11 Vict. *c.* cxxix.), *ss.* 17, 18, 20.]—The appellants, the owners of a beerhouse licensed before 1869, gave orders to a builder to take out the sashes of a window and alter them. The builder, without their instructions or knowledge, removed the stone sill of the window and substituted for it two courses of brickwork. The appellant was convicted by the justices for an offence under sect. 17 of the Bristol Improvement Act, 1847, because he had "taken down part of the front or external wall of a house to be rebuilt or repaired," and had not rebuilt the said wall in accordance with the provisions of the section. On appeal to quarter sessions the conviction was quashed by the recorder.

HELD—that whether the stone sill was or was not part of the external wall of the house, it having been removed without the knowledge of the appellants, it had not been taken down to be "rebuilt or repaired," and that the decision of the recorder must be upheld.

YABBICOM *v.* BRISTOL BREWERY, LD., (1903) [67 J. P. 261; 1 L. G. R. 477—Div. Ct.

106. *"Written Consent" of Authority—What Amounts to—Statutory Penalty the only Remedy—No Right of Action in Individual—Public Health (Buildings in Streets) Act*, 1888 (51 & 52 Vict. *c.* 52), *s.* 3.]—The defendant had erected a building in advance of the building line, and the owner of an adjoining house brought an action for damages and an injunction.

HELD—that sect. 3 of the Act of 1888 created a single new offence with a penalty affixed to it, viz., a fine on the prosecution of the authority, and that therefore a private individual had no cause of action, proceedings for a fine being the sole remedy.

Before erecting the building in question the defendant submitted plans, which were certified as being in order by the borough surveyor, and approved by resolution of a committee of the council; subsequently this and other resolutions of the committee were approved and adopted by the council, and a minute to that effect was made and entered and duly signed.

Semble, there was a "written consent" sufficient to satisfy sect. 3.

MULLIS *v.* HUBBARD, (1903) 72 L. J. Ch. 593; [67 J. P. 281; 51 W. R. 571; 88 L. T. 661; 1 L. G. R. 769—Farwell, J.

107. *Bay Windows of a House intended to be Brought Forward in a Street beyond Front Main Wall of Building on one Side—Deposit of Plans showing said Bringing Forward—Examination of Surveyor—Stamped Approval of Committees of Urban Authority with Signatures of Respective Chairmen—Confirmation by Urban Authority—Written Consent—Sect. 3 of the Public Health (Buildings in Streets) Act*, 1888 (51 & 52 Vict. *c.* 52).]—The appellant was convicted under sect. 3 of the Public Health (Buildings in Streets) Act, 1888, for erecting and bringing forward certain bay windows of the house in a street beyond the front main wall of the house or building on one side of his house in the same street. The appellant had, before commencing to build, submitted plans of his house to the respondents. These plans were examined by the respondents' surveyor, and submitted to the "Roads" and "Health" Committees of the respondent council, and the committees stamped their approval on the plans, and the approval was signed by their respective chairmen. The respondent council duly confirmed the approval. The plans thus submitted and approved showed a contemplated "bringing forward" of certain bay windows beyond the front main wall of the building on one side of the said house. The attention of neither of the said committees nor of the respondent council was specifically called to the intended projection. The respondents contended (*inter alia*) that the approvals and confirmation only extended to approval of the plans as complying with their bye-laws as regards building construction and drainage, and that, therefore, they had given no "written consent" to the said "bringing forward" within sect. 3 of the above-mentioned Act.

HELD—that there was a "written consent" within the section.

MERRETT *v.* CHARLTON KINGS URBAN DISTRICT [COUNCIL, (1903) 67 J. P. 419—Div. Ct.

108. *Bringing Forward of Building beyond the Front Main Wall of House "on either side thereof"—Building Brought Forward beyond the Front Main Wall of House on one side and not on the other—Offence—Public Health (Buildings in Streets) Act*, 1888 (51 & 52 Vict. *c.* 52), *s.* 3.]—The respondent, the occupier of a corner house, put up a shop front in front of his own main wall which projected beyond the main front wall of the house on one side of it, but did not project beyond the front main wall of the house on the other side, which was separated from the respondent's house by a cross street.

HELD—that the respondent had committed an offence against sect. 3 of the Public Health (Buildings in Streets) Act, 1888, which forbids the erection or bringing forward, without the consent of the urban authority, of any house or

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building beyond the front main wall of the house or building on either side of the same.

ANDERSON *v.* RICHARDS, (1906) 70 J. P. 231 ; 4 [L. G. R. 404—Div. Ct.

(b) Continuing Offence.

109. *Nonconformity with Bye-law — Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 158.]—The appellants, builders, were convicted for building a house in such a manner as not to be in conformity with a bye-law made by the respondents, the urban sanitary authority, and it was further found that the appellants were not, and had not been, in possession of the building or premises since the date of the conviction, and had no right, power, or authority to go upon the premises after the date of that conviction. For failure to comply with a notice subsequently given by the respondents to the appellants requiring them to put an end to the state of the building which was contrary to the bye-law, the appellants were again convicted.

HELD—that because the appellants could not have complied with the notice without committing a trespass they were not liable to be convicted for having failed to comply with it. The facts admitted did not constitute a continuing offence under the bye-law and sect. 158 of the Public Health Act, 1875.

WELSH & SON *v.* WEST HAM CORPORATION, [1900] 1 Q. B. 324 ; 69 L. J. Q. B. 114 ; 82 L. T. 262 ; 16 T. L. R. 114—Div. Ct.

110. *Building Erected in Contravention—Conviction — Subsequent Summons for Continuing Offence—Evidence.*]—Upon a charge for permitting to continue a building erected contrary to bye-laws, if is not sufficient to merely prove a previous conviction of the defendant for erecting the same building. Some evidence must be given as to who was responsible for permitting it to continue.

POMEROY AND ANOTHER *v.* MALVERN URBAN [COUNCIL, (1903) 67 J. P. 375 ; 19 T. L. R. 597 ; 89 L. T. 555—Div. Ct.

And see No. 120, *infra*.

111. *Domestic Buildings—Sufficiency of Space in Rear of Building—Digging out Bank.*]—A brewery company erected certain outbuildings on land belonging to them, adjoining their hotel with stables and yard, by sufficiently excavating a steep bank sloping down to the high road to enable them to place the buildings on the level of the high road. The back wall of these buildings was built right up against the portion of the bank remaining unexcavated, and the top of the bank was now about one foot higher than the level of the back wall of the new buildings.

The rural district council refused to approve plans of these buildings, as contravening the bye-laws under the Public Health Acts. The company having nevertheless erected the buildings, were convicted by the justices for a breach of the bye-laws and fined. A case was stated for the opinion of the High Court, which affirmed the conviction.

This was an action for an injunction to restrain the company from continuing to contravene the provisions of the bye-laws.

HELD—that the council were entitled to the injunction asked for.

ATTORNEY-GENERAL *v.* FRIARY, HOLROYD & [HEALY'S BREWERIES, LD., (1907) 71 J. P. 348 ; 23 T. L. R. 487 ; 5 L. G. R. 697—Warrington, J.

See also Nos. 102, 104, 127.

(c) Crown.

112. *Exemption of "Prisons" — Separate Warders' Houses—Whether within the Exemption.*]—Separate warders' houses, having no internal communication with the main building of the prison in which the warders were employed, were held not to fall within the exemption of "prisons" in a bye-law providing that "the following buildings and works shall be exempt from the operation of these bye-laws, common gaols, prisons, . . . "

It was HELD, however, that the bye-laws did not bind the Crown.

GORTON LOCAL BOARD OF HEALTH *v.* PRISON [COMMISSIONERS (1887), [1904] 2 K. B. 165, (n.) ; 73 L. J. K. B. 114, (n.) ; 68 J. P. 27 ; 89 L. T. 478, (n.) ; 1 L. G. R. 838, (n.)—Div. Ct.

(d) Deposit and Approval of Plans.

113. *Revised Plan — Non-approval — Use of Building — Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 158, 159—*Public Health Acts Amendment Act*, 1890 (53 & 54 Vict. *c.* 59), *s.* 33.]—A plan of a building called "arcade" was deposited with the proper authorities, which showed the building to be other than a dwelling-house. This plan, after being duly approved and passed by the local authorities, was altered and called "arcade, revised plan of proposed domestic conversion," and deposited with the borough surveyor, but never approved and passed.

HELD—that all the effect of the deposit of the revised plan for domestic conversion, and its not having been disapproved of within the month by the local authority, was that the local authority could not object to the building *quâ* building. The building was not unlawful until somebody used it for the purpose of habitation, when the 33rd section of the Public Health Acts Amendment Act, 1890, would be contravened.

FULFORD *v.* BLATCHFORD, (1899) 80 L. T 627 ; [19 Cox, C. C. 308—Div. Ct.

114. *Plans Conforming with Bye-laws—Interference with alleged Highway — Refusal to approve Plans* — Mandamus.]—A corporation who are the guardians of highways ought not to be compelled by *mandamus* to approve of plans for new houses which, though in accordance with the bye-laws, in the honest opinion of that body

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would interfere with an alleged highway under their charge.

Rex *v.* West Hartlepool Corporation, Ex [parte Richardson, (1902) 18 T. L. R. 1—Div. Ct.

115. *Public Health Acts — Erection of New Buildings—Contravention of Bye-law—Plans not deposited—Power to order Building to be pulled down—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 157, 158, 306.]—The owner of an old building, constructed of brick with a tiled roof, removed the roof and began to build on the walls thereof and upon the surrounding ground a "new building." He did this without giving notice to the local surveyor and without delivering any plans, as he was bound to do under the bye-law of the urban sanitary authority. Some six months after he had completed the new building, he was summoned by the urban sanitary authority to show cause why the new building should not be pulled down, and was subsequently ordered to pull it down.

Held—notwithstanding the fact that no plans of the new building had been deposited, and that the local authority had not therefore disapproved them, that the order had been rightly made. The jurisdiction of the local authority to make the order was not affected by the time that had elapsed since the completion of the building.

Fairbrass *v.* Mayor of Canterbury, (1903) [67 J. P. 181 : 1 L. G. R. 181—Div. Ct.

116. *Number of Houses on one Plan — Deposit and approval of Plan under old Bye-laws — Repeal of old Bye-laws — "Work commenced" after Date of new Bye-laws.*]—In the year 1897 a "street" plan, showing the street (Colchester Terrace) now in question, was deposited by a landowner, and approved by the local authority, and the said plan was re-deposited and re-approved in January, 1902. In 1900 a plan for thirty-one houses, part of Colchester Terrace, shown in the first plan, was deposited and approved.

On April, 19th, 1902, notice was given on behalf of the appellant, a builder, of his intention to build twenty houses in Colchester Terrace.

On June 6th, 1902, new bye-laws with respect to buildings were sanctioned by the Local Government Board, under which fresh conditions as to the thickness of party walls, &c., were imposed, and by bye-law 80 of such bye-laws it was provided: "From and after the date of the confirmation of these bye-laws the following bye-laws and parts of bye-laws relating to new streets and buildings, shall be repealed, except as regards any work commenced before the date of the confirmation of this bye-law.

On June 6th, 1902, the date of such confirmation, some of the thirty-one houses set out in the plan approved in 1900, had not been commenced; and on August 6th, 1902, the appellant commenced, on some of the vacant sites, work which was in accordance with the old, but not with the new bye-laws.

Held—that the plan approved in 1900 was not a plan for the whole of the buildings shown thereon, but a number of separate plans for each building; and that if the work on any particular building shown on the plan was not commenced before June 6th, 1902, such approval did not authorise the erection of such building in contravention of the new bye-laws.

It is a question of fact, whether in any particular case work on a building has been commenced.

Harrogate Corporation v. *Dickinson* (*infra*) and *Withington Urban District Council* v. *Moore* ((1896) 60 J.P. 408) considered.

White *v.* Mayor of Sunderland, (1903) 67 [J. P. 199; 88 L. T. 592; 1 L. G. R. 483—Div. Ct.

117. *Provision that Deposit void if execution of Work not commenced within certain Period—Plan showing several Buildings—Whether one Plan or several Plans—Harrogate Corporation Act*, 1893, *s.* 27.]—A local Act provided that the deposit with the corporation of any plan of any building should be null and void if the execution of the work specified in such plan was not commenced within a certain period. In 1894 the defendant deposited, and the plaintiffs approved, two plans showing eleven houses, and two stables and coach houses. Some of the buildings shown upon the approved plans were erected within the period specified in the Act. After the expiration of that period, the plaintiff commenced to erect other buildings shown upon such plans without depositing fresh plans.

Held—that the plan of every house, or stable and coach-house, was a separate plan, although they were all included on the two sheets deposited with the plaintiffs; and that, therefore, the deposit was null and void so far as such plans related to the buildings which were not commenced within the period specified in the Act. Fresh notices and deposits of plans were therefore necessary.

Decision of Wright, J. (67 J. P. 100; 88 L. T. 299) affirmed.

Harrogate Corporation *v.* Dickinson, [1904] [1 K. B. 468; 73 L. J. K. B. 262; 68 J. P. 202; 90 L. T. 41; 2 L. G. R. 525—C. A.

118. *Refusal to Approve Plans — Malice — Action for Damages*—Mandamus.]—An action for damages will not lie against a local authority for maliciously refusing to approve building plans.

In a proper case a *mandamus* will be granted to hear and determine the application.

Davis v. Bromley Corporation, (1907) 71 [J. P. 513; 24 T. L. R. 11; 5 L. G. R. 1229—C. A.

See also Nos. 106, 107.

(e) Exemptions and Dispensations.

119. *Dispensing Power—"Approved" Plan.*]—A local authority empowered to make bye-laws

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for the regulation of buildings is bound by those bye-laws, and has no power to sanction building plans not in accordance with them. They have no dispensing power — unless it is expressly given—and any purported approval of plans contravening such bye-laws is inoperative and invalid.

The approval must be a lawful, and not a mere actual, approval.

McIntosh v. *Pontypridd Improvements Company* (61 L. J. Q. B. 164 ; 8 T. L. R. 128, 203) followed.

YABBICOM *v.* KING, [1899] 1 Q. B. 444 ; 68 [L. J. Q. B. 560 ; 63 J. P. 149 ; 47 W. R. 318 ; 80 L. T. 159—Div. Ct.

120. *No Power of Exemption — Reasonableness.*]—A building bye-law is not unreasonable and therefore invalid because it contains no proviso enabling an authority to make an exception in an exceptional case.

It must be presumed that in a proper case the authority will not prosecute for a trivial breach, or that the justices will take advantage of the provisions of sect. 16 of the Summary Jurisdiction Act, 1879.

POMEROY AND ANOTHER *v.* MALVERN URBAN [DISTRICT COUNCIL, (1903) 67 J. P. 375 ; 19 T. L. R. 597 ; 20 Cox, C. C. 572—Div. Ct.

And see No. 110, *supra.*

121. *Bye-law reserring no Power of Exemption —Unreasonableness—Validity—Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *s.* 16.]—It is desirable ,but not essential to their validity, that building bye-laws should provide for some power of exemption in special cases.

A bye-law made by a rural sanitary authority, which provides that every new building shall be enclosed with walls constructed of bricks, stone, or other hard and incombustible materials, is not unreasonable and *ultra vires* because it does not reserve to the rural authority any discretion to permit the erection of a building not enclosed with walls of the above materials in any circumstances ; but the justices have a discretion under sect. 16 of the Summary Jurisdiction Act, 1879, upon a summons for breach of such a bye-law, to dismiss the summons or deal with it otherwise as the occasion may deserve.

SALT *v.* SCOTT-HALL, [1903] 2 K. B. 245 ; 72 [L. J. K. B. 627 ; 67 J. P. 306 ; 52 W. R. 95 ; 88 L. T. 868 ; 19 T. L. R. 518 ; 20 Cox, C. C. 497—Div. Ct.

(f) Floors.

122. *Bye-laws as to Buildings—Floors—Application of General Clause securing adequate Strength.*]—Certain rules were laid down by the bye-laws of the urban authority as to the quality, measurement and strength required for timbers for floors of ordinary construction. By another bye-law there was a general clause requiring all floors to be properly constructed of sound and suitable materials and of adequate strength.

HELD—that a floor which was built partly of timber and partly of steel came within the general clause, and not within the rules applicable to floors built entirely of timber.

TOWERS *v.* BROWN, (1903) 2 L. G. R. 942—Div. Ct.

(g) Notice.

123. *Open Space in Rear of Building—Notice —Sufficiency of Notice.*]—By a bye-law (No. 98) made by a rural district council and duly confirmed, it was provided that where a person executes any work to which the building bye-laws applied he should "receive notice in writing specifying any matters in respect of which . . . the execution of such work may be in contravention of any bye-law relating to . . . buildings" and requiring him to obey the bye-law. The respondent received a notice, purporting to be made under their bye-law, from the surveyor of the council to the following effect: "I am directed by this council to draw your attention to the fact that a wooden erection has been made in the backyard of your property, situate at No. 20, Avondale Terrace, Chester-le-Street, contrary to bye-laws Nos. 53 and 96 of the bye-laws relating to new streets and buildings in force in this district, and you are hereby requested," &c. On an information against the respondent it was proved that he had contravened the terms of bye-law No. 53 of the council, which related to the aggregate amount of open space required to be at the rear of any new domestic building, the required distance from the said building to the boundary of adjoining premises and the required freedom from erection within the limits of this open space, but the justices dismissed the information on the ground that the said notice was bad in law in that it did not, as required by bye-law No 98, specify the matters in respect of which the erection of the building contravened the provisions of bye-laws Nos. 53 and 96 referred to in the notice.

HELD—that the justices ought to have entertained the information as the notice was sufficient.

DICKINSON *v.* FORSYTH, (1904) 68 J. P. 171 ; 90 [L. T. 30 ; 2 L. G. R. 1199—Div. Ct.

(h) Res Judicata.

124. *Deposit of Plan of Buildings to be Erected —Deriation from Plan—Summons—Dismissal by Justices—Subsequent Deriation of Substantially the same Character with regard to other Houses.*]—The respondent, the owner of a building estate, deposited a specimen plan, in accordance with the bye-laws, of certain types of houses intended to be erected. Subsequently the respondent was summoned for deviating from such plan in regard to one of the houses in four respects. The justices dismissed the summons on the ground that these were not substantial deviations from the plan deposited by the respondent.

Subsequently the respondent was summoned for deviation from the deposited specimen plan in regard to two other houses in the same row,

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on the ground (as found by the justices) of similar deviations. The justices dismissed the summons on the ground that the matter was *res judicata*.

Held—that the justices were bound to hear the summons on its merits, and that the matter was not *res judicata*.

Balby-cum-Hexthorpe Urban District [Council *v.* Millard (No. 1) (1904) 68 J. P. 81 ; 2 L. G. R. 330—Div. Ct.

125. *Penalty — Offences Against — Special Remedy—Right of Attorney-General at the Relation of the Council to bring Action for Injunction in High Court—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 183, 251].—The Attorney-General is entitled to an injunction, as an ancillary remedy, to restrain the breach of a public right in the same way as a private person is so entitled in respect of a breach of his private rights ; and this is so in a case where the public right has been created by a statute which also provides a special remedy for its breach, as, for instance, the recovery of a penalty in a summary way.

An urban district council having by its bye-laws prescribed (amongst other things) the width of new streets under sect. 157 of the Public Health Act, 1875, and imposed penalties for offences against the bye-laws under sect. 183, which penalties were, by sect. 251, to be recovered before a court of summary jurisdiction, the Attorney-General, at the relation of the council, brought an action in the High Court against the defendant, who had contravened the bye-laws, for an injunction.

Held—that the action lay ; and that the injunction should be granted.

Attorney-General *v.* Ashbourne Recrea- [tion Ground Co. Ld., (1902) 51 W. R. 125 ; 19 T. L. R. 39 ; 72 L. J. Ch. 67 ; 67 J. P. 73 ; 87 L. T. 561 ; 19 T. L. R. 40—Buckley, J.

(i) Remedies for Breach.

126. *Dangerous Building—Notice to Owner—Erection of Hoarding—Recovery of Expense by Local Authority — Towns Improvement Clauses Act*, 1847 (10 & 11 Vict. *c.* 34), *s.* 75—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 160, 257.]—The respondent was the owner of premises which were in a dangerous condition. The appellants, the sanitary authority for the district, served a notice upon him under sect. 75 of the Towns Improvement Clauses Act, 1847, which was incorporated by sect. 160 of the Public Health Act, 1875, calling upon the respondent to take down or repair the roof of the premises in question. The respondent having failed to comply with the notice, the appellants, in pursuance of the section, caused a hoarding to be erected in front of the premises. A formal demand for payment of the expense of such hoarding was made, and such demand not being complied with a summons was issued. The justices dismissed the summons on a ground that the three months allowed by sect. 257 of the Public Health Act, 1875, had not elapsed. The sanitary authority appealed.

Held—that sect. 257 applied only to cases of apportionment, and that the justices ought to have convicted.

Usk Urban District Council *v.* Mortimer, [(1904) 68 J. P. 38 ; 90 L. T. 25 ; 20 T. L. R. 96 ; 2 L. G. R. 135—Div. Ct.

127. *Enforcement — Statutory Remedy — Remedy by Mandatory Injunction—Proceedings before Justices—Proceedings by Attorney-General —Double Remedy against same Defendant—* Laches—*Public Health (Buildings in Streets) Act*, 1888 (51 & 52 Vict. *c.* 52), *s.* 3.]—The defendants commenced to erect a building contrary to the provisions of the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), s. 3, and after due notice, were summoned by the urban authority before petty sessions and fined. The defendants paid the fine and continued, and threatened to complete the erection of the building. The Attorney-General, at the relation of the urban authority, moved for a mandatory injunction to compel the pulling down of so much of the building as infringed against the statute. The defendants objected to the action on the double ground that the only remedy was the one given by statute, that if there was a double remedy by proceedings before the justices and an injunction, only one could be adopted, and further, that there had been *laches* in reference to the proceedings.

Held—that it was lawful for the Attorney-General to take action, although there was also a statutory remedy ; that as the offence was a continuing one, the Attorney-General could sue for an injunction, although proceedings had been taken before the justices ; that in fact there had been no *laches*, and, there having been a breach of the law, a mandatory injunction must be granted.

Attorney-General v. *Ashbourne Recreation Ground Co.* ([1903] 1 Ch. 101 ; 72 L. J. Ch. 67 ; 67 J. P. 73 ; 51 W. R. 125 ; 87 L. T. 561 ; 19 T. L. R. 39 — Buckley, J., No. 125, *supra*) followed.

Attorney-General *v.* Wimbledon House [Estate Co., [1904] 2 Ch. 34 ; 73 L. J. Ch. 593 ; 68 J. P. 341 ; 91 L. T. 163 ; 20 T. L. R. 489 ; 2 L. G. R. 826—Farwell, J.

(j) Waterworks.

128. *Waterworks—Works on Land under Private Act—Private Act not to apply to general Sanitary Act—Waterworks Clauses Act*, 1847 (10 & 11 Vict. *c.* 17), *s.* 93—*Grand Junction Waterworks Act*, 1852—*Public Health (Building in Streets) Act*, 1888 (51 & 52 Vict. *c.* 52), *s.* 3.]—By the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 93, it is enacted :—"That nothing herein or in the special Act contained shall be deemed to exempt the undertaker from any general Act relating to waterworks or any Act for improving the sanitary condition of towns and populous districts which may be passed in the same

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session of Parliament in which the special Act is passed or any future session of Parliament."

By the Grand Junction Waterworks Act, 1852, the appellants were empowered to carry out certain works which by sect. 25 were to be completed within five years, "provided always that this Act or anything therein contained shall not restrain the company from extending their works . . . whenever it shall be necessary for the purpose of supplying water . . ."

By sect. 12 of the Waterworks Clauses Act, 1847, which was incorporated in the Private Act of 1852, the appellants were, subject to the provision of their special Act or Acts, incorporated therein, empowered to alter any works and to erect such buildings on the lands authorised to be taken by them as they shall think proper for supplying their district with water.

By sect. 3 of the Public Health (Building in Streets) Act, 1888 (51 & 52 Vict. c. 52), it is enacted "that it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building beyond the front main wall of the house or building on either side thereof in the same street, nor to build any addition to any house or building on either side of the same."

In October, 1897, the appellants, finding it necessary to extend their works and to build a further engine-house on their lands, proceeded to erect an engine-house beyond the front main walls of each of the buildings immediately adjoining on either side thereof. The respondents disapproved the plans and refused to give their consent to the erection. Directly the building was above the level the respondents gave the appellants formal notice, pursuant to the statute, and, upon the appellants continuing the work, issued summonses for offences under the Public Health (Buildings in Streets) Act, 1888.

The magistrates held that the appellants had been guilty of offences in so erecting and continuing the engine-house, and convicted the appellants.

HELD—that the conviction was right.

GRAND JUNCTION WATERWORKS CO. *v.* HAMPTON URBAN DISTRICT COUNCIL (No. 2), (1898) 67 L. J. Q. B. 903; 79 L. T. 176—Div. Ct.

129. *Water Tower erected by Company under Special Act—Non-compliance with Bye-laws of District Council—Waterworks Clauses Act*, 1847 (10 & 11 Vict. *c.* 17), *s.* 93—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 157.]—The Uckfield District Council laid two informations against the respondent water company for having begun to build a water tower without giving any of the notices prescribed by, or in any otherwise complying with the provisions of certain bye-laws made by the council under powers conferred on them by the Public Health Act, 1875.

The justices dismissed the information on the ground that as the erection of the water tower was expressly authorised by the company's Private Act of 1897, the byelaws did not apply.

HELD on appeal)—that the justices were wrong. The Special Act was merely to enable the respondent company to build the water-tower on land belonging to someone else; but being so empowered, they were then in the same position as a private person intending to erect a building on his own land, and under a similar obligation to comply with bye-laws duly made under the Public Health Act, 1875, which Act, although not expressly incorporated in the respondent company's Private Act of 1897, must, in the absence of any expression to the contrary, be held to apply.

HELD, also, that there was no such inconsistency between the powers conferred by the Special Act of 1897 upon the respondents to erect their tower and the provisions of the Public Health Act, 1875, empowering the appellants to make bye-laws, as would support an inference that the latter had been repealed.

UCKFIELD RURAL COUNCIL *v.* CROWBOROUGH [DISTRICT WATER CO., [1899] 2 Q. B. 664; 68 L. J. Q. B. 1009; 48 W. R. 63; 81 L. T. 539; 16 T. L. R. 3—Div. Ct.

See also No. 101.

(k) Words, Construction of: "New Building," "Building," "Sign," "Letting," etc.

And see No. 112.

130. *Wooden Structure—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 157—*Local Government Act*, 1858 (21 & 22 Vict. *c.* 98), *s.* 34.]—A bye-law made by a municipal corporation under sect. 34 of the Local Government Act, 1858 (since repealed), provided that a person intending to erect a "new building" must give fourteen days' notice to the corporation, and deliver plans showing the thickness of the walls, the dimensions of the rooms, the situation of the fireplaces, stoves, chimneys, and flues, and generally the position, form, and dimensions of the several parts of the building, and of the water-closet, privy, gully, drain, ashpit, &c.

HELD—that a wooden structure belonging to the respondents, 20 feet each way and, at the apex of a slanting roof, 12 feet high, in the centre of an acre of ground—to which the public has no access—part of which was used by the respondents as a builders' yard, the structure being used as a stable, was a "new building" within the meaning of the bye-law.

SOUTH SHIELDS CORPORATION *v.* WILSON [BROS., (1901) 65 J. P. 294; 84 L. T. 267; 17 T. L. R. 247; 19 Cox, C. C. 667—Div. Ct.

131. *Movable Wooden Shelter for Weighing Machine—Movable Wooden Refreshment Stall—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 157.]—An urban sanitary authority passed a bye-law under the powers conferred by the Public Health Act, 1878, s. 157, that "every person who shall erect a new building shall cause such building to be enclosed with walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together."

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In Archer's case the structure was wooden, measuring 10 feet by 7 feet, with a height of 10 feet, as a shelter for a large weighing machine on the esplanade, where the public stopped for the purpose of using the weighing machine. It was not fixed to the ground, and there were no sanitary arrangements in it, nor any provision for artificial lighting or heating.

In Romanis' case the structure was a wooden shelter, measuring 9 feet 3 inches by 6 feet 11 inches, with a height of 7 feet 5 inches, to shelter a counter on which tea, coffee, and light refreshments were sold on the esplanade. It was without sanitary or drainage arrangements, or provision for artificial lighting or heating. It could be readily removed.

Held—that neither of such structures was a "new building" within the meaning of the bye-law.

Southend-on-Sea Corporation *v.* Archer; [Southend-on-Sea Corporation *v.* Romanis, (1901) 70 L. J. K. B. 328; 65 J. P. 292; 84 L. T. 264; 17 T. L. R. 215; 19 Cox, C. C. 660—Div. Ct.

132. *Brick-kiln—Building "used exclusively for the working of such Mine"—Exemption—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 157, 158.]—A bye-law made by a borough corporation acting by the council as urban sanitary authority exempted "any building (not being a dwelling-house) erected, or intended to be erected, in connection with any mine or intended to be used exclusively for the working of such mine" from the operation of certain bye-laws dealing with new buildings. The respondent erected a brick-kiln in connection with a brick field from which fireclay was extracted. The fireclay was not saleable as an article of merchandise until it had passed through the kiln. The magistrates were of opinion that the word "mine" in the bye-laws should be construed in accordance with the definition contained in the Mines Regulation Act, 1887, and if so, upon the evidence they found as a fact that the kiln "was used exclusively for working such mine."

Held—that the Coal Mines Regulation Act, 1887, had nothing to do with the matter at all; that the magistrates really came to the conclusion on the facts that this particular kiln was used exclusively for the working or winning of the particular material in the sense that the clay would not be got at unless there was a kiln to turn it into bricks practically speaking at the mine; that the Court did not see its way to reversing the decision of the magistrates; and that the brick-kiln was therefore exempt under the bye-law.

Tylecote *v.* Morton, (1902) 66 J. P. 136; 85 [L. T. 692—Div. Ct.

133. *Newly-built House—Not yet Certified for Habitation — Occupation by Caretaker.*]—An owner of newly-built houses, which had not yet been certified as fit for habitation, allowed a caretaker to occupy one of them.

Held—that he could not be convicted for having "let" the house in contravention of the building bye-laws.

Gowen *v.* Sedgwick, (1904) 68 J. P. 484—[Div. Ct.

134. *Stables for Horses—Building constructed or adapted to be used as a place of habitual Employment for any Person in any Manufacture, Trade or Business — Public Health Act*, 1875 (35 & 36 Vict. *c.* 55), *s.* 157.]—The appellant was summoned for infringement of a bye-law made by the respondents which provided that no building should be erected except of brick or incombustible material "subject to certain exceptions." One of these exceptions was in the case of a building which should "not be constructed or adapted to be used, either wholly or in part, for human habitation, nor as a place of habitual employment for any person in any manufacture, trade or business." The appellant had erected a building in timber and roofed in wood, which was divided by partitions which did not extend above the ends of the roof. One end was used as a cement store, the middle portion as a timber store, and the other end was a stable. The respondents contended that the stable infringed the bye-law as to the erection of new buildings.

Held—that the bye-law did not apply, as the stable was not adapted to be used, either wholly or in part, as a place of habitual employment for any person in any manufacture, trade or business.

Linzell *v.* Felixstowe and Walton Urban [District Council, (1904) 68 J. P. 208; 90 L. T. 388; 2 L. G. R. 372—Div. Ct.

135. *Alteration of Old Building — Rejected Plan—Undertaking — Eastbourne Improvement Act* (48 & 49 Vict. *c.* clxv.) 1885.]—A local Act enacted that every undertaking given by or on behalf of the owner of property on the passing of plans should be binding upon the owner of the property for the time being. Plans were submitted for alterations and additions to certain premises, and were endorsed with an undertaking that the premises should not be used as a dwelling-house. These plans were rejected by the local authority because they provided insufficient air space. Other plans were afterwards submitted and approved, and the work was done according to the latter plans.

Held—that there was no evidence of any undertaking within the meaning of the Act binding upon the owner of the premises.

The local Act also contained a provision that the conversion of one dwelling-house into two or more, and the re-conversion into a dwelling-house, of a building discontinued as a dwelling-house, should be deemed to be the erection of a new building. A bye-law made under the Act laid down certain conditions for the occupation of a new dwelling-house.

A block of three shops with dwelling-rooms over each was converted into one shop in 1892; the upper part of the whole block was occupied

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as one dwelling from 1900 to 1903; in 1903 the shop was again divided into three shops, and the upper part correspondingly divided into three dwellings.

HELD—that the alteration of the upper part into three dwellings, and its occupation as such, were the erection of a new building and the occupation of a new dwelling-house within the meaning of the Act and bye-law.

HALL AND OTHERS *v.* EASTBOURNE COR- [PORATION, (1905) 69 J. P. 369 – Ld. Alverstone, C.J.

136. *Building Operations commenced before Bye-laws come into Force—Operations subsequently continued.*]—A builder was convicted on several informations for that he, being a person erecting a new building, had contravened certain building bye-laws of a rural district council with regard to new buildings. Between March and May, 1904, the builder, assisted by his father and a labourer, dug trenches in a plot of his ground for the foundations of a block of cottages. He then laid concrete foundations in the trenches, and laid from two to four courses of brickwork at the corners of the block. The bricks for the block were ordered in April, and in July the builder contracted with one X. to do the work of building the rest of the block. No work was done on the block from the end of May to October 11th, 1904, when X. commenced his work, in respect of which the informations were laid. Before August 31st, 1904, there were no bye-laws in force relating to new buildings within the district where the block was being built. Such bye-laws were made by the rural district council in August, 1904, and confirmed by the Local Government Board on the 31st of that month. The builder was convicted for infringing certain of these bye-laws.

HELD—that the block was not a "new building" within the meaning of the bye-laws, and that therefore the convictions must be quashed.

HUBBARD *v.* BROMLEY RURAL DISTRICT [COUNCIL, (1905) 67 J. 437—Div. Ct.

137. *Alteration of old Building—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 157, 159.]—Section 159 of the Public Health Act, 1875, is not an exhaustive enumeration of all the instances where the re-erection of an old building should be considered to be the erection of a new building.

In every case it is a question of fact for the justices whether an old building, exempt from the operation of the bye-laws, is being so reconstructed or re-erected as to be a new building within their operation.

Hobbs v. *Dance* ((1873) L. R. 9 C. P. 30; 43 L. J. M. C. 21; 22 W. R. 90; 29 L. T. 687) explained.

James v. *Wyrill* ((1884) 48 J. P. 725; 51 L. T. 237—Div. Ct.) followed.

REDRUTH BREWERY CO. *v.* REDRUTH URBAN [DISTRICT COUNCIL, (1905) 69 J. P. 78; 3 L. G. R. 130—Div. Ct.

See also No. 115, *supra*.

138. *One Building or Several—Erection of Domestic Building in Blocks—Single Entrance—Through Communication—Adapted for use by more than one Person.*]—A building was constructed in three blocks each of two storeys, and two blocks each of one storey, all structurally united together, and designed for use as stables and coach-houses. There was only one entrance, from which a continuous way ran through all the blocks. The building could easily be adapted for use by more than one person. Upon action brought by a local authority to restrain the defendants from building so as to contravene their bye-laws respecting air space, and also in other respects:—

HELD—that the building, although it might be adapted for use by more than one person, was structurally constructed as one building, and must be treated as being one building, and that, being such, it complied with the bye-laws.

ATTORNEY-GENERAL AND WOOD GREEN URBAN [DISTRICT COUNCIL *v.* MELVILLE AND ANOTHER, (1906) 70 J. P. 17; 93 L. T. 612; 4 L. G. R. 166—Kekewich, J.

139. *Projections—Pole Carrying Flag—Liverpool Improvement Act*, 1882 (45 & 46 Vict. *c.* lv.), *s.* 36.]—A local Act provided that it should not without the corporation's consent be lawful to "place, fix, or hang any door, shutter, trap, platform, shoot, sign, cathead, crane, hoist, or other apparatus or thing in connection with any building or structure so as to project over the surface of any street."

The respondent erected an iron pole which projected through an open window and was bolted to the building: from the pole hung a canvas advertisement.

HELD—that the iron pole and canvas could be considered a sign.

GOLDSTRAW *v.* JONES, (1907) 71 J. P. 22; 96 [L. T. 30; 4 L. G. R. 1176—Div. Ct.

140. *Portable Theatre—Temporary Erection not a Building—Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 157.]—A portable theatre, constructed of wood, and erected for a short period only, where the intention of the proprietor is to move to another locality within a short time, is not a "building" within the meaning of the Public Health Act, 1875, s. 157, or of bye-laws framed in pursuance of that action.

An injunction may, therefore, be granted to restrain an urban district council from pulling down such a theatre on the ground that it does not conform with their bye-laws.

NEWELL *v.* ORMSKIRK URBAN DISTRICT [COUNCIL, (1907) 71 J. P. 119—LANCASTER CHAN. CT.

III. MISCELLANEOUS.

141. *Dairies and Cowsheds—Ventilation—Air-space—Order in Council—"As if enacted by this Act"—Contagious Diseases (Animals) Act*, 1878 (41 & 42 *Vict. c.* 74), *ss.* 34 *and* 58—*Dairies, Cowsheds, and Milkshops Order*, 1885, *arts.* 7, 8, *and* 13.]—By sect. 34 (2) of the Contagious

Miscellaneous—*Continued.*

Diseases (Animals) Act, 1878, power is given to the Privy Council (now under 52 & 53 Vict. c. 30 the Board of Agriculture) to make by order regulations as to (*inter alia*) the "ventilation" of cowsheds and dairies. The Privy Council made an order regulating "ventilation including air space."

HELD—that the order was not inconsistent with the statute.

By sect. 34 (5) of the same Act the Privy Council can delegate its powers of making regulations to the local authority. By the Dairies, Cowsheds, and Milkshops Order, 1885, art. 13, it delegated this power to make (*inter alia*) regulations as to "ventilation" of cowsheds and dairies to the local authority. In arts. 7 and 8 it itself had prescribed certain regulations as to "ventilation including air space" of cowsheds and dairies. A local authority prescribed under art. 13 certain regulations as to air space in cowsheds.

HELD—that these regulations were within the powers delegated to them under art. 13.

When an Act of Parliament declares that orders made under it are to have effect "as if enacted by this Act," orders so made and the Act itself are to be read as one statute and so construed.

The Chartered Institute of Patent Agents v. *Lockwood* ((1894) A. C. 347) applied.

BAKER *v.* WILLIAMS, [1898] 1 Q. B. 23; 62 [J. P. 21; 66 L. J. Q. B. 880; 77 L. T. 495; 14 T. L. R. 12; 46 W. R. 64—Div. Ct.

142. *Parish Council—Costs of Action—Consent of Parish Meeting—Precept to Overseers*—Mandamus—*Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 11.]—A parish council meeting incurred law costs to the amount of £92 14*s.* 10*d.* in an action by them to establish the rights of the parish to the water supply of a pump erected by the parish, in which they were unsuccessful. A rate of 3*d.* in the pound would only produce £54 12*s.*, and since March, 1899, when the financial year began, precepts had been issued for sums amounting to £52. Two attempts had been made to call a parish meeting to authorise the levying of another 3*d.* in the pound, as directed by the statute, but had failed. Upon a rule *nisi* for a *mandamus* to the parish council to issue a precept to the overseers to pay to the treasurer of the parish out of the poor rate the sum due for law costs no information was given as to the parish meeting's consent to the costs being incurred.

HELD—that the consent of the parish meeting must be assumed, and the *mandamus* must issue.

REG. *v.* STOKE PARISH COUNCIL, (1900) 64 J. P. [343; 82 L. T. 198—Div. Ct.

143. *Rates — Asylums Board Expenses—Amounts of Contributions from County and County Boroughs — Apportionment — Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 33 —*Agricultural Rates Act*, 1896 (59 & 60 Vict. *c.* 16), *ss.* 1, 2, 3, 9—*Agricultural Rates Act*, 1896, *Ord., art.* 17.]—By the Lancashire County (Lunatic Asylums and Other Powers) Act, 1891, a lunatic asylums board was constituted for the county and county boroughs, and the Act directed that part of the expenses of the board should be raised every year by contributions from the county and county boroughs in proportion to their respective rateable values as ascertained under sect. 33 of the Local Government Act, 1888.

HELD—that the Agricultural Rates Act, 1896, does not affect the local Act of 1891, and therefore that the asylums board should continue to make the division for contributions in proportion to the rateable values as ascertained under the Local Government Act of 1896, and the order of the Local Government Board made in pursuance of that Act.

Decision of Div. Ct. ([1899] 1 Q. B. 759; 68 L. J. Q. B. 320; 47 W. R. 361; 80 L. T. 533; 15 T. L. R. 220) reversed.

LANCASHIRE ASYLUMS BOARD *v.* MANCHESTER [CORPORATION, [1900] 1 Q. B. 458; 69 L. J. Q. B. 234; 64 J. P. 101; 48 W. R. 356; 82 L. T. 1; 16 T. L. R. 145—C. A.

LOCOMOTIVES.

See HIGHWAYS, 50; RAILWAYS AND CANALS; STREET TRAFFIC.

LODGING HOUSES.

See LANDLORD AND TENANT; PUBLIC HEALTH.

LONDON.

See METROPOLIS.

LONDON BUILDING ACT.

See METROPOLIS.

LONDON, PORT OF.

See WATERS AND WATERCOURSES; SHIPPING AND NAVIGATION.

LORDS, APPEAL TO.

See COURTS; PRACTICE AND PROCEDURE.

LOTTERIES.

See GAMING AND WAGERING.

LOWER CANADA.

See DEPENDENCIES AND COLONIES.

LUNATICS AND PERSONS OF UNSOUND MIND.

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And see AGENCY, 64; EXECUTORS, 125; HUSBAND AND WIFE, 6, 181.

I. SUMMARY RECEPTION ORDER.

1. *Alleged Lunatic—Placing under proper Care and Control—Deemed to be a Lunatic—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 13, 15, 20.]—The plaintiff was a detective sergeant in the Liverpool police force, and the defendants were his superior officers. The defendant Duckworth accused the plaintiff of being mad, and informed the chief constable to that effect. Two police doctors certified that he was unfit for the performance of his duties by reason of infirmity of the mind, and an expert called in by the watch committee agreed with the police doctors, and the plaintiff was removed to the workhouse, where he was placed in a padded room. The plaintiff's claim was damages for conspiracy, and false imprisonment. The jury found for the defendants on the question of conspiracy, and for the plaintiff on the question of false imprisonment.

HELD—that judgment must be entered for the defendants on the question of false imprisonment as well as on the question of conspiracy; that the words "under proper care and control" did not refer to the situation of the man at the police office, but to the circumstances of his ordinary life; that there were ample grounds for the constable's taking proceedings under sect. 13 of the Lunacy Act, 1890; that every requisite under sect. 20 existed; and that the finding of the jury ought to be disregarded because there was no evidence to justify them in coming to the conclusion at which they had arrived.

WELSH *v.* DUCKWORTH AND OTHERS, (1902) [18 T. L. R. 633—Wills, J.

2. "*Alleged Lunatic*"—"*Deemed to be a Lunatic*"—*Person* "*Wandering at Large*"—*Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 15, 20.]—A master mariner went to the Minories, and meeting a constable, told him a tale about an assault upon him. The constable, seeing that he looked wild and vacant, suggested that he had better come to the police-station and tell his story to the inspector. The master went voluntarily to the police-station and there repeated his statements to the inspector. The inspector sent for a medical man, who was quite unconnected with the police, and he came and examined the master, who repeated his statements to him. The medical man gave a certificate that the master was not responsible for his actions, and that his case required further investigation. The police constable was then instructed by the inspector to take the plaintiff to the City infirmary, and this was done. The master sought to recover damages for arrest and false imprisonment against the constable and the inspector.

HELD—that judgment ought to be entered for the two defendants because the plaintiff was after the certificate of the medical man a person deemed to be a lunatic, and not being under control, was wandering at large.

MORRIS *v.* ATKINS AND BROOKER, (1902) 18 [T. L. R. 628—C. A.

3. *Removal of Lunatic to Workhouse—Meaning of* "*Satisfied*" *in sect.* 20 *of Lunacy Act*, 1890.]—By the Lunacy Act, 1890, s. 20, if a relieving officer, constable, or overseer is "satisfied" that it is necessary for the public safety, or the welfare of an alleged lunatic that he should immediately be placed under control he may remove the alleged lunatic to the union workhouse.

HELD—that "satisfied" means "honestly satisfied," and that there is no obligation imposed upon the relieving officer, the constable, or the overseer to take reasonable care to satisfy himself that the alleged lunatic is a dangerous lunatic.

HARWARD *v.* HACKNEY UNION, (1898) 14 [T. L. R. 306—C. A.

II. PRACTICE.

4. *Application by alleged Lunatic—Inspection of Documents—Appeal from Lord Justice sitting in Lunacy—Judicature Act*, 1873 (36 & 37 Vict. *c.* 66), *s.* 18 (5).]—Where an alleged lunatic applies to have inspection and to take copies of documents in the custody of the official solicitor as receiver for the estate, with a view to the inquiry in lunacy, the proper course is for the master in lunacy, who has charge of the inquiry, to look through the documents himself, and ascertain what are relevant to the inquiry.

Practice—*Continued.*

And *per cur.:* An appeal lies from a Lord Justice sitting in Lunacy to the C. A.

RE CATHCART, [1902] W. N. 80; 113 L. T. Jo. 9—C. A.

5. *Consent by Guardian* ad litem—*R. S. C. Ord.* 16, *r.* 21.]—In an action for sale in lieu of petition, one of the defendants was a married woman appearing by her guardian *ad litem*. On motion for judgment the question arose whether the guardian could, by virtue of Ord. 16, r. 21, consent to the evidence being given by affidavit without obtaining the leave of the Court.

HELD—quoting the "Annual Practice," 1904, p. 182, that the guardian *ad litem* could give the consent without the sanction of the Court.

PIGGOTT *v.* TOOGOOD, [1904] W. N. 130; 39 [L. J. (N.C.) 329; 48 Sol. Jo. 573—Buckley, J

6. *Divorce—Petition by Person detained in Lunatic Asylum under Order of Magistrate—Guardian* ad litem.]—The Court granted a decree *nisi* for a dissolution of marriage on the petition of a person detained in a lunatic asylum under a reception order made by a magistrate, the petitioner appearing by his guardian *ad litem*.

Baker v. *Baker* ((1881) 6 P. D. 12; 49 L. J. P. 83—C. A.) followed.

BURRELL *v.* BURRELL AND BLAKE, (1901) 17 [T. L. R. 41—Barnes, J.

7. *Inquisition—Right of Lunatic to Traverse—Discretion of Judge in Lunacy—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *s.* 101.]—As a matter of right a lunatic is entitled to leave to traverse the inquisition. But the judge in lunacy may by personal interview or otherwise satisfy himself that the application is *bonâ fide*, and that the lunatic is capable of exercising an act of volition upon the subject.

In re Cumming ((1852) 1 D. M. & G. 537) applied.

IN RE GILCHRIST, [1907] 1 Ch. 1; 76 L. J. Ch. [63; 95 L. T. 739—C. A.

8. *Separation—Petitioner of Unsound Mind—Inmate of Lunatic Hospital—Access to Petitioner to obtain necessary Affidavit—Matrimonial Causes Act*, 1857 (20 & 21 Vict. *c.* 85), *s.* 41—*Rules and Regulations in Divorce and Matrimonial Causes*, 1865, *r.* 2.]—A married lady of unsound mind who was an inmate of a lunatic hospital sought a judicial separation. The hospital superintendent refused the managing clerk of her solicitors and a commissioner of oaths access to the lady for the purposes of obtaining the necessary affidavit in verification of the petition pursuant to rule 2 of the Rules and Regulations in Divorce and Matrimonial Causes, 1865. The Commissioners in Lunacy indorsed the action and refusal of the superintendent. The Court on motion:—

HELD—that the lady and her advisers must be afforded the necessary facilities to enable the requirements of the Matrimonial Causes Act, 1857, s. 41, and the said rule 2 to be complied with, and to bring the case properly before the Court, and made an order against the Commissioners in Lunacy that they should authorise the access sought for.

IN RE PETITION FOR JUDICIAL SEPARATION; [EX PARTE BEECHAM, [1901] P. 65; 70 L. J. P. 20; 84 L. T. 63—Jeune, P.

III. COMMITTEE AND RECEIVER.

9. *Conditional Devise to Lunatic—Performance of Condition by Committee of Lunatic's Estate—Benefit of Lunatic—Jurisdiction of Court to order Performance—Statute* De Prerogativa Regis (17 Edw. 2, *stat.* 1, *c.* 10)—*Lunacy Act*, 1890 (53 Vict. *c.* 5).]—Notwithstanding the statute *De Prerogativa Regis*, the Court has power, under its general jurisdiction, to direct the committee of the estate of a lunatic to elect on behalf of the lunatic to accept a devise of land made to him, on condition that the devisee should within a year from the death of the testator execute a resettlement of certain family estates, and to execute on behalf of the lunatic a resettlement of those estates.

SEFTON, EARL OF, RE, [1898] 2 Ch. 378; 67 [L. J. Ch. 518; 78 L. T. 765; 14 T. L. R. 466; 47 W. R. 49—C. A.

10. *Contract to purchase Real Estate—Contract carried out by Committee by direction of the Master in Lunacy—Conversion.*]—A direction by the master in lunacy to the committee of a lunatic to carry out a contract by such lunatic for the purchase of real estate, and to provide the purchase-money out of such lunatic's personal estate, amounts to an election on the part of the lunacy authorities to confirm the voidable contract of such lunatic, and the result will be to effect a conversion of the estate so contracted to be purchased as between the lunatic's heir at law and next of kin, and such estate will accordingly descend to the heir.

BALDWYN *v.* SMITH, [1900] 1 Ch. 588; 69 [L. J. Ch. 336; 48 W. R. 346; 82 L. T. 616—Byrne, J.

11. *Default—Death of Lunatic—Liability of Surety Ended.*]—The surety for a person acting as committee or receiver in a lunacy is not liable in respect of rents and profits received by the committee or receiver after the death of the lunatic, for the committee or receiver is not accountable as such for such receipts.

IN RE WALKER, [1907] 2 Ch. 120; 76 L. J. Ch. [580; 96 L. T. 864—C. A.

12. *Determination of Reception Order—Effect on Order appointing Receiver—Person of Unsound Mind not so found—"Lawfully detained"—Lunacy Act*, 1890 (53 Vict. *c.* 5), *s.* 116, *sub-s.* 1 (*c*).]—Where an order had been made by the judge in lunacy, under sub-sect. 1 (*c*) of sect. 116 of the Lunacy Act, 1890, it does not come to an end by the mere fact of the person to whom it refers ceasing to be under detention;

Committee and Receiver—*Continued.*

but an order is required to discharge the lunatic, and the discretion to make such an order ought not to be exercised unless the Court is satisfied that the delusions under which the lunatic was suffering had ceased.

B. A. S., Re., [1898] 2 Ch. 392; 67 L. J. Ch. [453; 78 L. T. 638—C. A.

13. *Effect of Order under sect.* 116 *of Lunacy Act*, 1890—*Vendor's Lien.*—The effect of an order in lunacy under sect. 116 of the Lunacy Act, 1890, is to enable the person thereby appointed to get in a lunatic's property and nothing else; if other persons have acquired rights against his property, it is not intended that the order should affect those rights.

In re Winkle ([1894] 2 Ch. 519; 63 L. J. Ch. 541; 42 W. R. 513; 70 L. T. 710—C. A.) explained.

Davies *v.* Thomas, [1900] 2 Ch. 462; 69 L. J. [Ch. 643; 49 W. R. 68; 83 L. T. 11—C. A.

14. *Exercise of Power—Marriage Settlement—Special Power of Appointment—Exercise of by Committee—Lunacy Act*, 1890 (53 Vict. *c.* 5), *ss.* 116, 128.]—Sect. 128 of the Lunacy Act, 1890, authorises the committee of a lunatic's estate to join in her behalf with her husband in exercising a power of appointment among children contained in their marriage settlement.

In re A., [1904] 2 Ch. 328; 73 L. J. Ch. 648; [53 W. R. 2; 91 L. T. 238—C. A.

15. "*Lawfully detained*"—*Idiots—Persons of Unsound Mind not so found—Idiots Act*, 1886 (49 & 50 Vict. *c.* 25), *s.* 5—*Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *s.* 116 (1) (c).]—The expression "lawfully detained as a lunatic though not so found by inquisition" in sect. 116 (1) (c) of the Lunacy Act, 1890, is not confined to persons detained under that Act, but applies to persons lawfully detained under other English statutes.

It therefore applies to the case of a person detained under the Idiots Act, 1886, and gives the Court jurisdiction to make administrative orders in his case.

In re Watkins ([1896] 2 Ch. 336; 65 L. J. Ch. 636; 60 J. P. 500; 44 W. R. 609; 74 L. T. 504—C. A.) explained.

In re Whalley, [1906] 1 Ch. 565; 75 L. J. Ch. [328; 54 W. R. 349; 94 L. T. 423—C. A.

16. *Tenant for Life—Lunatic not so Found—Power of* quasi-*Committee to Sell Land—Lands Clauses Act*, 1845 (8 & 9 Vict. *c.* 18), *s.* 7—*Settled Land Act*, 1882 (45 & 46 Vict. *c.* 38), *ss.* 3, 6, 62—*Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 116, 120, 128.]—The Court has no jurisdiction to authorise the person, who has been appointed by the judge in lunacy under sect. 116 of the Lunacy Act, 1890, to exercise, as regards the estate of a person of unsound mind not so found by inquisition, the powers of a committee, to sell under sect. 7 of the Lands Clauses Act, 1845, land of which the person of unsound mind is tenant for life.

In re Baggs ([1894] 2 Ch. 416 (n.); 63 L. J. Ch. 612; 71 L. T. 138—C. A.) followed.

In re X. ([1894) 2 Ch. 415; 63 L. J. Ch. 613; 42 W. R. 657; 71 L. T. 139—C. A.), and *In re Salt* ([1896] 1 Ch. 117; 65 L. J. Ch. 152; 44 W. R. 146; 73 L. T. 598—C. A.) discussed.

A life tenant's power of sale under the Settled Land Act, 1882, is not vested in him "in the character of a trustee" within the meaning of sect. 128 of the Lunacy Act, 1890.

In re S. S. B., [1906] 1 Ch. 712; 75 L. J. Ch. 522; [54 W. R. 429; 94 L. T. 599; 22 T. L. R. 461—C. A.

17. *Tenant for Life—Lunatic not so found by Inquisition—Consent of Tenant for Life to Sale by Trustees—Authority of* quasi-*Committee or Receiver of Lunatic to give consent—Settled Land Act*, 1882 (45 & 46 Vict. *c.* 38), *s.* 56, *sub-s.* 2, and *s.* 53—*Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 116, 128.]—The consent of a tenant for life, who is a lunatic not so found, to a sale of the settled land by the trustees of the settlement estate cannot be exercised by his *quasi*-committee. The power of consent under sect. 56 (2) of the Settled Land Act, 1882, is not vested in the tenant for life in the character of a trustee, nor is it a check upon the undue exercise of the power in the trustees within the meaning of sect. 128 of the Lunacy Act, 1890.

In re De Moleyns & Harris' Contract, [(1907) 51 Sol. Jo. 824—Joyce, J.

IV. VESTING ORDER.

18. *Criminal Lunatic — Criminal Lunatic Trustee—Trustee Act*, 1850 (13 & 14 Vict. *c.* 60), *s.* 5—*Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 136, 340, 342.]—The Court has power to make a vesting order in the case of a trustee who is a criminal lunatic. Although sect. 5 of the Trustee Act, 1850, is repealed by the Lunacy Act, 1890, the old jurisdiction is preserved by sect. 342.

Form of order settled.

In re R., [1906] 1 Ch. 730; 75 L. J. Ch. 421; 54 [W. R. 578; 94 L. T. 494—C. A.

19. *Lunatic sole Trustee—Transfer of Government Stock—Form of Order—Lunacy Act*, 1890 (53 Vict. *c.* 5), *ss.* 136 (1) (4), 137.]—Where a vesting order is made under sub-sect. 1 of sect. 136 of the Lunacy Act, 1890, with reference to Government stock standing in the name of a lunatic trustee, the order should direct the person in whom the right to call for a transfer, and to transfer the stock, and to receive the dividends due and to accrue due thereon, is vested, to transfer the stock into his own name, to be held by him upon the trusts applicable thereto.

Re Gregson ((1893) 3 Ch. 233) approved and followed.

Such an order is not an order appointing a person to make a transfer of stock within the meaning of sect. 137 of the Act of 1890, and it

Vesting Order—*Continued.*

is not necessary to appoint an officer of the Bank of England to make the transfer.

Re C. M. G., [1898] 2 Ch. 324; 67 L. J. Ch. 468: [78 L. T. 669—C. A.

20. *Master's Jurisdiction — Appointment of Person to exercise Power of appointing New Trustees—Vesting Order—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *s.* 116, *sub-ss.* 1 (c), 2; *ss.* 128, 129, 135—*Lunacy Act*, 1891 (54 & 55 Vict. *c.* 65), *s.* 27, *sub-s.* 1.]—Sect. 27, sub-sect. 1. of the Lunacy Act, 1891, enables the master in lunacy to exercise the jurisdiction of the judge in lunacy "as regards management and administration." When, therefore, the master appoints a person to exercise a power of appointing new trustees under sect. 128 of the Lunacy Act, 1890, he can, under sect. 129 of the Lunacy Act, 1890, make an order vesting the trust estate in the new trustees when appointed.

In re Fuller, [1900] 2 Ch. 551; 69 L. J. Ch. [738; 49 W. R. 90; 83 L. T. 208—C. A.

21. *Master's Jurisdiction—Order vesting the right to transfer Trust Stock—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 116—130, 136—*Lunacy Act*, 1891 (54 & 55 Vict. *c.* 65), *s.* 27, *sub-s.* 1.]—Sect. 27 of the Lunacy Act, 1891, is not confined to the specific powers of "management and administration" which are conferred in the group of sects. 116—130 in the Lunacy Act, 1890, and the master, by virtue of sect. 27 of the Lunacy Act, 1891, has jurisdiction to exercise any power of management and administration outside that group.

A vesting order, under sect. 136, sub-sect. 2, of the Lunacy Act, 1890, cannot be made by a master, as such an order cannot properly be described as an order for the administration or management of a lunatic's estate.

In re Fuller ([1900] 2 Ch. 551: 69 L. J. Ch. 738; 83 L. T. 208—C. A., No. 20, *supra*) distinguished.

In re Langdale (a lunatic). [1901] 1 Ch. 3; [70 L. J. Ch. 38; 49 W. R. 177; 83 L. T. 451—C. A.

22. *Practice—Direction to Transfer Stock—Title of Proceedings—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 116 (1) (*d*), 133, 333—*Rules in Lunacy*, 1892, *rr.* 9, 57, 58, *Sched., Form* 1.]—An order in lunacy directing a transfer of stock under sect. 133 of the Act of 1890 should be intituled in the matter of the Lunacy Acts, 1890 and 1891, as well as in the matter of the particular lunacy.

This rule, however, will not apply to an order made under sect. 116 (1) (*d*) where the title mentions the statutes "53 Vict. c. 5 and 54 & 55 Vict. c. 65."

In re Purvis. [1904] 1 Ch. 373; 73 L. J. Ch. [281; 90 L. T. 394—Vaughan Williams, L.J.

V. PROPERTY AND CAPACITY OF LUNATIC.

23. *Charge on Realty — Repairs — Permanent Improvements — Payment of Expenses out of Personalty—No power to charge general Costs in Lunacy—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *s.* 118.]—There is no power to charge upon a lunatic's real estate part of the general costs in the lunacy.

Under sect. 118 of the Lunacy Act, 1890, there is power, if thought proper, to charge moneys expended, or to be expended, for the permanent improvement of a lunatic's property upon the particular property improved. Application for an order to this effect should be made promptly; and, indeed, the order authorising the expenditure of money in permanent improvements should either direct how the cost is to be ultimately borne, or expressly state that the question is reserved. In considering such an application, the judge will have regard to what is fair and right as between the real and personal estates.

A new tenant agreed to take a farm upon a large agricultural estate, belonging to a lunatic, only upon condition that an old malt-house should be converted into labourers' cottages.

Held—that the cost of this work might properly be regarded as incurred in the ordinary course of management, and that it ought not to be charged upon the real estate in favour of the personalty.

In re Gist, [1904] 1 Ch. 398; 73 L. J. Ch. 251; [52 W. R. 422; 90 L. T. 35—C. A.

24. *Estate Duty—Realty—Duty Paid out of Personalty—Charge in favour of Next of Kin—Surplus Rents—Finance Act*, 1894 (57 & 58 Vict. *c.* 30), *ss.* 6 (2), 9 (1), 4 (6).]—A lunatic became entitled under the will of a testatrix to her residuary real and personal estate. S.E.D., who was the sole executor of the testatrix and also the committee of the lunatic, paid the estate duty in respect of the real estate out of personalty, but did not apply in Lunacy for a charge on the real estate. The lunatic continued to live for a number of years, and, after providing for his maintenance throughout this time there was a considerable amount of surplus rents, which would have sufficed, if so applied, to entirely pay the amount of the estate duty.

The lunatic died intestate, and the next of kin now claimed to be entitled to a charge upon the lunatic's real estate for the amount of the estate duty.

Held—that any charge which might once have existed had become extinguished or merged, and that the next of kin was not now entitled to a charge.

Lord Compton v. *Oxenden* ((1793) 2 Ves. Jun. 261) followed.

Decision of Farwell, J. ([1905] 2 Ch. 384; 74 L. J. Ch. 689; 54 W. R. 73; 93 L. T. 153) affirmed.

Re Hole. Davies *v.* Witts, [1906] 1 Ch. 673; [75 L. J. Ch. 362; 94 L. T. 451—C. A.

25. *Power of Attorney—Transfer of Shares—Donor of Power unsound of Mind.*]—A power of attorney for the transfer of shares executed by a person not at the time capable of understanding its effect is void, and any transfer

Property and Capacity of Lunatic—*Continued.*

executed in pursuance of it is a nullity; a company acting upon such a transfer renders itself liable to the donor of the power.

A power of attorney executed by a person of unsound mind must be deemed invalid until proved to have been executed during a lucid interval.

DAILY TELEGRAPH NEWSPAPER CO., LD. *v.* [MCLAUGHLIN, [1904] A. C. 776; 73 L. J. P. C. 95; 91 L. T. 233; 20 T. L. R. 674—P. C.

26. *Will—Lunatic so found by Inquisition—Lucid Interval—Execution of Will—Execution of Deed—Validity—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 123, 341.]—If a lunatic so found by inquisition executes a will during a lucid interval (the inquisition not however having been superseded), the will may be admitted to probate after his death if the Court is satisfied that he was in fact at the date of its execution *compos mentis*.

A deed purporting to dispose of his property, and executed under similar circumstances, is in a different position. It is entirely null and void, and the Court will not even recognise it to the extent of directing proceedings to inquire into the lunatic's mental capacity at the date of its execution, or to perpetuate testimony on the point.

Before such a deed can be validly executed, the inquisition must be superseded.

Bererley's Case ((1604) 4 Rep. 123 b, 126 b) followed.

Ex parte Wright ((1683) 1 Vern, 155) considered.

IN RE WALKER, [1905] 1 Ch. 160; 74 L. J. Ch. [86; 53 W. R. 177; 91 L. T. 713—C. A.

VI. MAINTENANCE.

27. *Foreign Asylum—Person of Unsound Mind, not so found——Application of Property for Maintenance—Jurisdiction of Chancery Division—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *s.* 116.]—A lady, absolutely entitled to a trust fund invested partly in India stock and partly on mortgage, had for some time been detained in a foreign asylum, being of unsound mind but not so found by inquisition. Upon an originating summons in the Chancery Division taken out in her name by a next friend against the trustees:—

HELD (overruling Joyce, J.)—that the matter need not be dealt with in Lunacy; and, upon the trustees undertaking to transfer the stock into Court and to deposit there all deeds, it was ordered that, until the plaintiff's death or further order, the interest should be paid to her sister, one of the trustees, who undertook to apply it for her maintenance and benefit.

IN RE CARR'S TRUSTS, CARR *v.* CARR, [1904] [1 Ch. 792; 73 L. J. Ch. 459; 52 W. R 595; 90 L. T. 592—C. A.

28. *Death of Lunatic—Liability of Committee of Person to Account — Allowance for Maintenance.*]—By an order in lunacy, made in March, 1896, a sister and niece of the lunatic were appointed the committees of the person of the lunatic, and the official solicitor was appointed the committee of her estate, and £2,500 per annum was allowed in the common form for the lunatic's maintenance from January 29th, 1896.

The allowance was paid quarterly in advance, the fourth quarterly payment of £625 being made on October 29th, 1896, and on November 11th following the lunatic died. The executors of the will of the lunatic claimed from the committees of the person repayment of a proportionate part of the last quarterly payment for the period subsequent to the death of the lunatic, or, in the alternative, an inquiry what sums were properly payable and paid for the maintenance of the lunatic between October 29th, 1896, and her death.

HELD—that the allowance of £2,500 was sanctioned only as the provision for the maintenance of the lunatic for a year taken as a whole, and as the whole yearly payment had been made, although the lunatic had not been maintained for a year, the executors were entitled to recover from the committees of the person such portion of the yearly allowance as could not be said to have been properly expended by them for the purpose of the lunatic, and an inquiry was directed what sum should be allowed for the maintenance of the lunatic during the time she was maintained, regard being had to the order of March, 1896, with liberty to apply in chambers for the balance that might be found due to the lunatic's estate.

STRANGWAYS *v.* READ, [1898] 2 Ch. 419; 67 [L. J. Ch. 581; 79 L. T. 245; 14 T. L. R. 508; 46 W. R. 671—Romer, J.

29. *Fund in Court—Payment of Dividends to next Friend—Application to Court in Lunacy—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *s.* 116.]—A lunatic not so found was entitled to a sum of £1,250, which had been paid into Court under the Trustee Act, 1893. Her next friend petitioned the Court in Chancery that an annual sum of £50 might be paid out to her for the maintenance of the lunatic, this sum to be provided out of dividends so far as they would extend.

HELD—that having regard to sect. 116 of the Lunacy Act, 1890, the application should have been made to the Court in Lunacy, that Court having power to make the next friend render periodical accounts. Liberty to amend the petition by entitling it "in Lunacy."

IN RE BARKER'S TRUSTS, [1904] W. N. 13—Joyce, J.

30. *Maintenance of Children—No Committee appointed—Brother Selling Business—Children Maintained out of the Proceeds—Necessaries—Liability of Lunatic—Right to Recover against Brother.*]—A lunatic is not liable for money expended by a stranger in maintaining his children.

The plaintiff was in 1882 placed in an asylum and no committee of hise state was appointed; his brother, however, sold his business, and, at

Maintenance—*Continued.*

the request of the wife, expended the proceeds received by him in maintaining the lunatic's children.

The plaintiff, on leaving the asylum, refused to ratify what had been done by his brother and wife, who were at that time living together. The jury found that the maintenance of the children in fact cost more than the sum received by the brother.

HELD—that, though the wife might be entitled to support herself out of such of the money as she received from the brother, yet the latter must repay the sum spent by him in maintaining the children.

Read v. *Legard* ((1851) 6 Ex. 636; 20 L. J. Ex. 309) and *Mortimore* v. *Wright* ((1841) 6 M. & W. 482 (Exch.)) considered.

HEALING v. HEALING AND ANOTHER, (1903) [51 W. R. 221; 19 T. L. R. 90—Ridley, J.

VII. CREDITORS.

31. *Charging Order—Fund in Court of Lunacy—Fund in Court of Chancery—Necessities of Lunatic.*]—When a fund is in Court in Lunacy, or can be got at through the Court of Lunacy, that Court will, in the first place, have regard to the necessities of the lunatic, and will only allow a judgment to have effect subject to making proper provision for the lunatic.

Where a charging order has been obtained against the interest of a lunatic in a fund in the Court of Chancery, the charge will be satisfied before the fund is ordered to be transferred to Lunacy.

IN RE BROWN, LLEWELLIN *v.* BROWN, [1900] 1 Ch. 489; 69 L. J. Ch. 234; 64 J. P. 327; 48 W. R. 461; 82 L. T. 83—Cozens-Hardy, J.

32. *Execution Creditor — Maintenance — Receiver—Priority—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 116, 117, 120.]—Although the Court in Lunacy will not allow property in its custody belonging to a lunatic to be applied otherwise than for his benefit and will not pay his creditors out of it without first providing for him, yet the Court has no jurisdiction to interfere with the right of creditors to seize and sell by legal process property of the lunatic which at the time of seizure is not in the custody of the Court.

Although a summons in Lunacy has been issued, the lunatic's property is not withdrawn from legal process by a creditor until some order is made showing that the Crown has actually taken the property under its protection.

The judgment creditor of a lunatic not so found by inquisition, after notice that a summons had been taken out under sect. 116 of the Lunacy Act, 1890, for the appointment of a receiver, issued a *fi. fa.* under which the debtor's goods were seized before the order had been made on the summons, but the receiver was appointed soon after.

HELD—that the sheriff being in possession of the goods, the execution creditor was entitled to the proceeds of the sale, and that the Court had no jurisdiction under sect. 117 of the Lunacy Act, 1890, to direct them to be applied for the maintenance of the lunatic in priority to the judgment creditor's claim.

Re Winkle ((1894) 2 Ch. 519) distinguished.

RE CLARKE, [1898] 1 Ch. 336; 67 L. J. Ch. [234; 78 L. T. 275; 14 T. L. R. 274; 46 W. R. 337—C. A.

33. *Order in Lunacy for Payment of Debt in Priority—Person not detained as, nor Found, of Unsound Mind—Found incapable of managing Affairs—Death of Lunatic—Administration of Estate in Chancery Division—Effect of Order—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 116, 117.]—H. having been found incapable of managing his affairs through mental infirmity arising from disease, an order was made under sect. 116 of the Lunacy Act, 1890, that his wife should be authorised to do such things as the Masters should approve for the purpose of protecting his estate, and should exercise the powers of a committee of his estate.

In 1902 she was ordered to apply certain funds in paying to creditors a dividend of 6*d.* in the pound.

In 1904 another order was made that B. & Co., who had not previously claimed, should be admitted as creditors to participate in future dividends, and should rank in priority to other creditors to the extent of 6*d.* in the pound upon their debt.

H. died before effect could be given to this order, and his estate was administered in the High Court.

HELD—that the order ceased to have effect on H.'s death and did not bind the High Court, and that in the administration B. & Co. had no claim to priority.

IN RE HUNT, SILICATE PAINT CO. AND OTHERS [*v.* HUNT, [1906] 2 Ch. 295; 75 L. J. Ch. 801; 95 L. T. 600—Buckley, J.

VIII. BREACH OF PROMISE.

34. *Promise of Marriage — Breach — Mere Postponement — Justification — Supervening Insanity.*]—A fortnight before the date fixed for his marriage, a man, feeling that his mind was giving way, wrote to his *fiancée's* father stating that the marriage could not take place at the date fixed. Ten days later he entered an asylum as a voluntary patient, and was shortly afterwards certified and detained as a lunatic. He never recovered, and died in the asylum two years afterwards. After his death the lady raised an action of damages against his testamentary trustees.

HELD—first, that the man had merely postponed the marriage, and had never been able subsequently to fulfil his engagement, and that therefore the pursuer was not entitled to damages for breach of promise to marry; and secondly, that she was not entitled to recompense for salary which she lost owing to ill-health caused by her trouble.

Semble (per the Lord Justice Clerk), even if

Breach of Promise—*Continued.*

there had been a breach of the promise, the breach was, in the circumstances, justifiable.

Hall v. *Wright*, (1860) 29 L. J. Q. B. 43; E. B. & E., 746) commented on.

LIDDELL *v.* EASTON'S TRUSTEES, [1907] S. C. [154—Ct. of Sess.

IX. PAUPER LUNATICS.

See also POOR LAW.

35. *Money in Post Office Savings Bank—Magistrate's Jurisdiction—Order to Seize—Power to State a Case—Summary Jurisdiction Act*, 1848 (11 & 12 Vict. *c.* 43), *s.* 35—*Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *s.* 54—*Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *s.* 299.]—An order can be made under sect. 299 of the Lunacy Act, 1890, to seize money standing in the lunatic's name in the Post Office Savings Bank.

Justices acting under that section have no power to state a case, as they are not sitting as a court of summary jurisdiction.

IN RE BETHEL, (1899) 63 J. P. 453; 80 L. T. [492; 19 Cox C. C. 262—Div. Ct.

36. *Person of Unsound Mind not so found by Inquisition — Detained as Pauper Lunatic — Maintenance—Application of his Small Property —Jurisdiction—Discretion—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *s.* 299.]—A wandering lunatic not so found by inquisition was detained in a county asylum, and maintained there at the expense of a union. By an order of the Master in Lunacy, a sum exceeding £300 which had been found upon the lunatic's person, and represented his entire savings, had been lodged in court, with directions to raise by periodical sales thereout the sum of £35 a year for the maintenance of his destitute wife and daughter. The guardians of the union applied for a small sum in respect of the lunatic's past maintenance, and for an allowance of £26 a year for his future maintenance, over and above some provision for the wife.

HELD—that as sect. 299 of the Lunacy Act, 1890, only gave a power to justices to act summarily in certain cases, and did not interfere with the discretionary power of the lords justices to direct the property of the lunatic to be applied for his maintenance, the reasonable application of the guardians should be complied with.

IN RE TYE, [1900] 1 Ch. 249; 69 L. J. Ch. 153; [48 W. R. 276; 81 L. T. 743—C. A.

X. FOREIGN LUNATICS.

37. *Alien temporarily resident in England—Inquiry into State of Mind—Jurisdiction.*]—The widow of a citizen of the United States of America and who was domiciled there came over to England in 1901. During the voyage and after arrival she manifested symptoms of insanity, and was placed in an asylum. It was probable that she had a few personal chattels in this country. Her property mainly consisted of real estate in the State of New Jersey.

HELD—that the Court had jurisdiction to direct an inquiry into her state of mind.

In re Sottomaior ((1874) 9 Ch. 677) followed.

IN RE BURBIDGE, [1902] 1 Ch. 426; 71 L. J. Ch. [271; 86 L. T. 331; 18 T. L. R. 347—C. A.

38. *English Property — Lunatic Abroad — English Domicil—Payment to Foreign Committee —Discretion of Court.*]—A lady, born in the United States, married an Englishman, who was domiciled in England, and so acquired an English domicil. After her husband's death she was confined in a lunatic asylum in Brussels, whence she was removed to an asylum in New York. By an order of the Supreme Court in New York she was adjudged incompetent to manage her affairs, and the plaintiffs were appointed by the Supreme Court of New York the committee of her person and property. She was entitled to certain moneys in the High Court in England and to the income of certain property in the hands of trustees in England under a settlement. The plaintiffs were directed by the Supreme Court of New York to take proceedings there to recover the moneys and income, and to give discharges for the same.

HELD—that in the exercise of the Court's discretion there was no reason why the order for payment should not be made: the future income to be paid until further order.

Didisheim v. *London and Westminster Bank* ([1900] 2 Ch. 15; 69 L. J. Ch. 442; 48 W. R. 501; 82 L. T. 738; 16 T. L. R. 311—C. A., No. 42, *infra*) considered.

NEW YORK SECURITY AND TRUST CO. *v.* [KEYSER, [1901] 1 Ch. 666; 70 L. J. Ch. 330; 49 W. R. 371; 84 L. T. 43; 17 T. L. R. 207—Cozens-Hardy, J

39. *Committee*—Locus standi *of* Curator Bonis *—Lunatic Debtor—Bankruptcy Proceedings by Committee—Jurisdiction of Court in Lunacy over Proceedings—Summons for Directions—Bankruptcy Act*, 1883 (46 & 47 Vict. *c.* 52), *s.* 148.]—Section 148 of the Bankruptcy Act. 1883, which says that, for the purposes of the Act, "a lunatic may act by his committee or *curator bonis*," does not mean that the lunatic may act either by his committee or by his *curator bonis*, as a matter of choice. It means that he may act by his committee, if the lunacy is an English lunacy and a committee has been appointed, and he may act by a *curator bonis* if, there being no committee in England and there being a *curator bonis*, it is necessary that the bankrupt lunatic should do some act under the Bankruptcy Act. A *curator bonis* in Scotland is not entitled to intervene in English bankruptcy proceedings and, in the presence of the committee through whom in England the lunatic acts, to claim a *locus standi* to argue any question arising in the bankruptcy proceedings, either as to the validity of the petitioning creditor's debt or upon any other point. Where the Court in Lunacy made an order which entitled and obliged the committee to commit an act of bankruptcy on behalf of the

Foreign Lunatics—*Continued.*

lunatic by filing a declaration of insolvency in the name of the lunatic, and, if necessary, to present a petition, the proceedings are not to go on unless the committee applies to the Master in Lunacy by a summons for directions.

In re R. S. A., [1901] 2 K. B. 32; 70 L. J. K. B. [475: 84 L. T. 477; 8 Manson, 164—C. A.

40. *Status of Lunacy declared by Foreign Court — Guardian appointed by Foreign Court — "Tuteur"—Vesting of Property in Guardian—Payment and Transfer to Guardian.*]—Where application is made to the Court to direct an English firm holding moneys and securities of a foreign lunatic for payment and transfer thereof to the applicant, if there has been a judicial declaration of the status of lunacy by a competent court of the country to which the lunatic belongs, and if the applicant on the lunatic's behalf has, according to the laws of the lunatic's country, the latter's property vested in him in the sense that he has the right to retain and deal with it without becoming the actual owner, the application may properly be, and generally should be, granted.

Semble, a French "tuteur" is such an applicant.

In re Brown ([1895] 2 Ch. 666; 64 L. J. Ch. 808; 44 W. R. 17; 73 L. T. 375; 12 R. 587—C. A.) and *In re De Linden* ([1897] 1 Ch. 453; 66 L. J. Ch. 295; 45 W. R. 342; 76 L. T. 180—Stirling, J.) followed.

Didisheim v. *London and Westminster Bank* ((1899), 81 L. T. 108; 15 T. L. R. 457—North, J., *see* No. 42, *infra*) distinguished.

Thiery *v.* Chalmers, Guthrie & Co., [1900] [1 Ch. 80; 69 L. J. Ch. 122; 48 W. R. 148; 81 L. T. 511—Kekewich, J.

41. *Transfer of Stock to Curator—Lunatic Resident out of the Jurisdiction—Appointment of Curator—Stock standing in name of Lunatic in England—Discretion of Court—Evidence as to Proposed Application of the Stock—Lunacy Act*, 1890 (53 Vict. *c.* 5), *s.* 134.]—A curator of the property of a person of unsound mind, who is resident out of the jurisdiction, duly appointed in accordance with the law of the place where the lunatic is residing, is not entitled, as of right, to have stock standing in the name of the lunatic in this country transferred to him under sect. 134 of the Lunacy Act, 1890; but the Court here has a discretion as to whether or not it will exercise the jurisdiction thereby conferred on it, and the curator must first adduce evidence to show that the fund is required for the maintenance of the lunatic, according to the law of the place where he is residing, and the grounds upon which the transfer of the stock should be made.

Re Knight, [1898] 1 Ch. 257; 67 L. J. Ch. 136; [77 L. T. 773; 46 W. R. 289—C. A.

42. *Property at English Bank—Person of unsound Mind resident in Belgium—Right of* Administrateur Provisoire *to sue Bank—Private International Law—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 117, 134.]—A foreign curator or *administrateur provisoire* may be a proper next friend of the person whose curator he is. Security for costs from such a next friend might be required if he were resident abroad. No suit can be stayed simply because the next friend fills an official position in a foreign country.

An action or suit can be successfully maintained, if brought in the name of a lunatic not so found by inquisition, without the sanction of the Crown. Until the Crown interferes, or until its interference is invoked by a petition for an inquisition or by an application for the appointment of a receiver, the prerogative of the Crown has no practical legal effect.

When a lunatic is absolutely entitled to trust money and his title is clear, and a person is duly appointed by a competent authority to get in such money for the lunatic and his authority to act for the lunatic is clear, the Court has no discretion to refuse payment.

On general principles of private international law, the Courts of this country are bound to recognise the authority conferred on an alien domiciled abroad by a foreign Court, unless lunacy proceedings in this country prevent them from doing so.

An alteration in the status of a lunatic appears to be necessary in order to enable the Court in Lunacy to exercise the jurisdiction conferred upon it by sect. 134 of the Lunacy Act, 1890; but it does not follow that persons, whose status has not been altered by their being judicially declared lunatic, cannot sue by themselves by a next friend for the recovery of their own property.

G. died in 1892, leaving large property, and his widow then domiciled and resident in Belgium, partly in her own right and partly as administratrix of her husband, had a large number of securities deposited with the defendant bank.

In 1893 the widow gave the bank directions to hold on her behalf.

In 1897 she became of unsound mind, and certain proceedings were taken under which D. was appointed in 1899 an *administrateur provisoire* by the Belgian Court of First Instance. D., as *administrateur provisoire* and administrator *de bonis non* to G., asked for an order that the bank should deliver all the property it held for the widow, either in her own right or as administratrix of her husband.

Held—that the order should be made, and that the Belgian Court having had jurisdiction to make the order which it made, the bank would have a perfectly good defence to any action which the lunatic could bring against it, either by another next friend or by another official curator, or by herself if she should recover.

Scott v. *Bentley* ((1855), 1 K. & J. 281; 24 L. J. Ch. 244; 1 Jur. (N.S.) 391; 3 W. R. 280) approved.

In re Barlow's Will (1887), 36 Ch. D. 287; 56 L. J. Ch. 795; 35 W. R. 757; 57 L. T. 95—C. A.) discussed.

Foreign Lunatics—*Continued.*

Judgment of North, J. (81 L. T. 108; 15 T. L. R. 457), reversed.

DIDISHEIM *v.* LONDON AND WESTMINSTER [BANK, [1900] 2 Ch. 15; 69 L. J. Ch. 442; 48 W. R. 501; 82 L. T. 738; 16 T. L. R. 311—C. A.

And see No. 38, *supra.*

43. *Transfer of Stock to Curator—Discretion of Court—Special Circumstances—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *s.* 134.]—Under the special circumstances of the case the Court, under sect. 134 of the Lunacy Act, 1890, made an order for the transfer of English stocks and shares standing in the name of a lunatic resident in France to the curator of such lunatic, although the stocks, &c., were not required for the lunatic's maintenance.

In re Elias ((1857) 3 Mac. & G. 234) followed.

IN RE DE LARRAGOITI, [1907] 2 Ch. 14; 76 L. J. [Ch. 483; 96 L. T. 862—C. A.

MACHINERY.

See FACTORIES AND WORKSHOPS: NEGLIGENCE; RATES AND RATING.

MAGISTRATES.

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I. DISQUALIFICATION OF JUSTICES.

And see INTOXICATING LIQUORS, Nos. 3, 4, 5, 38, 57.

1. *Bias—Interest—Charge against Unqualified Person for acting as Solicitor—Prosecution by Incorporated Law Society—Member of Society sitting as Justice.*]—A justice of the peace is not disqualified, by reason of the fact that he is a member of the Incorporated Law Society, from adjudicating upon a case where the accused is charged with wilfully and falsely pretending to be a solicitor, and where the proceedings are taken by the Incorporated Law Society.

REG. *v.* BURTON, EX PARTE YOUNG, [1897] [2 Q. B. 468; 18 Cox, C. C. 647; 61 J. P. 727; 66 L. J. Q. B. 831; 77 L. T. 364; 13 T. L. R. 587; 46 W. R. 127—Div. Ct.

2. *Bias—Interest*—Ex officio *Trustee of Institution interested.*] — The complainer was charged before the Burgh Court of Port Glasgow with having committed malicious mischief in the Moffat Public Library. The magistrate who heard the charge, and found the complainer guilty, was an *ex officio* trustee of the said library, and a suspension of the conviction was afterwards sought, on the ground that it was pronounced by a magistrate who was personally interested and a trustee of the property damaged.

HELD—that the magistrate was not disqualified.

WILDRIDGE *v.* ANDERSON, (1898) 25 R. 27; [35 Sc. L. R. 125.—Ct. of Sess.

3. *Bias—Membership of Temperance Association—Engaging a Solicitor to Oppose Licence.*]—Upon an application by F. for a publican's licence three of the justices composing the quarter sessions were subscribers to the funds of an association whose objects were to secure a diminution in the number of licensed houses, and to organise strong opposition to licensing applications, and whose solicitor actually attended the sessions and opposed, in the name of local objectors, the granting of this and other licensing applications. A fourth justice was member of a firm who had subscribed to the funds of the association, and two others, A. and B., were members of the executive committee of the association, which, before each licensing sessions, decided upon the licensing applications to be opposed, and directed their solicitor to oppose F.'s application. A. was not proved to have been a party to this decision. B. was present, but exerted his influence in favour of allowing F.'s application to pass without opposition, but during the hearing at the sessions he decided to vote against it. It was the practice of the executive committee before each licensing sessions to send circulars to over one hundred magistrates apprising them of the dates, with a view to insuring their attendance.

HELD—that no disqualification attached to any of the justices from taking part in the determination of F.'s application.

HELD, also (Barton, J., dissenting), that a justice in opposing, or retaining a solicitor to oppose, a licensing application is not thereby disqualified from hearing and determining the application as a member of the licensing authority.

REX *v.* DUBLIN JJ., [1904] 2 Ir. R. 75—K. B. D.

4. *Bias—Signing Petition.*]—On a rule *nisi* for a *certiorari* to quash a licence granted by two licensing justices, it appeared that one of the justices had previously signed a petition in favour of granting a grocer's licence to the grantee. He had been especially asked by the clerk to attend the court, because without him there would not have been a quorum. He had no knowledge that this particular application was coming on, as it did, after some other business had been disposed of; and that he had no manner of interest in granting or refusing the licence. As a matter of fact, the Court had not looked at the petition containing the justice's signature.

Disqualification of Justices—*Continued.*

HELD—that there was no ground for suggesting bias on the part of the justice. Rule discharged.

REG. *v.* TAYLOR, EX PARTE VOGWILL, (1898) [14 T. L. R. 185.—Div. Ct.

5. *Clerk to Justices—Practising Solicitor—Clerk accepting Office of Justice—Right to Sit as Justice—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 22—*Justices' Qualification Act*, 1871 (34 & 35 Vict. *c.* 18), *s.* 1.]—The offices of justice of the peace and justices' clerk are incompatible offices, and cannot both be held by the same person; and, consequently, as the office of justices' clerk is one which the holder thereof can resign of his own motion, such office is *ipso facto* vacated by the holder accepting the office of justice.

A person, while clerk to the justices of a petty sessional division, accepted the office of mayor of the borough, and thereby, by virtue of sect. 22 of the Local Government Act, 1894, became *ex officio* a justice of the peace for the county, and upon the hearing of a certain charge, which resulted in a conviction, he sat as one of the justices who adjudicated upon the charge, being at the time clerk to the same justices and in receipt of a salary as such clerk: and such person had also been a solicitor practising in the borough, but he had retired from practice for some years, assigning his business to certain relations under an agreement by which he was to receive a yearly sum from the firm, and at the date of the conviction in question he had ceased to take out his certificate as a solicitor.

HELD—that such person by his acceptance of the office of mayor, and thereby of the office of justice, had vacated his office as clerk to the justices, and that he was therefore qualified to sit as a justice, and that, as he had ceased to practise as a solicitor, he did not come within the disqualification in sect. 1 of the Justices' Qualification Act, 1871, as a practising solicitor.

REG. *v.* DOUGLAS, [1898] 1 Q. B. 560; 62 J. P. [277; 67 L. J. Q. B. 406; 78 L. T. 198; 14 T. L. R. 267; 46 W. R. 377—C. A.

6. *Licensing Appeal—Justices whose Order appealed against.*]—Upon the hearing of a licensing appeal at quarter sessions from an order of licensing justices refusing to renew a licence, two of the licensing justices who were parties to the refusal of the renewal of the licence, sat on the bench at quarter sessions during the hearing of the appeal; they retired with the other justices when considering the decision, and they returned into Court and sat on the bench when the decision was given dismissing the appeal. They made affidavits jointly with the chairman of quarter sessions to the effect that they took no part whatever, in Court or when the justices retired to consider their decision, in the decision that was given.

HELD—that the justices being disqualified from acting on the appeal, their mere presence on the bench, even though they took no part in the proceedings, rendered the proceedings of the Court of quarter sessions irregular, and the order was, therefore, invalid, and the appeal must be re-heard.

REX *v.* LANCASHIRE JJ., (1906) 75 L. J. K. B. [198; 70 J. P. 337; 94 L. T. 481—Div. Ct.

7. *Rating Appeal—Possibility of Bias—Membership of Assessment Committee.*]—A rule *nisi* was obtained for a *certiorari* to quash the judgment of the quarter sessions for the county of London on an appeal against an assessment on the ground that one of the magistrates who took part in the judgment was chairman of the assessment committee of a borough in London, other than the assessment committee whose decision was appealed against, and that he was, therefore, disqualified by interest or possibility of bias.

HELD—that the test to be applied was that justice should be administered by persons who could not reasonably be suspected of being biassed, and that the rule must be discharged, since, on the application of this test, there was no ground for thinking that the facts showed any interest or any possibility of bias on the part of the magistrate in question.

REX *v.* LONDON JJ., EX PARTE SOUTH METRO- [POLITAN GAS CO., (1907) 97 L. T. 716; 71 J. P. 476; 23 T. L. R. 726; 5 L. G. R. 1064—Div. Ct.

Affirmed (1908) 98 T. L. R. 519; 72 J. P. 137—C. A.

II. JURISDICTION AND POWERS OF JUSTICES.

And see ANIMALS; HIGHWAYS, 160: INSURANCE, 57, 59: INTOXICATING LIQUORS, 10; LUNATICS, 35, 36.

8. *Action against Justice—Wrongful Distress—Excess of Jurisdiction shown on Summons—Allegation of Malice and want of reasonable and probable Cause—Justices Protection Act*, 1848 (11 & 12 Vict. *c.* 44), *ss.* 1, 2.]—A summons was taken out against the appellant for unlawfully neglecting to cause his child to be vaccinated, within six months after its birth, contrary to the provisions of the Vaccination Acts. As the date of the child's birth was given on the summons as April 19th, 1901, and the summons was dated February 3rd, 1903, it appeared on the face of the summons that the child was then more than eighteen months old. By sect. 11 of the Vaccination Act, 1871, the information or complaint must be laid within twelve months of the above-mentioned offence, and the offence is complete at the expiration of six months from birth. The respondent, a metropolitan police magistrate, convicted the appellant, and the fine then imposed not having been paid, issued a warrant of distress, which was levied on the goods of the appellant. The conviction was subsequently quashed by the High Court, and the appellant brought an action in the county court against the respondent for wrongful distress. Evidence was given that the clerk on the hearing of the charge had said to the appellant: Have you had your children vaccinated according to law? and that the appellant had answered, No.

Jurisdiction and Powers of Justices—*Continued.*

The county court judge left three questions to the jury. (1) Was the want of jurisdiction brought to the notice of the respondent at the hearing of the summons? Answer.—No. (2) Was the age of the children apart from its being on the summons at any time brought to the notice of the respondent? Answer.—No. (3) What damage did the appellant suffer by the issue of the warrant? Answer.—Nominal damages £10. Of these findings judgment was entered for the respondent.

HELD, on appeal, that questions 1 and 2 were not material. The action was one of trespass, and no allegation of malice or want of reasonable and probable cause was necessary by reason of sect. 2 of the Justices Protection Act, 1848, as the respondent had acted in excess of his jurisdiction, and that fact appeared on the face of the summons. The appellant could not be taken to have pleaded guilty. Judgment would therefore be entered for the appellant for £10, as he elected that course in preference to a new trial.

POLLEY *v.* FORDHAM, (1904) (2) 68 J. P. 504; 20 [T. L. R. 639; 91 L. T. 525—Div. Ct.

9. *Adjournment—Power to Adjourn Indictable Case—Charge of Libel—Prospect of Settlement—Indictable Offences Act*, 1848 (11 & 12 Vict. *c.* 42), *s.* 21.]—Upon a summons for libel if an apology and settlement are in prospect and are likely to be facilitated by an adjournment, the justices have power to adjourn the case for more than eight days if the defendant has never surrendered to, or been detained in custody, provided that they do not decline to exercise jurisdiction and do not take extra-judicial matters into consideration.

REX *v.* SOUTHAMPTON JJ., EX PARTE LEBERN, [(1907) 71 J. P. 332; 96 L. T. 697—Div. Ct.

10. *Agreement to Tax Costs out of Sessions—Power of subsequent Court of Quarter Sessions to review Taxation.*]—Where costs, incurred in an appeal to quarter sessions, have been by agreement taxed out of sessions, a subsequent court of quarter sessions has no jurisdiction to review the taxation.

BLACKPOOL TOWER CO., LD. *v.* FYLDE UNION. [(1903) 67 J. P. 379—Qr. Sess.

11. *Bench equally divided in Opinion—Dismissal of Information—Effect of.*]—A. was summoned for an offence under sect. 3 of the Public Health (Buildings in Streets) Act, 1888, in building a house, the front wall of which projected beyond the building line. At the hearing the justices were equally divided in opinion, and on the advice of their clerk the chairman dismissed the information. A second information was subsequently laid in precisely the same terms, save that the period for which penalties were claimed was different from that in the first. The justices convicted.

HELD—that the dismissal of the first information was a good dismissal, although the justices were equally divided.

HELD, further, that such dismissal decided that the erection of the house was not an offence under sect. 3, and that the continuing of that erection could therefore not be an offence.

KINNIS *v.* GRAVES, (1898) 67 L. J. Q. B. 583; [78 L. T. 502; 46 W. R. 480—Div. Ct.

12. *Bench equally divided in Opinion—Refusal to Dismiss—Adjournment for re-hearing—Summary Jurisdiction Act*, 1848 (11 & 12 Vict. *c.* 43), *s.* 16—*Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *s.* 20 (11).]—An information was preferred against the appellant on August 18th, 1903, before two justices, who retired to consider their decision, and on their return announced in open court that they were divided in opinion. They were asked on behalf of the appellant to dismiss the summons, but they refused, and decided to adjourn it to a future date, when they and other justices on the rota would be convened to re-hear the information. The information came on for re-hearing on September 15th, 1903. The jurisdiction of the justices was objected to on behalf of the appellant.

HELD—that the justices had jurisdiction on the first occasion to adjourn the summons, and were not bound to dismiss it.

BAGG *v.* COLQUHOUN, [1904] 1 K. B. 554; 73 [L. J. K. B. 272; 68 J. P. 159, 52 W. R. 494; 90 L. T. 386; 20 Cox, C. C. 605—Div. Ct.

13. *Binding Over to Keep the Peace—No Cross Summons—Power to Bind Over Complainant as well as Defendant—Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *s.* 25.]—A complainant took out a summons for an order binding the defendant over to keep the peace, and the justices on its appearing to them that the complainant had himself used towards the defendant threats calculated to lead to a breach of the peace, and that there was a real danger of a breach of the peace on the part of both complainant and defendant, bound over both parties to keep the peace.

HELD—that the Court would not, on the application of the complainant, quash the order against him on the ground that no information was laid or summons issued against him, the Court being satisfied that before the making of the order the complainant had notice as to what the result of the proceedings would probably be, nor would it quash the order on the ground that it did not allege that the defendant stated on oath that he went in bodily fear, since the recognisance had been entered into by the complainant without protest.

REX *v.* WILKINS AND OTHERS, [1907] 2 K. B. [380; 76 L. J. K. B. 722; 71 J. P. 327; 96 L. T. 721—Div. Ct.

14. *Discretion to Issue Summons—Proceedings against Jesuits—Roman Catholic Relief Act*, 1829 (10 Geo. 4, *c.* 7), *s.* 34—*Indictable Offences Act*, 1848 (11 & 12 Vict. *c.* 42), *s.* 9.]—Upon an information under sect. 34 of the Roman Catholic Relief Act, 1829, against certain persons, charging them with having been admitted and become

Jurisdiction and Powers of Justices—*Continued.*

Jesuits within the United Kingdom, the magistrate, in the exercise of his discretion, refused to grant a summons, taking into consideration the fact that the penalties imposed by the Act had never been put in force, that the object of the Act was to get Jesuits out of the country and not to punish criminally individual Jesuits, and that it was a matter in which, in the circumstances, proceedings should be instituted by the Crown and not by a private individual. Upon an application for a *mandamus* to the magistrate to hear and determine the application for a summons :—

The Court refused to interfere with the exercise of the magistrate's discretion.

Rex *v.* Kennedy, (1902) 50 W. R. 633 ; 86 L. T. [753 ; 18 T. L. R. 557 ; 20 Cox, C. C. 230—Div. Ct.

15. *Jurisdiction — Claim of Right — Tenant against Landlord—Wilful Damage to Property—Act done "under a fair and reasonable Supposition"—Malicious Damage Act*, 1861 (24 & 25 Vict. *c.* 97), *s.* 52.]—By the Malicious Damage Act, 1861, "whosoever shall wilfully or maliciously commit any damage, injury or spoil to or upon any real or personal property whatsoever, either of a public or private nature," may be convicted before a justice of the peace, and imprisoned and fined, "provided, that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of," &c.

The claimants were the tenants of the respondents, who owned the land over which the right was claimed. The claimants had several times pulled down a hedge in pursuance of a supposed right of pasture on a down held in undivided shares by the respondents.

Held—that the claimants could have no right by prescription against the landlords, but only by the terms of their leases, which gave no such rights, and that a claim outside those leases was clearly impossible, and the parties did not act under a fair and reasonable supposition that they had a right to do the act complained of.

White v. *Feast* ((1872), L. R. 7 Q. B. 353 ; 41 L. J. M. C. 81 ; 26 L. T. (N.S.) 611 ; 36 J. P. 36) followed.

Brooks and Another *v.* Hamlyn and [Others, (1900) 63 J. P. 215 ; 79 L. T. 734 ; 19 Cox, C. C. 231—Div. Ct.

16. *Jurisdiction—Claim of Title to "Interest in Land"—Commoners—Assaults while objecting to User of Right of Common—Offences against the Person Act*, 1861 (24 & 25 Vict. *c.* 100), *s.* 46.]—The proviso to sect. 46 of the Offences against the Person Act, 1861, must be read so that the word "title" governs not only the words "lands, tenements or hereditaments," but also the words "any interest therein or accruing therefrom."

The complainant and the defendant both had rights of common over a certain piece of land, and for two or three days before the assault complained of, the complainant had been engaged in carting across the grass of the land in a way the defendant objected to. It did not appear that the defendant had given any notice of his objection to the complainant, or had raised any question as to what he was doing, until the day in question, when, the complainant being then in the act of carting turnips across the grass, the defendant, after some remonstrance, assaulted him by striking him with a whip. The complainant summoned the defendant for this assault, and at the hearing the defendant took the objection that the jurisdiction of the justices was ousted on the ground that the case raised a question as to an interest in land. The justices were of opinion that the objection was a frivolous one, and that they ought not to give effect to it, and they convicted the defendant.

Held—that no question of a right in either one or other party arose : that it was merely a question of an assault being committed at a place where both parties had a right to be ; and that the justices were right.

Rex *v.* French, [1902] 1 K. B. 637 ; 71 L. J. [K. B. 382 ; 66 J. P. 487 ; 50 W. R. 555 ; 86 L. T. 587 ; 18 T. L. R. 440 ; 20 Cox, C. C. 200—Div. Ct.

18. *Jurisdiction — Transfer of Part of one County to another County—Effect on Jurisdiction of Justices—County Police Act*, 1840 (3 & 4 Vict. *c.* 88), *s.* 2.]—Where there is a transfer of a part of a county to another county by agreement between the justices of the two counties, in pursuance of sect. 2 of the County Police Act, 1840, the jurisdiction to administer the licensing laws within the transferred portion of the county is not transferred, but remains with the justices of the district of which it formed part prior to the transfer.

Reg. *v.* Justices of Worcestershire ; Reg. [*v.* Justices of Warwickshire, [1899] 1 Q. B. 59 ; 68 L. J. Q. B. 109 ; 62 J. P. 836 ; 47 W. R. 135 ; 79 L. T. 393 ; 15 T. L. R. 45 ; 19 Cox, C. C. 198—C. A.

19. *Local Jurisdiction—Petty Sessional Division—Rural District in several Divisions—Division of Counties Act*, 1828 (9 Geo. 4, *c.* 43), *s.* 6—*Poor Law Amendment Act*, 1851, (14 & 15 Vict. *c.* 105), *s.* 9.—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 231.]—Where a rural district council extends into several petty sessional divisions, the justices of the county sitting in any of those divisions have jurisdiction to hear a complaint preferred by the council against overseers who are overseers of a parish situate in another division, and who are resident in that other division, for neglecting to pay in obedience to an order of the council from a separate rate to be levied in accordance with sect. 230 of the Public Health Act, 1875, a contribution required by the council for the performance of their duties.

Caistor Rural District Council *v.* Taylor [(1907) 71 J. P. 310 ; 97 L. T. 281 ; 5 L. G. R. 767—Div. Ct.

Jurisdiction and Powers of Justices—*Continued.*

20. *Objection to Jurisdiction not taken before Justices—Costs.*]—The objection that there was no jurisdiction in the justices may be taken before the divisional Court, although it was not taken before the justices, and no question has been left by the justices on the point.

But as a rule the party succeeding on such a point must pay the costs thrown away by his failure to take it at the proper time.

Knight v. *Halliwell* ((1874) L. R. 9 Q. B. 412: 43 L. J. M. C. 113; 38 J. P. 470; 30 L. T. 359) followed.

London, Edinburgh and Glasgow Assurance Co. Ld. *v.* Partington, (1903) 67 J. P. 255; 88 L. T. 732; 19 T. L. R. 389—Div. Ct.

21. *Right to preside at Petty Sessions—Municipal Borough without a Bench of Magistrates or Quarter Sessions—Right of Mayor to preside at Petty Sessions dealing with Offence committed in Borough, when Summons signed by County Justice—County Business—Municipal Corporation Act*, 1882 (45 & 46 Vict. *c.* 50), *s.* 155.]—In a recently incorporated borough, which had not a separate commission for the peace nor a separate court of quarter sessions, and in which petty sessional courts were held by the county justices precisely in the same manner as before the corporation, the business before a petty sessions included a summons signed by a county justice on an information against a person for throwing stones in the borough; and on the case being called on, the mayor of the borough claimed the right to take the chair, on the ground that the business was business of the borough. The justices present objected, and the mayor brought an action to obtain a declaration that he had a right in such a case to preside.

Held—that the effect or the issue of a summons by a county justice was, in such a case, to make the matter county and not borough business, and that in such a case the justices were not acting in relation to the business of the borough, within the meaning of the Municipal Corporation Act, 1882, s. 155 (the business having been already appropriated as county business) and consequently the mayor was not entitled to preside. "When a magisterial case has been earmarked as county or borough business by the issue of a summons to appear before the county or borough justices, the county or borough justices, as the case may be, have seisin of it, and the other body of justices, though having concurrent jurisdiction, cannot intercept such case."

Lawson *v.* Reynolds, [1904] 1 Ch. 718; 73 [L. J. Ch. 451; 68 J. P. 254; 52 W. R. 375; 90 L. T. 278; 20 T. L. R. 293; 2 L. G. R. 749—Farwell, J.

22. *Test Case — Dismissed — Justices being equally Divided*—Res judicata.]—A large number of summonses were issued by the Harton Coal Co. against their workmen under the Employers and Workmen Act, 1875, claiming damages for wrongfully leaving their employment. It was agreed that one of the cases, when heard by the justices, should be treated as a test case, and should decide the others.

On the hearing of this particular case the justices were equally divided and the summons was dismissed.

Held—that this determination of the proposed test case was not within the contemplation of the above agreement, and that the decision therein referred to meant a decision on the merits, and that the justices were not, therefore, precluded from hearing one of the other summonses.

Reg. *v.* Wardle, Ex parte Burrows, (1898) [14 T. L. R. 424—Div. Ct.

23. *Trifling Offence — Baking Bread on Sunday—Dismissal of Information—Previous Convictions—Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *s.* 16.]—The respondent was summoned under 3 Geo. 3. c. cvi., s. 16, for baking bread on Sunday. The magistrate thought the offence proved was of so trifling a nature that he dismissed the information and refused to receive evidence of former convictions.

Held—that there was no reason why the magistrate in this case could not avail himself of the power given him of dismissing the information under sect. 16 of the Summary Jurisdiction Act, 1879. The section was not only intended to apply in case of first convictions.

Vinters *v.* Freedman, (1902) 71 L. J. K. B. [48; 66 J. P. 135; 85 L. T. 628; 18 T. L. R. 77; 20 Cox, C. C. 197—Div. Ct.

24. *Trifling offence—Selling Liquor without Licence—Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *s.* 16.]—The High Court may interfere when justices wrongly deal with an offence as one "of a trifling nature."

Justices ought not to regard it as a trifling offence for an incoming tenant of an inn to sell beer for nine days without a licence merely because there were no sessions at which he could apply for a temporary transfer.

Barnard *v.* Barton and Others, [1906] 1 [K. B. 357; 75 L. J. K. B. 326; 69 J. P. 281; 92 L. T. 859; 20 Cox, 870—Div. Ct.

25. *Trifling Offence—Sewage Discharged into a Stream—Negotiations Pending between Conservancy Board and Urban District Council—Dismissal of Information—Jurisdiction of Justices—Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *s.* 16.]—The appellants, in January, 1902, gave notice to the respondents to discontinue the flow of sewage into a tributary of the river Lee, within the districts of the respondents. Negotiations were entered into between the appellants and respondents, and meanwhile the sewage was permitted to flow into the tributary as before. On November 1st 1904, the respondents were served with a summons for failing to comply with the notice. Before the hearing of the summons measures were taken by the respondents to discontinue the flow of sewage. The hearing of the summons was adjourned for six months, and finally came on on May 25th, 1905,

Jurisdiction and Powers of Justices—*Continued.*

when the magistrates dismissed the information having regard to the negotiations between the parties subsequent to the service of the notice, and the steps taken by the respondents subsequent to the service of the summons.

HELD—that the fact that there had been negotiations between the parties did not justify the justices in refusing to convict, and that the case must go back for their further consideration

HELD, further, that although, *primâ facie*, the discharge of sewage into a river cannot be regarded as a trival offence within the meaning of sect. 16 of the Summary Jurisdiction Act, 1879, yet, if the evidence before the justices on the rehearing appeared to them to warrant their so doing, it would be open to them to act under that section, but that they must not allow their judgment to be influenced by the fact that there had been negotiations between the parties.

LEE CONSERVANCY BOARD *v.* BISHOP'S STORTFORD URBAN DISTRICT COUNCIL, (1906) 70 J. P. 244 ; 4 L. G. R. 641—Div. Ct.

III. PROCEDURE.

26. *Costs—Payment by Treasurer of County Fund—"Place"—Vagrant Act*, 1824 (5 Geo. 4, *c.* 83), *s.* 9.]—The appellants were alleged to have committed an offence against the Vagrant Act, 1824, and were convicted before the justice of the County borough of Huddersfield ; but on appeal to the quarter sessions, to which an appeal lay under sect. 14 of the Act, the conviction was quashed, and an order was made for payment of the costs of the appellant and also of the respondent, a police inspector, by the treasurer of the borough of Huddersfield.

HELD—that the order should have been made on the treasurer of the county fund ; that the word "place" in sect. 9 of the Vagrant Act, 1824, must be held to mean a place having a separate court of quarter sessions.

REG. *v.* WEST RIDING JUSTICES, [1900] 1 Q. B. [291 ; 69 L. J. Q. B. 13 ; 16 T. L. R. 4—Div. Ct.

27. *Conviction — Form — Variance between Information and Conviction—Seals of Justices—Power of Amendment — Summary Jurisdiction Act*, 1848 (11 & 12 Vict. *c.* 43), *ss.* 1, 14—*Quarter Sessions Act*, 1849 (12 & 13 Vict. *c.* 45), *s.* 7.]—On an information and summons charging the defendant with unlawfully exposing to view in a window a certain indecent exhibition, this being an offence for which a penalty of 40*s.* may be imposed under sect. 28 of the Town Police Clauses Act, 1847, it was stated on behalf of the prosecution at the hearing that the proceedings were taken under the Vagrancy Act, 1824, under which, as amended by sect. 2 of the Vagrancy Act, 1838, the offence of "wilfully" exposing such an exhibition to public view in the window of any shop, situate in any street, is punishable with a fine of £25, but objection was not taken before the justices on behalf of the defendant to the absence of the word "wilfully" from the summons. The justices convicted the defendant of "wilfully" exposing an indecent exhibition to public view, and fined him £20, and signed the conviction but did not seal it with their seals.

HELD—that the Court would not quash the conviction, as the objection was not taken at the hearing, and no information is necessary if the defendant is before the justices, and as the Court had power under the Quarter Sessions Act, 1849, sect. 7, to amend the conviction with regard to the omission of the seals of the justices.

REX *v.* TABRUM AND ANOTHER, (1907) 71 J. P. [325 ; 97 L. T. 551 : 23 T. L. R. 474—Div. Ct.

28. *Conviction—Summons — Distinct Offences charged—Defendant convicted generally.*]—M. was charged on summons for that, without being duly authorised, he did go and enter upon the lands of the complainant, provided with a gun, to look for, set, spring, start, follow, shoot, course, hunt, or otherwise pursue, take, or destroy, game (in the words of the statute infringed). An order was made by the justices, "defendant duly convicted and ordered to pay," &c.

HELD—that the conviction was bad, inasmuch as several distinct offences were charged, and it did not appear of which the defendant was convicted.

REX *v.* DONEGAL JJ., [1907] 2 Ir. R. 386—[K. B. Div.

29. *Different Offences charged—Hearing of all Information before decision of first — Conviction on first Information — Legality of Conviction.*]—Three informations were preferred at petty sessions against a beerhouse-keeper for breaches of the Licensing Acts. At the conclusion of the first case the justices postponed their decision thereon and proceeded to hear the other informations, which related to different charges committed on a different day, and they dismissed the second and third informations : they then announced that they had decided to convict on the first charge, and they convicted accordingly on the first information. The justices stated that they were unanimous in favour of convicting at the close of the first case, but that they adjourned their decision and the consideration of the amount of the penalty until after the other charges were disposed of, and that in adjudicating on each case they applied to that case the evidence that was given in reference to it, and no other.

HELD—that the postponement by the justices of their decision in the first case until they had disposed of the other cases did not, under the circumstances, render the conviction in the first case bad in law.

REG. *v.* FRY, EX PARTE MASTERS, (1898) 62 J. P. [457 ; 67 L. J. Q. B. 712 ; 78 L. T. 716 ; 14 T. L. R. 445 ; 46 W. R. 649 ; 19 Cox C. C. 135 —Div. Ct.

30. *Evidence—Summons [disclosing a Former Offence—Statements as to previous Convictions of which no Notice taken by Court.*]—A summons

Procedure—*Continued.*

set out that the defendant was charged with driving a motor car on a public highway at a speed which was dangerous to the public, having regard to all the circumstances of the case, "the same being his second offence," and the defendant was so charged at petty sessions by the clerk of the Court. In the course of the hearing, whilst giving evidence, two constables mentioned that the defendant's licence was endorsed when they saw it, on the car being stopped. Objection to these statements was made, and the Court took no written note of them, the chairman of the justices deleting a note he had made, and stating that the Bench would take no notice of the statement. The defendant was convicted.

HELD—that there had been no misreception of evidence, and that the conviction must be upheld.

CHOLERTON *v.* COPPING, (1906) 70 J. P. 484—[Div. Ct.

31. *Fines — Regulation of—First Offence — Second Offence.*]—Sect. 4 of the Summary Jurisdiction Act, 1879, as far as reduction of fines is concerned, applies only to first offences. Fines for second and subsequent offences are regulated by 7 & 8 Geo. 4, c. 53, s. 78, under which such fines cannot be reduced below one fourth of their full amount as imposed by statute. To constitute a second offence under 32 & 33 Vict. c. 14, s. 27, it is not necessary to be convicted twice in the same year for keeping a carriage without having a licence for that year. A conviction in one year for keeping a carriage without a licence for that year following a conviction in a previous year for keeping a carriage without a licence for that year is a second conviction for the same offence.

PHILLIPS *v.* STEPHENS, (1898) 79 L. T. 280; [62 J. P. 789; 19 Cox C. C. 172—Div. Ct.

32. *Indictable Offence—Evidence by Accused before the Committing Justices.*] — When an accused person charged with an indictable offence is about to be committed for trial and intends to rely upon evidence by way of defence, it is advisable that he should give evidence before the committing justices. Justices should impress this upon all accused persons. If an accused person omits to give evidence before the justices, the value of his evidence at the trial will be much lessened.

REX *v.* HUMPHRIES, (1903) 67 J. P. 396—[Wills, J.

33. *Offence Punishable with more than Three Months' Imprisonment — Offender must be informed of his Right to be tried by Jury — Waiver — Summary Jurisdiction Act,* 1879 (42 & 43 Vict. *c.* 49), *s.* 17.]—A defendant, if charged with an offence within sect. 17 of the Summary Jurisdiction Act, 1879, must be informed by the Court of Summary Jurisdiction of his right to be tried by a jury. It is not sufficient that he has heard a defendant in a previous case, charged with a similar offence arising out of the same subject-matter, informed of his right to be so tried, and he cannot, under these circumstances, be held to have waived his right to be informed by the Court, when his case came on, of his right to be tried by a jury.

HARKER *v.* HOPKINS, (1903) 67 J. P. 428—[Qr. Sess.

34. *Offence Punishable with more than Three Months' Imprisonment—No Reading of Notice informing Defendant of right to a Jury—Waiver —Betting Act,* 1853 (16 & 17 Vict. c. 119), *s.* 3—*Summary Jurisdiction Act,* 1879 (42 & 43 Vict. c. 49), *s.* 17 (1), (2).]—By sect. 17 (1) of the Summary Jurisdiction Act, 1879, "A person when charged before a court of summary jurisdiction with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault may, on appearing before the Court and before the charge is gone into and not afterwards, claim to be tried by a jury, and thereupon the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence. . . ."

And by sub-sect. (2), "A court of summary jurisdiction, before the charge is gone into in respect of an offence to which this section applies for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section shall address him to the following effect: 'You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily to be tried by a jury; do you desire to be tried by a jury?' With a statement, if the Court thinks it desirable for the information of the person to whom the question is addressed, of the meaning of being dealt with summarily, and of the assizes or sessions (as the case may be) at which such person will be tried if tried by a jury."

R. was charged with an offence under sect. 3 of the Betting Act, 1853. He was not aware of his right to be tried by a jury, and was never so informed by the court of summary jurisdiction. He was convicted and fined £50.

HELD—that the conviction must be quashed as the caution was not given. Further, that the conviction need not state the fact of the caution being given.

REG. *v.* COCKSHOTT, EX PARTE RICKERBY, [1898] 1 Q. B. 582; 62 J. P. 335; 67 L. J. Q. B. 467; 78 L. T. 168; 14 T. L. R. 264; 19 Cox C. C. 3—Div.

35. *Nuisance Order Signed by one Justice only —Public Health Act,* 1875 (38 & 39 Vict. *c.* 55), *ss.* 96, 251, *and Sched. IV. Form C.—Summary Jurisdiction Act,* 1848 (11 & 12 Vict. *c.* 43), *ss.* 12, 14—*Summary Jurisdiction Act,* 1879 (42 & 43 Vict. *c.* 49), *s.* 29—*Summary Jurisdiction Rules,* 1886, *r.* 31, *Consolidated Forms. No.* 19.]—An order of justices for the abatement of a nuisance made under sect. 96 of the Public Health Act, 1875, must be drawn up in writing

Procedure—*Continued.*

and must be signed by two justices, at least, who were present and took part in the hearing and determination of the case.

Semble, the order should be served upon the defendant.

Decision of Qr. Sess. (67 J. P. 380) reversed.

WING *v.* EPSOM URBAN DISTRICT COUNCIL, [1904] 1 K. B. 798; 73 L. J. K. B. 389; 68 J. P. 259; 52 W. R. 461; 90 L. T. 513; 20 T. L. R. 310—Div. Ct.

36. *Warrant of Commitment — Insufficient Goods for Distress—Evidence of Insufficiency of Goods—Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 19), *s.* 21.]—The defendant was convicted by a court of summary jurisdiction of an offence under sect. 1 of the Motor Car Act, 1903, and fined £10 and 9*s.* 6*d.* costs.

It appeared from the affidavits of the defendant and his solicitor that on the announcement of the sentence the solicitor, stating that his client was in employment as a chauffeur at £2 a week, asked the Court to grant time for payment; but that the chairman of the justices replied, "£10, or alternatively one month's imprisonment"; and that the solicitor then left the Court and the defendant was removed in custody.

It appeared from the affidavits of the justices and their clerk that on the announcement of the sentence the clerk asked an inspector of police what the defendant was and where he lived, and he received the reply that he was a servant of a chauffeur, living on weekly wages in a room in certain mews; that the solicitor then stated that his client was only a second chauffeur, and had no means whatever beyond his wages, and made an appeal to the bench for time for payment, urging that if it were not given, his client would have to go to prison; and that the justices being satisfied by what had passed before them that the defendant had not sufficient goods to satisfy a distress issued their warrant of commitment.

It was contended on the return to a writ of *habeas corpus* that the warrant was bad in that application was made to the justices to levy a distress, and that no distress was levied, and that there was no evidence that the defendant had not sufficient goods to satisfy a distress.

HELD—that the conviction and warrant of commitment being good upon the face of them, and there being nothing in the affidavits to displace the justices' finding that the defendant had not sufficient goods whereon to levy the distress, the defendant must be recommitted to prison.

REX *v.* MORTIMER, (1906) 70 J. P. 512—Div. Ct.

IV. APPEALS.

And see FOOD AND DRUGS; INTOXICATING LIQUORS; RATES AND RATING.

(a) To Quarter Sessions.

37. *Service of Notice of Appeal — Summary Jurisdiction Act*, 1879 (12 & 43 Vict. *c.* 49), *ss.* 31 (2), (7).]—Upon an appeal to quarter sessions from a conviction by a Court of summary jurisdiction, personal service is not necessary under the Summary Jurisdiction Act, 1879, s. 31 (2), (7).

REG. *v.* SOMERSETSHIRE JJ., EX PARTE TALBOT, [(1900) 69 L. J. Q. B. 311; 64 J. P. 341; 16 T. L. R. 166—Div. Ct.

38. *Case Stated for the Opinion of the Court—Reversal of Conviction—Appeal to Quarter Sessions—Final and Conclusive Effect of Decision of High Court—Summary Jurisdiction Act*, 1857 (20 & 21 Vict. *c.* 43), *ss.* 6, 14.]—D. was summoned before justices, under the Fisheries Acts, for not making, and for not maintaining a legal free gap in his weir at Lismore. The justices, in January, 1899, convicted him for not making the free gap, and imposed a fine of £1,000, their order being silent as to the second count—for not maintaining it. At D.'s request they stated a case for the opinion of this division (Q. B.), setting out that, as they had convicted the defendant for not making the gap, they considered they could not also convict for not maintaining it, but that, if wrong in this, they were of opinion that the gap had not been legally maintained in certain particulars. The Court reversed the conviction for not making, but remitted the case to the justices, with an expression of their opinion that, by reason of a certain finding of fact in regard to the non-maintenance of the gap, the justices ought to convict the defendant for not maintaining it, and should impose in respect thereof such penalty as was right. Thereupon, on July 29th, the justices at petty sessions made an order of conviction imposing on the defendant a penalty of £54. The defendant appealed from this order to quarter sessions. The prosecutor, on September 13th, obtained a conditional order for a writ of prohibition directed to the chairman and justices, who, when the quarter sessions subsequently met on September 20th, adjourned the matter pending the decision of the Court whether prohibition should go on motion to make the order absolute.

HELD (Murphy, J., dissenting) — that the "final and conclusive" effect of the decision of the High Court upon the case stated, and the "abandonment," by the acceptance of the case, of the alternative right of appeal to quarter sessions from the conviction of January, 1899, did not preclude the defendant from appealing to quarter sessions from the justices' subsequent order of July 29th.

Quære, Was the application for the writ of prohibition premature?

REG. *v.* WATERFORD JJ., [1900] 2 Ir. R. 307—[Q. B. D.

39. *Refusal of Pawnbroker's Certificate — Appeal—Liability of District Council for Costs — Jurisdiction of Quarter Sessions — Pawnbrokers Act*, 1872 (35 & 36 Vict. *c.* 93), *s.* 52.] On an appeal to quarter sessions against the refusal by a district council to grant a certificate to a pawnbroker, quarter sessions have no

Appeals—*Continued.*

jurisdiction to order the appellant's costs to be paid by the council as respondents to the appeal, where they have taken no step in relation to the appeal and have not appeared at the hearing.

Rex *v.* Northumberland JJ., (1907) 71 J. P. [331; 96 L. T. 700; 5 L. G. R. 1110—Div. Ct.

(b) **By Special Case.**

40. *Application to State Case — Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *s.* 33 (2)—*Summary Jurisdiction Rules*, 1886, *r.* 18.]—On the conviction, on September 21st, 1906, of a publican for an offence against the licensing laws, the justices orally agreed to state a case, and his solicitor on September 26th, 1906, served them with copies of a written application requesting them to do so, and left with the assistant clerk to the justices a copy addressed to the clerk to the justices. On October 8th, 1906, the justices refused to take the necessary recognisances and to state the case, on the ground that the written application had not been served in accordance with rule 18 of the Summary Jurisdiction Rules, 1886, which requires that there shall be left with the clerk a copy for each of the justices, which shall be duly forwarded to them by him.

Held—that the rule had been sufficiently complied with, and that the justices must be ordered to state a case.

Rex *v.* Woodcock and Others, [1907] 2 K. B. [104; 76 L. J. K. B. 683; 71 J. P. 241; 96 L. T. 672—Div. Ct.

41. *No service of Special Case — All Means taken to Serve—Knowledge of Respondent—Summary Jurisdiction Act*, 1857 (20 & 21 Vict. *c.* 43), *s.* 2; 1879 (42 & 43 Vict. *c.* 49), *s.* 33.]—Where no copy of a special case with notice in writing of the appeal had been given to the respondent, but every effort had been made to serve the respondent, and the Court were satisfied that the respondent knew about it:—

Held—that the Court would hear the appeal.

Teddington Urban District Council *v.* [Vile, (1906) 70 J. P. 381—Div. Ct.

42. *Notice of Appeal not duly given—Respondent's Solicitor accepting Service of Copy of Case—No Jurisdiction to Hear Appeal—Summary Jurisdiction Act*, 1857 (20 & 21 Vict. *c.* 43), *s.* 2.]—An appellant, having received the special case, delivered a copy to the respondent's solicitors, who formally accepted service thereof on behalf of the respondent; he did not, however, at the same time serve notice in writing, of the appeal, as required by the statute.

Held—that the appeal could not be heard.

Rust *v.* St. Botolph, Bishopsgate, (1906) 94 [L. T. 575—Div. Ct.

43. *Power to State Case—Revision of Jury Lists by Justices in Special Sessions—"Court of Summary Jurisdiction"—Juries Act*, 1825 (6 Geo. 4, *c.* 50), *s.* 10—*Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *s.* 33.]—Justices sitting in special sessions under the Juries Act, 1825 (6 Geo. 4, *c.* 50) to review the jury lists are not a court of summary jurisdiction under the Summary Jurisdiction Acts, and have no power to state a special case.

Hagmaier *v.* Willesden Overseers, [1904] [2 K. B. 316; 73 L. J. K. B. 638; 68 J. P. 343; 52 W. R. 654; 90 L. T. 683; 20 T. L. R. 494; 2 L. G. R. 965—Div. Ct.

44. *Power to state Case—Indictable Offence — Embezzlement—Dismissal—No service of Notice of Appeal and Case on Respondent—Summary Jurisdiction Act*, 1857 (20 & 21 Vict. *c.* 43), *s.* 2—*Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *s.* 33.]—The respondent was charged on an information for embezzlement. The justices dismissed the information on the ground that the offence had not been committed in law, but stated a case. The appellants were unable to serve the respondent, as he had disappeared.

Held—that the Court had no jurisdiction to hear the case, as the appellants had not served the respondent with the notice of appeal and copy of the case, as provided by the Summary Jurisdiction Acts.

Semble, justices have no power to state a case under sect. 33 of the Summary Jurisdiction Act, 1879, where they dismiss an information for felony and decline to commit the person charged for trial.

Foss *v.* Best, [1906] 2 K. B. 105; 75 L. J. K. B. [575; 70 J. P. 383; 95 L. T. 127; 22 T. L. R. 542; 21 Cox C. C. 226—Div. Ct.

45. *Practice—Argument of Case on Admitted Facts.*]—On an application for a rule to justices to state a special case it is now a recognised practice, if the parties agree, to treat the affidavits as constituting a case, and to deal finally with the point raised by them.

Rex *v.* Denman, (1907) 5 L. G. R. 649—Div. Ct.

46. *Refusal of Justices to State Case—Discretion to Order*—Certiorari.]—An order was made by justices that a certain dog alleged to be dangerous, should be kept under proper control, and led by a leash by day and chained up at night. The owner applied to the justices to state a case, alleging, *inter alia*, that the words "and chained up at night" rendered the order *ultra vires*. The justices refused. A rule was then obtained calling upon the justices to state a case.

Held—that, as the main question, whether in making the order the justices had acted *ultra vires*, could more properly be raised by writ of *certiorari*, the rule for a *mandamus* to the justices to state a case would be discharged in the discretion of the Court: the application to the justices being based on several grounds, some of which were frivolous, the facts were unsuitable to raise the main question, which the Court was asked to determine.

Rex *v.* Owen and Others, (1907) 52 Sol. Jo. [132—Div. Ct.

Appeals—*Continued.*

47. *Refusal of Justices to State Case—Recognisance nevertheless entered into by Appellant—Order to State Case—Death of Surety—Necessity for fresh Recognisance—Summary Jurisdiction (Appeals) Act*, 1857 (20 & 21 Vict. *c.* 43), *ss.* 3, 5.]—The applicant against whom an order had been made, asked the magistrate to state a case, which was refused. Two or three days after the applicant entered into a recognisance with a surety. At a later date a rule for an order to the magistrate to state and sign a case was made absolute. The magistrate accordingly stated and signed the case, but refused to deliver it to the applicant until fresh recognisances had been entered into, the applicant having become bankrupt and his surety having died before the rule had been made absolute. The applicant applying for an order.

HELD—that, as security had already been given in accordance with sect. 3 of the Summary Jurisdiction (Appeals) Act. 1857, the case must be delivered by the magistrate without further security being given.

REX *v.* KETTLE, [1905] 1 K. B. 212 ; 74 L. J. K. B. [254 ; 69 J. P. 55 ; 53 W. R. 364 ; 92 L. T. 59 ; 21 T. L. R. 151 ; 3 L. G. R. 112 ; 20 Cox, C. C. 753—Div. Ct.

48. *Refusal of Justices to State—Right of Attorney-General to Demand—Summary Jurisdiction Act*, 1857 (20 & 21 Vict. *c.* 43), *s.* 4.—When justices in petty sessions are asked to state a special case by, or at the direction of, the Attorney-General, they have no option in the matter, even if they consider the application to be frivolous. If they refuse, the Court will issue an order to them to do so.

REX *v.* SHARPE AND OTHERS, (1903) 67 J. P. [181—Div. Ct.

49. *Respondent not appearing—Appeal allowed — Costs.*—The general rule of the Divisional Court is to allow an appeal without costs if the respondent does not appear on the hearing. Where, however, the successful appellants are a public body, who have taken proceedings in performance of their duty to the inhabitants, they may be allowed their costs although the respondent does not appear, especially if his contention is frivolous or obviously unarguable.

USK URBAN DISTRICT COUNCIL *v.* MORTIMER, [(1904) 68 J. P. 38 ; 8 L. G. R. 135—Div. Ct.

50. *Respondent not Appearing — Appeal Allowed—Costs.*]—Where an appeal is allowed in the absence of a respondent, the Court has entire discretion as to the costs.

Though the respondent did not set the law in motion, yet, if, having no merits on his side, he takes, and succeeds on, a technical point before the justices, but their decision is reversed in his absence on appeal ; he will, as a rule, be mulcted in the costs of the appeal, which he has rendered necessary.

ROBINSON *v.* GREGORY, (1905), 69 J. P. 191 ; [20 Cox, C. C. 781—Div. Ct.

51. *Signature of Case—Summary Jurisdiction Act*, 1857 (20 & 21 Vict. c. 43), *s.* 7.]—A case stated under the Summary Jurisdiction Acts for the opinion of the High Court must be signed by all the justices taking part in the hearing and determination of the Court of Summary Jurisdiction, whether assenting to or dissenting from the decision of that Court.

BARKER *v.* HODGSON, (1904) 68 J. P. 310—[Div. Ct.

MAIN ROADS.

See HIGHWAYS.

MAINTENANCE.

See ACTION, 3, 4, 5 ; BASTARDY ; HUSBAND AND WIFE ; POOR LAW ; WILLS.

MALICIOUS DAMAGE.

See CRIMINAL LAW.

MALICIOUS PROSECUTION AND PROCEDURE.

1. *Absence of reasonable and probable Cause—Question for Jury.*]—Where in an action for malicious prosecution, the facts which raise the question whether there is an absence of reasonable and probable cause are disputed, the evidence of such facts should be left to the jury, in order that the jury may find facts on which the judge may determine whether reasonable and probable cause was absent. Withdrawal of the prosecution is not conclusive proof of absence of reasonable and probable cause.

HILLIAR *v.* DADE (1898) 14 T. L. R. 534—C. A.

2. *Corporation—Action for Malicious Prosecution.*]—An action for malicious prosecution can lie against a limited company or corporation.

Edwards v. *Midland Ry. Co.* ((1880), 6 Q. B. D. 287 ; 50 L. J. Q. B. 281 ; 45 J. P. 374 ; 29 W. R. 609 ; 43 L. T. 694—Fry, J.) followed.

Decision of Darling, J. ([1899] 1 Q. B. 392 ; 68 L. J. Q. B. 196 ; 80 L. T. 121 ; 15 T. L. R. 156) affirmed.

CORNFORD *v.* CARLTON BANK, [1900] 1 Q. B. 22 ; [69 L. J. Q. B. 1020 ; 81 L. T. 415 ; 16 T. L. R. 12—C. A.

See also Bostock v. *Ramsey Urban District Council*, (1900) 63 J. P. 728 ; 16 T. L. R. 18—Ld. Russell of Killowen, C.J. *See* PUBLIC AUTHORITIES, No. 30.

3. *Onus of Proof—Functions of Judge and Jury—Setting aside Verdict.*]—In an action for maliciously and without reasonable and probable cause instituting insolvency proceedings against the plaintiff, the burden is on the plaintiff to prove the absence of reasonable and probable cause.

The question is one for the judge to decide upon the facts found by the jury.

A plaintiff in such an action obtained a verdict: but there was evidence on which a reasonable man might conclude that he was intentionally avoiding and delaying his creditors.

HELD—that the verdict could not be supported.

COX *v.* ENGLISH, SCOTTISH AND AUSTRALIAN [BANK, LD., [1905] A. C. 168; 74 L. J. P. C. 62; 92 L. T. 483—P. C.

4. *Reasonable and Probable Cause—Motive—Abuse of Remedy sought—Fraud upon Court.*]—A plaintiff or petitioner who institutes and insists in a process before the bankruptcy or any other Court, in circumstances which make it an abuse of the remedy sought or a fraud upon the Court, cannot be said to have acted in that proceeding either with reasonable or probable cause. But to constitute an abuse of process or fraud upon the Court, mere motive, however reprehensible, will not be sufficient; it must be shown that the remedy would be unsuitable and would enable the persons obtaining it fraudulently to defeat the rights of others.

Ex parte Wilbran ((1820) 5 Madd. 1) approved.

It is not the duty of a judge to submit any issue of fact to the jury which is not fairly raised by the evidence. The jurisdiction of the Registrar in Bankruptcy is confined to a discretion to grant or refuse a receiving order. No question as to *res judicata* arises thereon.

Ex parte Vitoria ([1894] 2 Q. B. 387; 63 L. J. Q. B. 161; 42 W. R. 529; 71 L. T. 48; 1 Mans. 236—C. A.) approved.

KING *v.* HENDERSON, [1898] A. C. 720; 67 L. J. [P. C. 134; 47 W. R. 157; 79 L. T. 37; 5 Mans. 308—P. C.

5. *Reasonable and Probable Cause—Charge of Larceny of several Articles—Absence of Reasonable and Probable Cause as to some of the Articles.*]—The plaintiff having been indicted in one count with having stolen a number of articles and having been acquitted, if there was an absence of reasonable and probable cause for the charge as regards one or more of the articles, an action for malicious prosecution will lie on proof of malice.

Reed v. *Taylor* ((1812) 4 Taunt. 616) followed.

PALMER *v.* BIRMINGHAM MANUFACTURING [CO., (1902) 18 T. L. R. 552—Jelf, J.

MANDAMUS.

See CROWN PRACTICE.

MANITOBA.

See DEPENDENCIES AND COLONIES.

MANOR.

See COPYHOLDS AND MANORS.

MANSLAUGHTER.

See CRIMINAL LAW AND PROCEDURE.

MARGARINE.

See FOOD AND DRUGS.

MARINE INSURANCE.

See INSURANCE.

MARITIME LIENS.

See SHIPPING AND NAVIGATION.

MARKET GARDENS.

See AGRICULTURE.

MARKETS AND FAIRS.

COL.
I. IN GENERAL 674
II. TOLLS 677
III. HAWKERS 679

I. IN GENERAL.

See also ANIMALS, No. 13.

1. *Bye-laws*—Intra *or* Ultra vires—*Markets and Fairs Clauses Act*, 1847 (10 & 11 Vict. *c.* 14), *s.* 42—*Diseases of Animals Act*, 1894 (57 & 58 Vict. *c.* 57), *s.* 32, *sub-s.* 2.]—The corporation of Glasgow, with the sanction of the Board of Agriculture — without which the bye-law in dispute would have had no validity—framed a bye-law which purported to be a bye-law for the regulation of the use of a certain market in which foreign cattle were sold. The bye-law was in these terms: "The sale-rings shall be used only for public sales of cattle by auction on conditions of sale which shall be equally applicable to all bidders and buyers. The sale-rings shall not be used for private sales to any limited

In General—*Continued.*

number of persons or for sales in which any class of the public are excluded from bidding or buying."

HELD—that the corporation had acted strictly within their jurisdiction in regulating this particular market, and that the bye-law was not *ultra vires.*

Judgment of the First Division of the Ct. of Sess., Scotland ((1899) 1 F. 665; 36 S. L. R. 458), affirmed.

SCOTT *v.* GLASGOW CORPORATION, [1899] A. C. [470; 68 L. J. P. C. 98; 64 J. P. 132; 81 L. T. 302; 15 T. L. R. 498—H. L. (Sc.).

2. *Market not limited by Metes and Bounds—Extent—New Streets—Dedication Subject to Market Rights—Presumption.*]—From time immemorial the lord of the manor of Stepney had held a hay and straw market in High Street, Whitechapel. After 1840 two narrow streets, not used for market purposes, were widened and made into new streets by the Commissioners of Woods and Forests, under the powers of the Metropolis Improvement (Additional Thoroughfares) Act, 1840. In 1870 an entirely new street was cut through private property by the Metropolitan Board of Works, under the powers of the Whitechapel and Holborn Improvement Act, 1865. These Acts did not refer to the market rights, but the market was in fact held in the new streets shortly after they were made, as well as in the High Street. Certain railway and tramway Acts contained provisions for the protection of the market in the several streets. It was admitted that the market was without metes and bounds, and that the area of the market franchise extended to the whole manor.

HELD—by Vaughan Williams and Buckley, L.JJ. (Fletcher Moulton, L.J. dissenting), that the new streets must be presumed to have been dedicated to the public subject to the market franchise, and that therefore certain regulations made by the defendants, excluding carts and waggons from those streets and restricting the market to certain other streets, were invalid.

Decision of Eady, J. ([1906] 2 K. B. 468; 75 L. J. K. B. 777; 70 J. P. 503; 95 L. T. 146; 22 T. L. R. 688; 4 L. G. R. 1092) affirmed.

GINGELL, SON & FOSKETT, LD. *v.* STEPNEY [BOROUGH COUNCIL, (1907) 71 J. P. 486; 23 T. L. R. 759; 24 T. L. R. 148—C. A.

3. *Market Rights—Infringement—Horses—Sale—Injunction.*]—In 1698, William 3 granted to F. M., by Royal charter, a licence to hold on certain lands at Southall one market on every Wednesday for ever, and two annual fairs for ever, for the sale of horses and cattle. Plaintiff was lessee of the market under a lease dated March 24th, 1902. In August, 1902, defendant advertised a sale by auction of fifty Welsh ponies in a field about three hundred yards from the entrance of the market, and the sale took place on August 20th. Defendant had sold such ponies in the market in 1898 and 1900, but had been requested by the then lessee not to do so again, because the ponies were unbroken and disturbed the market. The consignor of the ponies also objected, because the market ground was too hard.

HELD—by Kekewich, J., that, under the circumstances, there had been no intentional invasion of the market by the defendant so as to make him liable to an injunction.

HELD—on appeal, that there had been in fact a disturbance of the plaintiff's market, and that therefore the absence of any intention to set up a rival market was immaterial. As, however, the plaintiff had in a way invited such disturbance, he was allowed no costs of the action, and a declaration was granted instead of an injunction.

Decision of Kekewich, J. (67 J. P. 261) reversed.

WILCOX *v.* STEEL. (1903) 20 T. L. R. 78; [1904] [1 Ch. 212; 73 L. J. Ch. 217; 68 J. P. 146; 89 L. T. 640—C. A.

4. *Market Rights—Infringement—Injunction—Presumption—Claim of Right—Public Health Act,* 1875 (38 & 39 Vict. *c.* 55), *s.* 166.]—The proviso to sect. 166 of the Public Health Act, 1875, refers to rights acquired adversely to the rest of the world and does not extend to a right of an individual enjoyed only in common with the rest of the public.

By letters patent a right to a Friday market for the town of W. was granted by James I. By an Act of 48 Geo. 3. the tollage was extended to Wednesday and Saturday. On June 13th, 1887, the market rights were conveyed to the plaintiffs' predecessors, the W. Local Board, and bye-laws were made. By a charter in the fifty-sixth year of Hen. III., a Tuesday market in P. was granted, which was conveyed to the plaintiffs. Under sect. 19 of the London Government Act, 1899, a scheme was made for W. and an Order in Council was made extending the boundaries of W. so as to include P. No provision was made as to charging tolls in P., but power to do so was given by the Woolwich Borough Council Act, 1903, s. 6. The defendants claimed a right to sell in the market in P. without paying toll, and proved that they had sold without paying toll for a number of years.

HELD—that as the right to take tolls was not given by the charter, but by the Act of 1903, no right was acquired by non-payment of tolls for a considerable period, and that the defendants must be restrained by injunction from selling within the borough (except at their own houses or shops) articles usually sold in public market.

WOOLWICH CORPORATION *v.* GIBSON AND [OTHERS, (1905) 69 J. P. 361; 92 L. T. 538; 21 T. L. R. 421; 3 L. G. R. 961—Eady, J.

5. *Market Right—Infringement—Statutory Remedy—Injunction.*]—Where there is a liability existing at common law, and which is only re-enacted by a statute with a special form of remedy, there, unless the statute contains words necessarily excluding the common law remedy,

In General—*Continued.*

the plaintiff has his election of proceeding either under the statute or at common law.

The Sidmouth Market Act, 1839, provided for the substitution of a new market-place in lieu of the old market-place, and new tolls which extended to and included the old tolls. The old tolls were kept alive for the benefit of the lord, subject to a list of tolls being affixed upon conspicuous places in the market-place. The plaintiff sued in respect of his market rights, claiming a declaration, injunction, and accounts. The defendant's objection was in effect a plea to the jurisdiction.

HELD—that the Act of 1839 had simply re-enacted the old common law right to the market, applying the right to the particular new building when substituted for the old building, and the remedies by re-enactment were extended to both the new and old tolls; that though the Act provided a particular remedy for the infringement of the right of property so created, that did not exclude the jurisdiction of the Court to protect the right of property by injunction, as the Act did not in terms deprive the Court of that jurisdiction.

STEVENS *v.* CHOWN, STEVENS *v.* CLARK, [1901] [1 Ch. 894; 70 L. J. Ch. 571; 65 J. P. 470; 49 W. R. 460; 84 L. T. 796; 17 T. L. R. 313—Farwell, J.

6. *Proceedings for Penalties—Sale of Articles outside Market—Information laid by an Association—"A Party Aggrieved"—Markets and Fairs Clauses Act*, 1847 (10 & 11 Vict. *c.* 14), *s.* 13—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *ss.* 167, 253.]—An association of retail dealers, many of whom dealt in tollable articles in a place in which the Markets and Fairs Clauses Act, 1847, was applicable under sect. 167 of the Public Health Act, 1875, are entitled, by their servant, to take proceedings as a party aggrieved within the meaning of sect. 253 of the Public Health Act, 1875, for the recovery of penalties for selling tollable articles in that place contrary to sect. 13 of the Markets and Fairs Clauses Act, 1847.

ROSS *v.* TAYLERSON, (1898) 62 J. P. 181—[Div. Ct.

II. **TOLLS.**

7. *Evasion of Toll—Agreement to Sell Goods then outside the Market — Subsequent Delivery within Market—Markets and Fairs Clauses Act*, 1847 (10 Vict. *c.* 14), *s.* 13.]—Sect. 13 of the Markets and Fairs Clauses Act, 1847, imposes a penalty on persons selling articles liable to toll within the limits of a market except in their own shops or dwelling houses.

On June 9th, G. being then within the limits of the market agreed to supply to M. one cwt. of potatoes, no price being fixed.

The potatoes were not at that time within the limits of the market, but on June 13th they were delivered within such limits.

HELD—that G. had not committed an offence within the meaning of sect. 13.

Stretch v. *White* ((1851) 25 J. P. 485) followed.

Exeter (Mayor of) v. *Heaman* ((1878) 37 L. T. 534) distinguished.

GRACEY *v.* BANBRIDGE URBAN DISTRICT [COUNCIL, [1905] 2 Ir. R. 209—K. B. D.

8. *Exposure for Sale — Cart loaded with Aerated Waters—Local Improvement Act.*]—The plaintiffs were authorised by sect. 59 and Sched. B. of the Newton District Improvement Act, 1855, to collect a toll "for every cart used by any person for exposing or in which shall be exposed for sale any article," &c. An aerated water dealer was in the habit of sending round a cart loaded with aerated waters to the houses of his customers. The man in charge of the cart entered the house of the customer, took his order, and there and then delivered from the cart the goods ordered.

HELD—that the goods were not exposed for sale within the meaning of the schedule, and that no toll was therefore chargeable in respect of the cart.

NEWTON-IN-MAKERFIELD URBAN DISTRICT [COUNCIL *v.* LYONS, (1900) 69 L. J. Q. B. 230; 48 W. R. 222; 81 L. T. 756—Div. Ct.

9. *Fair and Market held on Same Day—Grantee of Franchise changing Fair and Market Days—Fair Tolls — Market Tolls — Stallage—Demise of Market Tolls—Recovery of Tolls.*]—A fair toll is payable to the owner of the franchise in respect of goods sold in his fair, or brought into his fair for sale, whether he be the owner of the soil or not, and has nothing to do with the ownership of the soil. Stallage is paid in respect of the user of the soil, and can be exacted only by the owner of the soil.

By a charter of Edward 1. was granted one market in every week on Wednesday at the manor of Worksop, and one fair there in every year, to last eight days. These liberties were taken into the hands of Edward 3, and granted again on payment of a fine. This charter was confirmed by Richard 3. In 13 Charles 2, the king granted to the then lord of the manor of Worksop, one market in and upon every Wednesday in every week through the year in the town of Worksop, and also three new fairs or markets every year at the same town of Worksop, to be holden the first of the same fairs and markets upon March 21st, the second upon June 21st and 22nd, and the third upon October 3rd and 4th in every year.

A lease dated November 11th, 1851, was granted by the lord of the manor of all the tolls, stallages and market dues (except all fairs) to a joint-stock company for 99 years. In 1882 this lease was assigned to the defendants' predecessors, the Worksop Local Board. The reversion expectant thereon had become vested in the plaintiff. In 1845 the plaintiff's predecessor changed the days for holding two of the fairs granted by the charters. No new charter or licence had been obtained for this change. There was no evidence that any fair tolls had ever been paid since the third year of Edward 3.

Tolls—*Continued.*

The defendants had received all tolls on fair days as on other market days. On fair days the defendants charged an increased toll for stalls to persons who attended only on fair days and not on market days.

The plaintiff sued the defendants for an account of fair tolls belonging to the plaintiff under the reservation in the lease alleged to have been received by the defendants.

HELD—that the two franchises of a fair and a market were separate and distinct, and of equal dignity, and there could be no merger of the two; that the parties to the lease of 1851 contracted on the basis of the existing facts, namely, that no fair tolls had in fact been paid since the reign of Edward 3, and that no fair tolls could be recovered in respect of the fairs on the two new fair days, and that the non-existence of the fair tolls was in the contemplation of the parties; that the omission of all express reference to fair tolls in the lease was strongly corroborative of the view that the parties were contracting with the knowledge and on the basis that there were in fact no fair tolls; that the increased tolls for stalls and eggs were not fair tolls, but stallage tolls; that so long as the lord did not exceed the maximum toll he was entitled to demand, he might remit all or part of a toll to whomsoever he pleased; and that the action failed, and must be dismissed with costs as between solicitor and client in accordance with the Public Authorities Protection Act, 1893.

DUKE OF NEWCASTLE *v.* WORKSOP URBAN [DISTRICT COUNCIL, [1902] 2 Ch. 145; 71 L. J. Ch. 487; 86 L. T. 405; 18 T. L. R. 472 —Farwell, J.

10. "*Stallage*" — *Charge payable by Fish Salesmen—Consent of Local Government Board—Markets and Fairs Clauses Act*, 1847 (10 & 11 Vict. *c.* 14), *ss.* 36, 42—*Public Health Act*, 1875 (38 & 89 Vict. *c.* 55), *ss.* 166, 167.]—A charge imposed by the urban authority, who were the owners of the soil of a quay and were also the market authority, upon fish salesmen in a market without the sanction of the Local Government Board, is not justified as a "stallage" charge, or as a landing charge, or as a rent.

ATTORNEY-GENERAL *v.* TYNEMOUTH CORPORA- [TION, (1901) 17 T. L. R. 77—Buckley, J.

III. HAWKERS.

11. *Bye-laws—"Hawking"—Round of Regular Customers Visited with Waggon—Wares sold if and as Required.*]—By a bye-law of the Deal Town Council every person who should "hawk or expose about the town for sale" certain commodities, was liable to pay a toll, and on refusing to pay such toll was liable to pay for every offence the sum of 20*s.* A., who was in the employ of a manufacturer of mineral waters at Ramsgate, and was in charge of a waggon laden with mineral waters in a public street at Deal, entered a public-house, asked the landlord if he wanted any minerals or lemonade, and was told to call the next day. The landlord had been a customer of A. for ten years. It appeared that the practice of A. was to call, with his waggon, on customers in Deal, and to sell and deliver to them the quantities of mineral waters (if any) which they might then require. As a rule, the mineral waters were not ordered in advance; they were carried in an ordinary four-wheeled waggon and were not cried. A. made no attempt to attract casual customers, but, if asked, he would sell to anyone from the waggon; but it was not his rule to compete with his ordinary customers by selling retail. On A. leaving the public-house he refused to pay the toll required by the above-mentioned bye-law when demanded of him. A. was summoned to answer a complaint for "hawking" mineral waters and refusing to pay a toll under the bye-law. The justices held that A. did not "hawk" his wares within the meaning of the bye-law, and dismissed the summons.

HELD (Darling, J. dissenting)—that the justices were right.

PHILPOTT *v.* ALLRIGHT, (1906) 70 J. P. 287; 94 [L. T. 540; 4 L. G. R. 1013; 21 Cox, C. C. 128 —Div. Ct.

12. *Exhibition and Sale in a place other than that in which Business is usually carried on—Hawkers Act*, 1888 (51 & 52 Vict. *c.* 33), *ss.* 2, 4, 6—*Revenue Act*, 1898 (61 & 62 Vict. *c.* 46), *s.* 15 (4).]—The appellants' usual place of business was Glasgow. They hired a hall in Hamilton for three days. In that hall they sold goods which they had removed from Glasgow. Their manager and several other employees, none of whom held a hawker's licence, travelled from Glasgow to Hamilton to conduct the sale. They were charged with hawking without licence, and they objected to the competency and relevancy of the complaint as directed against them. The justices repelled the objection, and on the evidence adduced convicted the appellants.

HELD—that the complaint was competent and relevant, and that the appellants were rightly convicted.

CO-OPERATIVE DRAPERY AND FURNISHING [SOCIETY, LD. *v.* BLIGH (1902) 66 J. P. 215— Ct. of Justy.

13. "*Person*" — *Co-operation — Hawking without Licence.*]—A co-operative society registered under the Industrial and Provident Societies Act, 1893, is a "person" within the meaning of sect. 2 of the Hawkers Act, 1888, and may be convicted under sect. 6 of that Act if it trades as a hawker without a licence.

CO-OPERATIVE DRAPERY AND FURNISHING CO. [*v.* BLIGH, (1903) 4 F. (Just. Cas.) 97—Ct. of Justy.

14. *Person who travels with a Horse from Place to Place — Offering Goods for sale to Persons previously ascertained to be likely Purchasers—Hawkers Act*, 1888 (51 & 52 Vict. *c.* 33), *ss.* 2, 6.]—A canvasser employed by makers of sewing machines called at houses and asked the

Hawkers—*Continued.*

inmates to buy a sewing machine. He had no machines with him, but offered to send a machine on approval. At some of the houses he was told he might do so. The respondent was employed by the same makers, and was instructed to call with unsold machines at the houses, the inmates of which had previously expressed to the canvasser a desire to see a machine in order to decide whether they would make a purchase. Machines were shown at these houses, and if approved of they would be sold then and there.

HELD—that the respondent was going about travelling "with a horse or other beast bearing or drawing burden," and going "from place to place" carrying to sell goods, and was a hawker within the meaning of sect. 2 of the Hawkers Act, 1888: that it was none the less an offering for sale because the persons who were likely to be purchasers had been ascertained before the respondent visited the houses; and that he required a hawker's licence.

HOLLAND *v.* HALL, (1902) 66 J. P. 424; 50 [W. R. 525; 86 L. T. 355; 18 T. L. R. 368; 20 Cox, C. C. 167—Div. Ct.

15. *Person who travels with a Horse—Shopkeeper selling Oil to Customers—No previous Orders as to Quantity — Hawkers Act*, 1888 (51 & 52 Vict. *c.* 33), *ss.* 2, 3, 6.]—The respondent, a shopkeeper, was in the habit of calling on certain days with a horse and cart by request at the houses of customers to supply oil, which he brought in the cart. He did not know how much, or whether any, oil would be required before he reached the house.

HELD—that he was a hawker within sect. 2 of the Hawkers Act, 1888, and must be licensed as such thereunder.

O'DEA *v.* CROWHURST, (1899) 68 L. J. Q. B. [655; 63 J. P. 424; 80 L. T. 491; 15 T. L. R. 320; 19 Cox, C. C. 260—Div. Ct.

16. *Selling Potatoes in a Street — Licensed Hawker—Exemption—Hawkers Act*, 1888 (51 & 52 Vict. *c.* 33), *s.* 3, *sub-s.* 3—*Markets and Fairs Clauses Act*, 1847 (10 & 11 Vict. *c.* 14), *s.* 13.]—By sect. 3, sub-sect. 3, of the Hawkers Act, 1888, a person is not required to take out a hawker's licence to sell in the street, fish, fruit, victuals, or coals.

By sect. 13 of the Markets and Fairs Clauses Act, 1847, a penalty is imposed on "every person other than a licensed hawker" who exposes for sale in the street any produce in respect of which a toll is leviable by the market authority of that district.

HELD—that, if such a vendor has taken out a hawker's licence, he is to be deemed a licensed hawker, and comes within the benefit given to that class by sect. 13 of the Markets and Fairs Clauses Act, 1847.

LLANDUDNO URBAN DISTRICT COUNCIL *v.* [HUGHES, [1900] 1 Q. B. 472; 69 L. J. Q. B. 303; 64 J. P. 357; 48 W. R. 366; 82 L. T. 147; 16 T. L. R. 171—Div. Ct.

MARRIAGE.

See HUSBAND AND WIFE.

MARRIAGE, PROOF OF.

See EVIDENCE.

MARRIAGE SETTLEMENTS.

See CONFLICT OF LAWS; SETTLEMENTS.

MARRIED WOMAN.

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See BANKRUPTCY AND INSOLVENCY; EXECUTORS AND ADMINISTRATORS.

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MASTER AND SERVANT.

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I. LIABILITY OF MASTER FOR INJURY TO SERVANT.

1. *Under Workmen's Compensation Acts, 1897 and 1900.*

And see BANKRUPTCY, No. 56; EVIDENCE; FRIENDLY SOCIETIES, No. 1; PATENTS, Nos. 69, 131, 135; PUBLIC HEALTH, Nos. 55, 56, 71; SHIPPING, Nos. 204–7.

(a) Accident.

1. *Strain while Working—Death—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 1.]—A workman, while engaged in the ordinary course of his duty in attempting to turn a wheel for the purpose of starting a gas-engine, ruptured some blood-vessels in his stomach and died. It was proved that he was suffering from slight chronic inflammation of the stomach at the time of his death.

HELD—that death was not caused by an "accident" within the meaning of sect. 1, sub-sect. 1, of the Workmen's Compensation Act, 1897.

HENSEY *v.* WHITE, [1900] 1 Q. B. 481; 48 W. R. [257; 69 L. J. Q. B. 188; 63 J. P. 804; 81 L. T. 767; 16 T. L. R. 64—C. A.

Disapproved in *Fenton* v. *Thorley*, No. 7, *infra*.

2. *Extent of Injury—Condition of Constitution of Person Injured—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1.]—The principle always followed in cases where compensation had to be assessed for personal injuries caused by negligence, so far as related to the causes contributing to the disability, must be applied in cases under the Workmen's Compensation Act, 1897. Where there is the accident, the consequent injury and the extent of the injury must depend upon the condition of the constitution of the person injured at the time of the accident.

By reason of a mis-hit by a hammerer a workman's hand was jarred, became swollen, and gout in his hand was brought on.

HELD—that there was evidence that the injury was caused by the accident—the mis-hit—and the Act applied.

LLOYD *v.* SUGG & CO., [1900] 1 Q. B. 486; 69 [L. J. Q. B. 190; 81 L. T. 768; 16 T. L. R. 65 —C. A.

3. *Fortuitous and Unexpected Event—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—The plaintiff was employed by the defendants in lifting planks of timber from a stack, and moving them from one part of a yard to another. One day after rain and frost during the previous night all the planks were frozen together, and he in trying to lift one ruptured himself.

HELD—that *primâ facie* he was ruptured by "accident" within the meaning of the Workmen's Compensation Act, 1897, and there was evidence of a fortuitous and unexpected event, and consequently the award of the county court judge in the plaintiff's favour must be upheld.

TIMMINS *v.* LEEDS FORGE CO., LD., (1900) 83 [L. T. 120; 16 T. L. R. 521—Div. Ct.

4. *Fortuitous and Unexpected Accident—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 1.]—"Accident" in sect. 1, sub-sect. 1, of the Workmen's Compensation Act, 1897, implies something fortuitous and unexpected.

An engine-fitter had a blister on his finger, and while working upon steam-pipe joints, some red lead and oil got into the wound, causing inflammation and injury.

HELD—that it was not an accident within the

Liability of Master for Injury to Servant—*Continued.*

meaning of the Workmen's Compensation Act, 1897, s. 1, sub-s. 1.

WALKER *v.* LILLESHALL COAL CO., [1900] [1 Q. B. 488; 69 L. J. Q. B. 192; 64 J. P. 85; 48 W. R. 257; 81 L. T. 769; 16 T. L. R. 108—C. A.

5. *Fortuitous and Unforeseen Event—Strain—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 1.]—The plaintiff was employed as a box maker, and upon the occasion in question the boxes upon which she had to work were of a larger size than usual; every one knew that they were so. She began to work upon those boxes in the morning; she found them somewhat too heavy for her; she did not give up, but went on with the work. When she came to the seventh box, which was just the same as the others were before it, she strained herself and was injured. She claimed compensation from her employers, alleging the injury was caused by accident.

HELD—that as there was nothing fortuitous or unforeseen there was no accident at all.

ROPER *v.* GREENWOOD & SONS, (1901) 83 L. T. [471—C. A.

6. *Tearing Fibres of Muscles while lifting a heavy Beam — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—A workman, in a normal state of health, was, as part of his ordinary duty, lifting a beam of 100 lbs. weight from a loom. He had done such a thing successfully on many occasions. Whilst lifting the beam he suddenly tore several fibres of the muscles of his back. He said that he was in the act of lifting the beam on to his shoulder when he found it was unevenly balanced, and that he gave it an extra hitch up to get it on to his shoulder, and felt his back crack.

HELD—that all the elements were to be found necessary to constitute an "accident" within the meaning of sect. 1 of the Workmen's Compensation Act, 1897.

BOARDMAN *v.* SCOTT AND WHITWORTH, (1901) [85 L. T. 502; 18 T. L. R. 57; [1902] 1 K. B. 43; 71 L. J. K. B. 3; 66 J. P. 260; 50 W. R. 184—C. A.

7. *Meaning of—Injury caused by a Strain—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1 (1).]—In the Workmen's Compensation Act, 1897, the word "accident" is used in its popular and ordinary sense as denoting an unlooked-for mishap, or an untoward event which was not expected or designed.

A workman was engaged in turning a wheel, when the wheel stuck: and, in exerting himself to move it, he ruptured himself.

HELD—that his injury was caused by accident within the meaning of the Act.

Hensey v. *White* ([1900], 1 Q. B. 481; 69 L. J. Q. B. 188; 63 J. P. 804; 48 W. R. 257; 81 L. T. 767; 16 T. L. R. 64—C. A., No. 1, *supra*) disapproved.

Stewart v. *Wilson and Clyde Co., Ld.* ([1903] 5 F. 120—Ct. of Sess.) approved.

FENTON *v.* J. THORLEY & CO., LD., [1903] A. C. [443; 72 L. J. K. B. 787; 52 W. R. 81; 89 L. T. 314; 19 T. L. R. 684—H. L. (E.).

8. *Miner's "Beat Hand"—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 1.]—Injury to a coal miner's hand or knee, which is known as "beat hand" or "beat knee," and which is caused in the one case by the friction of the pick in the hand and in the other by the friction on the knee when the miner is obliged to work kneeling, the injury being gradually caused by continued friction and not by any slip, wrench or strain, and it not being possible to point to any particular act at any particular time as the cause of it, or the time of its commencement, is not an injury by "accident" within the meaning of sect. 1, sub-sect. 1, of the Workmen's Compensation Act, 1897.

MARSHALL *v.* EAST HOLYWELL COAL CO., LD.; [GORLEY *v.* BLACKWORTH COLLIERIES, [1905] 93 L. T. 360; 21 T. L. R. 494—C. A.

9. *Lead Poisoning— Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 1.]—The applicant was employed by ship builders as a caulker, his work involving the use of red and white lead for the purpose chiefly of making the plates of ships water-tight. The applicant had been employed on this work for two years when he was seized with paralysis due to lead poisoning. The medical evidence was to the effect that the poisoning was such as might have been expected as a result of the applicant's work: that it might have been caused by his taking the poison into his lungs by inhalation, or by his eating his food without having removed the lead from his hands, or by absorption of the poison through the skin; that only a small number of cases of this description occurred among those working with lead; and that the development of lead poisoning was a gradual process and generally took a considerable time.

HELD—that the injury was not caused by an "accident" within sect. 1, sub-sect. 1 of the Workmen's Compensation Act, 1897, it being impossible to point to any definite time when the poison entered the man's system.

STEEL *v.* CAMMELL, LAIRD & CO., LD., [1905] [2 K. B. 232; 74 L. J. K. B. 610; 53 W. R. 612; 93 L. T. 357; 21 T. L. R. 490—C. A.

10. *Fall caused by Epileptic Fit—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 1.]—A workman was employed at a wharf in unloading coal from a ship. His duty was to stand on a stage near the opening into the hold and guide the bucket which was raised from and lowered into the hold by a crane, and to give signals to the man working the crane. While so employed he was seized with an epileptic fit, and fell into the hold and was injured.

HELD—that the injuries were caused by an "accident" arising out of his employment within

Liability of Master for Injury to Servant— *Continued.*

sect. 1, sub-sect. 1, of the Workmen's Compensation Act, 1897, the proximate cause of the accident being his necessary proximity to the hatchway.

WICKS *v.* DOWELL & Co., Ld., [1905] 2 K. B. [225; 74 L. J. K. B. 572; 53 W. R. 515; 92 L. T. 677; 21 T. L. R. 487—C. A.

11. *Anthrax—Disease Contracted from Employment—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1.]—A workman employed in a wool-combing factory contracted anthrax from certain wool which was infected with that disease, and which got into his eye.

HELD—that the workman was injured by "accident" arising out of and in the course of his employment within the meaning of sect. 1 of the Workmen's Compensation Act, 1897.

Decision of C. A. ([1904] 1 K. B. 328; 73 L. J. K. B. 158; 68 J. P. 193; 52 W. R. 195; 89 L. T. 690; 20 T. L. R. 129—C. A.) affirmed.

BRINTONS, Ld. *v.* TURVEY, [1905] A. C. 230; [74 L. J. K. B. 474; 53 W. R. 641; 92 L. T. 578; 21 T. L. R. 444—H. L.

12. *Engine-driver injured by Stone-throwing—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 1.]—An engine-driver in the employment of a railway company, while driving his engine, which was attached to an express train, was injured by a stone intentionally dropped by a boy from a bridge over the line.

HELD—that this was an "accident," and that it arose "out of" the engine-driver's employment within sect. 1, sub-sect. 1, of the Workmen's Compensation Act, 1897.

CHALLIS *v.* THE LONDON AND SOUTH WESTERN [RAILWAY, [1905] 2 K. B. 154; 74 L. J. K. B. 569; 53 W. R. 613; 93 L. T. 330; 21 T. L. R. 486—C. A.

13. *Attempt to rescue Fellow-workman — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37) *s.* 1, (1).] — A stevedore had contracted to unload a vessel belonging to the appellants, and for that purpose employed B. and other men. B. was employed on the quay discharging cargo from the afterhold, and his work did not require him to go on board the vessel.

Upon hearing that a man in the forehold was overcome by bad gas, the stevedore went to obtain rescue appliances; in his absence B., without orders, volunteered to attempt a rescue, and in the attempt he was suffocated.

HELD (by a majority)—that B.'s death was due to an "accident arising out of and in the course of his employment."

Per Lord Kyllachy, there was no "accident."

LONDON AND EDINBURGH SHIPPING CO. *v.* [BROWN, (1905) 7 F. 488—Ct. of Sess.

See also Nos. 248, 255, 257, 309.

(b) Alternative Remedies.

14. *Dismissal of Action under the Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42)—*Subsequent Proceedings under the Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37).]—Where a workman has brought an action against his employer to recover damages independently of the Workmen's Compensation Act, 1897, for personal injuries caused by accident, and the action is dismissed, the workman cannot subsequently take proceedings to recover compensation under the Act of 1897 in respect of the same injuries, the only remedy being to apply, under sect. 1, sub-sect. 4, of the Act of 1897, as soon as the previous action was dismissed, to the Court in which the action was tried to assess compensation under the Act of 1897.

EDWARDS *v.* GODFREY, [1899] 2 Q. B. 333; 68 [L. J. Q. B. 666; 47 W. R. 551; 80 L. T. 672; 15 T. L. R. 365—C. A.

15. *Weekly Payments—Receipts in Full—Satisfaction under Workmen's Compensation Act*, 1897—*Proceeding under Employers' Liability Act*, 1880, *barred—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 4.]—A workman sued his employers under the Employers' Liability Act, 1880, for personal injuries sustained by him when working in the defenders' employment. Receipts had been given by him for sums paid to him during six months. Four of them were given in "full satisfaction of amount due to me as compensation under the Workmen's Compensation Act, 1897 . . . based on my average weekly earnings in accordance with the said Act." Having accepted payments on that footing he wished to go on with an action under the Employers' Liability Act, 1880, alleging that he had accepted such payments and granted receipts therefore on the footing that they were merely to account of compensation due to him by law in respect of "his" injuries, and that he did not understand that he was thereby making an election as averred by the defenders.

HELD—that he was not entitled to have the documents set aside, and he was not entitled to proceed under the Employers' Liability Act, 1880; but that he could obtain a decree under sect. 1, sub-sect. 4, of the Workmen's Compensation Act, 1897.

LITTLE *v.* P. & W. MACLELLAN, Ld., (1900) [2 F. 387.

16. *Notice to Employers of Accident—Wages paid as before—Action against Third Party—"Proceeding"—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 2, 6.]—The plaintiff, a sawyer, who worked for Messrs. J., met with an accident caused by the negligence of a servant in the employment of the defendant. Having given a mere notice of the accident to his employers, Messrs. J., they continued to pay the plaintiff the same wages as before, and no further steps were taken by him to obtain compensation under the Workmen's Compensation Act, 1897. He brought a common law action against the defendant for damages.

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HELD—that the action was maintainable, because a mere notice of an accident given under sect. 2 of the Workmen's Compensation Act, 1897, to the employer was not a "proceeding" against the employer within the meaning of sect. 6, and did not, therefore, preclude the plaintiff from bringing an action against a person, other than his employer, whose negligence caused the injury.

PERRY *v.* CLEMENTS, (1901) 49 W. R. 669; 17 [T. L. R. 525—Ridley, J.

17. *Proceeding against Employer or against Third Person — Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37), *s.* 6.]—A workman who was injured by accident in the course of his employment took proceedings under the Workmen's Compensation Act, 1897, against his employers, and obtained an award for the payment of compensation. He subsequently commenced an action to recover damages against the person whose negligence was the cause of the accident.

HELD—that by reason of sect. 6 of the Workmen's Compensation Act, 1897, the workman was debarred from maintaining the action for damages.

TONG *v.* GREAT NORTHERN RY. CO., (1902) [66 J. P. 677; 86 L. T. 802; 18 T. L. R. 566 —Wright, J.

18. *Partial Incapacity for Work—Maximum Weekly Payment received by Workman—Right to sue for Balance of Wages—Estoppel—Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37).]—The plaintiff agreed to work for the defendant for a weekly salary and certain bonuses. He sustained an accident to his left arm in the course of his employment, which temporarily disabled him. He gave notice of the accident to his employer, and claimed the allowance provided by the Workmen's Compensation Act, 1897. By agreement between the plaintiff and defendant, the latter paid the former during his incapacity the maximum amount, *i.e.*, one-half of his average weekly earnings.

HELD—that the plaintiff's conduct was inconsistent with the view that he was still entitled to the whole of his original wages; and that he was not entitled to the balance of his wages during the time in which he was disabled from work and receiving compensation.

ELLIOTT *v.* LIGGENS, [1902] 2 K. B. 84; 71 [L. J. K. B. 483; 50 W. R. 524; 87 L. T. 29; 18 T. L. R. 514—Div. Ct.

19. *Unsuccessful Proceedings under the Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37) *—Right to institute subsequent Proceedings independently of the Act.*]—When a workman has proceeded to have compensation for his injuries assessed under the Workmen's Compensation Act, 1897, and is defeated by reason of a ruling that his case does not come within the provisions of the Act, he is not thereby prevented from instituting subsequent proceedings independently of the Act, to enforce any previously existing remedy to which he may have been entitled (Boyd, J. dissenting).

In September, 1900, the plaintiff instituted proceedings in the Recorder's Court for compensation, under the Workmen's Compensation Act, for injuries sustained on August 4th, 1900. On October 18th, 1900, the Recorder dismissed the application on the ground that the plaintiff, not having been employed for at least two weeks, was not within the Workmen's Compensation Act, on the authority of two decisions of the Court of Appeal in England. These decisions were overruled by the House of Lords on December 14th, 1900. The plaintiff brought an action for damages for negligence in the superior Courts with respect to the same injuries as were the subject of proceedings in the Recorder's Court.

HELD, by K. B. Div. (Boyd, J. dissenting)—that the proceedings in the Recorder's Court were no bar to the action in the Superior Court.

Affirmed by C. A. (Holmes, L.J. dissenting).

BECKLEY *v.* SCOTT & CO., [1902] 2 Ir. R. 504— [A. C.

20. *Action under Employers' Liability Act—Action dismissed—Application to assess Compensation under Workmen's Compensation Act—Not a Bar to an Appeal against dismissal of Action — Proper Course to adopt — Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (4).]—A workman, whose action against his master under the Employers' Liability Act has been dismissed, must then and there apply for an assessment of compensation under the Workmen's Compensation Act, or he will be debarred from making such claim in the future. If he intends to appeal in the action he should apply *pro formâ* in order to preserve his rights, and ask for the matter to be adjourned. Such an application is not a binding election to accept the judgment in the action and rely on the Act of 1897.

Edwards v. *Godfrey* ([1899] 2 Q. B. 333; 68 L. J. Q. B. 666; 47 W. R. 551; 80 L. T. 672—C. A., No. 14, *supra*) considered.

ISAACSON AND ANOTHER *v.* NEW GRAND (CLAPHAM JUNCTION), LD., [1903] 1 K. B. 539; 72 L. J. K. B. 227; 88 L. T. 291; 19 T. L. R. 150—Div. Ct.

22. *Receipt signed by Injured Servant—Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (2).]—An injured workman, while in bed, signed a single receipt for 12*s.* 6*d.*, bearing the words, "Under the Workmen's Compensation Act, 1897."

HELD—not sufficient to warrant a finding that he had elected to abandon his right to bring an action in respect of his injury.

FOWLER *v.* HUGHES, (1903) 5 F. 394—Ct. of [Sess.

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23. *Negligence of a Stranger—Weekly Payments accepted from Employer "without Prejudice"—Whether Right of Action against Stranger abandoned—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 6.]—By sect. 6 of the Workmen's Compensation Act, 1897, a workman who is injured under circumstances such as would give him a right of action against a stranger as well as a right to be compensated by his employers, may proceed against either of them, "but not against both."

The plaintiff, whilst working for R. & Co., was injured through the negligence of the defendants, and was in hospital for four months. The agent of the insurance society with whom his employers were insured against claims under the Act of 1897, made payments to him during this time, and the receipts signed by him contained the following words: "On account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897, in respect of the accident which occurred to me on ——." After the first payment had been made the plaintiff was advised to accept no more, except on the understanding that he did so "without prejudice," and accordingly all subsequent payments were expressly made and accepted "without prejudice."

Eventually he declined to accept any further payments, and brought an action against the present defendants.

HELD (reversing Jelf, J.)—that the whole of the payments must be regarded as having been made without prejudice; and that the plaintiff had not irrevocably elected to proceed against his employers, and could recover against the defendants.

Decision of Jelf, J. reversed.

OLIVER *v.* NAUTILUS STEAM SHIPPING CO., [LD., [1903] 2 K. B. 639; 72 L. J. K. B. 857; 89 L. T. 318; 19 T. L. R. 697; 52 W. R. 200; 9 Asp. M. C. 436—C. A.

24. *Scheme of Compensation under Workmen's Compensation Act*, 1897, *acceptance of—Effect of Right of Action under Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42)—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 1 (2) (b); 3 (1).]—A workman who had accepted a scheme duly certified by the Registrar of Friendly Societies, under sect. 3 (1) of the Workmen's Compensation Act, 1897, was killed by an accident arising out of and in the course of his employment. The workman's widow, after receiving certain sums as compensation under the scheme, brought an action against the employers under the Employers' Liability Act, 1880, to recover damages for the death of her husband.

HELD—that the acceptance of the scheme was an exercise by the workman of the option given to him by sect. 2 (1) (b) of the Workmen's Compensation Act to claim compensation under that Act, and was a bar to the action under the Employers' Liability Act, 1880.

Decision of Div. Ct. (68 J. P. 181; 20 T. L. R. 166) reversed.

TAYLOR *v.* HAMSTEAD COLLIERY CO., LD., [1904] 1 K. B. 838; 73 L. J. K. B. 469; 68 J. P. 300; 52 W. R. 417; 90 L. T. 363; 20 T. L. R. 338—C. A.

25. *Infant — Accident due to Employer's Negligence—Money paid under the Act of* 1897 *—Whether a Bar to an Action—Inability of Infant to elect—Next Friend—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (2) (b).]—An infant apprentice cannot make a binding election to accept compensation under the Act of 1897 instead of relying on a common law action against his employer for damages for negligence, although an apprentice is a workman within the meaning of the Act. He will not be bound by the fact that a person *in loco parentis*, but not a legally appointed next friend, has applied for payments on his behalf under the Act of 1897.

Decision of Bruce, J. (19 T. L. R. 665) affirmed.

STEPHENS *v.* DUDBRIDGE IRONWORKS CO., LD., [1904] 2 K. B. 225; 73 L. J. K. B. 739; 68 J. P. 437; 52 W. R. 644; 90 L. T. 838; 20 T. L. R. 492—C. A.

26. *Workman demanding and receiving Money from Third Party — Subsequent Claim against Employers — Exercise of Option — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (4).]—An injured workman, relying on his common law rights, made a claim against a person other than his employer, and without taking legal proceedings obtained a sum of money in settlement of his claim; by the receipt which he gave he purported to reserve his right to claim compensation from his employers.

He then made a claim against his employers under the Act of 1897.

HELD—that he had exercised his option and was thereby debarred from proceeding against his employers, and that the clause in the receipt did not operate to prevent this result.

Oliver v. *Nautilus Co.* ([1903] 2 K. B. 639; 72 L. J. K. B. 857; 89 L. T. 318; 19 T. L. R. 607 C. A., No. 23, *supra*) distinguished.

MULLIGAN *v.* DICK, (1904) 6 F. 126—Ct. of [Sess.

27. *Construction of Sect. 6 of Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37).]—In sect. 6 of the Act of 1897 "employer" is synonymous with "undertaker."

A workman was injured while working for a firm of contractors, who had a contract with the respondents; the latter were the "undertakers" within the meaning of the Act of 1897.

He asked for and obtained from the contractors a payment in discharge of all claims against them, but purported to reserve his right to claim compensation against any other persons.

HELD—that sect. 6, upon its true construction, barred any claim by him against the respondents under the Act of 1897, for he had

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already recovered against "some person other than the employer."

MURRAY *v.* NORTH BRITISH RY. CO., (1904) 6 [F. 540—Ct. of Sess.

28. *Claim under Workmen's Compensation Act abandoned—Subsequent Action under Employers' Liability Act*, 1880—*Election—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 2 (b).]—A workman who was injured by an accident while working on a building filed a request for arbitration under the Workmen's Compensation Act, 1897. The employers in their answer denied liability to pay compensation on the ground that the building did not exceed thirty feet in height. The workman thereupon abandoned his claim under the Act, and brought an action under the Employers' Liability Act, 1880.

HELD—that the workman had not exercised his option under sect. 1, sub-sect. 2 (b) of the Workmen's Compensation Act, 1897, so as to debar him from bringing an action under the Employers' Liability Act, 1880.

ROUSE *v.* DIXON, [1904] 2 K. B. 628; 73 L. J. [K. B. 662; 68 J. P. 407; 91 L. T. 436; 20 T. L. R. 553; 53 W. R. 237—Div. Ct.

29. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (2) (*b*).]—A claimant, who has been refused compensation under the Workmen's Compensation Act, 1897, on the ground that she was not a dependant of the deceased workman, is not debarred by her application from subsequently enforcing any rights which she may have either at common law or under the Employers' Liability Act.

So held in respect of an action by a mother to recover damages or *solatium* for the death of a son, upon whom she had been found not to be dependent.

MCDONALD *v.* DUNLOP & CO., (1905) 7 F. 533—[Ct. of Sess.

30. "*Undertaker*"—"*Employer*"—*Claim in Alternative—Workmen's Compensation Act*, 1897. (60 & 61 Vict. *c.* 37), *s.* 4.]—An injured workman must elect whether to claim compensation against his own employer or the undertakers for whom such employer is working. He cannot claim against them in the alternative.

HERD *v.* SUMMERS, (1906) 7 F. 870—Ct. of [Sess.

31. *Unsuccessful Action at Common Law—Assessment of Compensation under Workmen's Compensation Act*, 1897—*Application for New Trial of Action—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-ss.* 2 (b), 41.]—The plaintiff, who was an infant, brought an action by his next friend against his employers to recover damages for personal injuries caused by their alleged negligence or by a breach of their statutory duty to fence a machine. Judgment was given in that action for the defendants, and at the request of the plaintiff's counsel the judge assessed compensation under sect. 1, sub-sect. 4, of the Workmen's Compensation Act, 1897, and gave a certificate of the compensation awarded. The plaintiff subsequently applied for a new trial of the action.

HELD—that the plaintiff, having obtained an award of compensation under sect. 1, sub-sect. 4, of the Act, was debarred by sect. 1, sub-sect. 2 (b), from proceeding with his action.

Isaacson v. *New Grand (Clapham Junction), Ld.* ([1903] 1 K. B. 539; 72 L. J. K. B. 227; 88 L. T. 291; 19 T. L. R. 150—Div. Ct., No. 20, *supra*) discussed.

NEALE *v.* THE ELECTRIC AND ORDNANCE [ACCESSORIES CO., LD., [1906] 2 K. B. 558; 75 L. J. K. B. 974; 95 L. T. 592; 22 T. L. R. 732—C. A.

32. *Common Law Action dismissed—Appeal—Assessment of Compensation—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (4).] An injured workman sued his employers at common law, and his action was dismissed. He appealed, and on the appeal so being dismissed, asked for compensation to be assessed under the Act of 1897.

The Court remitted the assessment to the sheriff.

QUINN *v.* JOHN BROWN & CO., (1906) 8 F. 855—[Ct. of Sess.

33. *Foreign Workman—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (2) (b)]—To an action for personal injuries the defenders pleaded that the pursuer had claimed and accepted compensation under the Act of 1897. It appeared that the workman was an Italian imperfectly acquainted with English and wholly unable to read or write it; that he had applied for money for his injuries; that he had accepted two sums from the defendants consisting of the amount due to him under the Act of 1897 for three weekly payments, and had under his mark given two receipts therefor which bore to be for payments under the Act of 1897; that he knew of his right to half wages during incapacity, but did not know of the Act by name or of his rights apart from the Act; and that the receipts were not read over or explained to him.

HELD—that it had not been proved that he had elected to take compensation under the Act of 1897, and that consequently he was not barred from maintaining the present action.

VALENTI *v.* DIXON, (1907) S. C. 695—Ct. of [Sess.

34. *Action for Damages dismissed—Motion to have Compensation assessed—Delay—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37).]—An injured workman brought an action for damages, which was dismissed on February 5th, 1907. On February 19th, 1907, the workman applied to the Court to remit the case to have compensation assessed under the Workmen's Compensation Act. The Court refused the

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application on the ground that it was not made timeously.

Baird v. *Higginbotham* (3 F. 673) followed.

M'Gowan *v.* Smith, [1907] S. C. 548—Ct. of [Sess.

See also Nos. 89, 122.

(c) Ancillary or Incidental Work.

35. *Railway Contractor—Business—"Undertakers"—Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37), *s.* 4.]—The appellants, who were carriers, charged a through rate for the conveyance of goods by their railway, which was inclusive of all charges for collection and delivery of the goods. A firm of carting contractors had a contract with the appellants for the collection and delivery from and to the public within a certain radius of one of their stations of goods sent by rail, receiving from the railway company a proportion of the through rates paid by the public. The deceased was at the time of his death a lorryman in the employment of the firm of carting contractors, and while engaged in transferring a barrel of beer from a lorry on the appellant's platform, and within their goods station, to a goods train standing beside the platform, received such injuries from the barrel of beer falling upon him that he died.

Held—that the work in which the deceased was engaged was not merely ancillary or incidental to, but was part of or process in the trade or business carried on by the appellants as carriers within the meaning of the exception in sect. 4 of the Workmen's Compensation Act, 1897, and that the railway company were undertakers in the sense of the Act, and liable.

Greenhill *v.* Caledonian Ry. Co., (1900) 2 [F. 736—Ct. of Sess.

36. *Railway Company—Contractor's Workman—Painting Station—Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37), *ss.* 4, 7.]—The primary business of a railway company is to carry passengers and goods. The erection and repairing of stations is no part of, or process in, that business. A workman in the employment of builders and contractors was engaged as a painter in painting the respondents' Hampton Court Station, and met with the accident in respect of which he claimed compensation from the respondent railway company.

Held—that the work upon which the appellant was engaged was merely ancillary or incidental to, and no part of or process in the trade or business which the railway company carried on within the meaning of sect. 4 of the Workmen's Compensation Act, 1897.

Pearce *v.* London and South Western Ry. [Co., [1900] 2 Q. B. 100; 69 L. J. Q. B. 683; 48 W. R. 599; 82 L. T. 473; 16 T. L. R. 336 —C. A.

37. "*Undertakers*"—*Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37), *ss.* 4, 7.]—A company, whose business was running cars for passenger traffic through the streets of Dublin on a tramway by electric power, employed a firm of contractors to erect coal-hauling machinery at one of their power stations. Part of the coal-hauling machinery consisted of a trolley, at which B. was engaged at work. A splinter from the head of a bolt which he was driving into the trolley struck him in the eye, and destroyed the sight of the eye. B. was employed by the firm, and not by the company. At the time of the accident the firm had not handed over the coal-hauling machinery to the company, and none of the company's workmen were engaged upon it.

Held—that the erection of the coal-hauling machinery in the power station was work merely ancillary to the company's trade or business, and that they were not liable to pay B. compensation under the Workmen's Compensation Act, 1897.

Brennan *v.* Dublin United Tramways Co., [[1901] 2 Ir. R. 241—C. A.

38. *Undertakers—Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37), *s.* 4; *s.* 7, *sub-s.* 2.] —The deceased workman was in the employ of a firm of engineers who had contracted with a firm of cotton spinners to supply and fix a new driving wheel for the steam engine belonging to their cotton spinning factory. A hand winch and pulley were used for the purpose of lifting the new driving wheel, and while directing that operation the deceased workman met with an accident which caused his death.

Held—that the work in question was merely ancillary or incidental to, and was no part of, or process in, the trade or business of cotton spinners, and that a dependant on the deceased workman was not entitled to compensation against the owners of the cotton spinning factory.

Decision of C. A., *sub nom. Wrigley* v. *Bagley and Wright* ([1901] 1 K. B. 780; 70 L. J. K. B. 538; 65 J. P. 372; 49 W. R. 472; 84 L. T. 415) affirmed.

Wrigley *v.* Whittaker & Sons, [1902] A. C. [229; 71 L. J. K. B. 600; 66 J. P. 420; 50 W. R. 656; 86 L. T. 775; 18 T. L. R. 559— H. L. (E.); *and see* No. 215, *infra.*

39. *Undertakers—Railway—Signal Cabin—Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37), *ss.* 4, 7.]—The deceased, for whose death compensation was claimed, was working at a stone and lime screen, which a contractor, his employer, was putting up for a way to and around a signal cabin which the appellants had built for the service of their line, the purpose being to prevent soil coming down a bank and blocking the access to the cabin. The death was caused by a passing train when the deceased was walking towards the cabin in the course of his master's work.

Held—that the work which was being done was ancillary and incidental to the appellants' undertaking, and thus did not involve liability

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on their part to the workmen engaged under the Workmen's Compensation Act, 1897.

Pearce v. *London and South Western Ry. Co.* ([1900] 2 Q. B. 100; 69 L. J. Q. B. 683; 48 W. R. 599; 82 L. T. 473; 16 T. L. R. 336—C. A., No. 36, *supra*) approved.

Dundee and Arbroath Joint Ry. Co. *v.* [Carlin, (1901) 3 F. 843—Ct. of Sess.

40. *Sub-contractor—Work no part of Business of Undertaker—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 4.]—The plaintiff was in the service of the sub-contractor of the defendant, and was accidentally injured in the course of his employment while engaged in putting an iron roof on to a building which was in course of erection by the defendant. The defendant was a builder who had contracted to put up the building, but had sub-contracted with the plaintiff's employer for the putting up of the iron roof.

Held—that the finding of fact by the county court judge that it was not a part of the business carried on by the defendant to construct iron roofs on buildings, brought the case within the proviso to sect. 4, and the defendant was not liable to pay compensation to the plaintiff.

Bush *v.* Hawes, (1901) 85 L. T. 507; [1902] [1 K. B. 216; 71 L. J. K. B. 68; 66 J. P. 260; 50 W. R. 311—C. A.

41. *"Factory"—"Warehouse"—Rooms for Storing Goods until wanted in Sale Room—Factory and Workshop Act*, 1901 (1 Edw. 7, *c.* 22), *s.* 149, *sub-s.* 1 (c), *and sub-s.* 4—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—The respondent's premises consisted of two blocks of buildings, separated by a street, but connected by a bridge, and also by an underground passage. Some parts of Q block contained machinery used for printing, etc., and were a "factory" within the meaning of sect. 7 of the Workmen's Compensation Act, 1897. The appellant had occasionally to go to Q block to get tickets; but he was employed as a salesmen in the "hat department" in W block, which consisted of retail sale-rooms, with rooms in the basement used for storing goods for two or three days before they were wanted in the sale-rooms. The appellant was injured, whilst passing down a corridor in the basement on his way from the dining-room, where employés had their meals. The county court judge found that he was not employed on, in, or about a factory, nor in a workshop, the storage in W block being merely ancillary to the retail business carried on there.

Held—that it was a question of fact; and, moreover, that the Court agreed with the finding of the Judge.

Burr *v.* William Whiteley, Ld., 19 T. L. R. [117—C. A.

See also Nos. 52, 329, 330, 344.

(d) Assessment of Compensation.

(1) *Difference in Wages or Earning Capacity.*

42. *Partial Disablement—Workman Disabled for a period of at least Two Weeks from Earning Full Wages—Full Wages Paid after Accident—Amount and Duration of Compensation—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 2 (a).]—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the applicant was a foreman in the employment of the respondents, who were carpet manufacturers. His main work consisted in supervision, but he used also frequently to set up and adjust the machines. While adjusting a machine he received an injury to his thumb, which had to be amputated. He returned to his work the next day, but after the accident he was unable to set up or adjust the machines, and his work was confined to supervision. He received the same wages after the accident as before.

Held—that he was disabled for two weeks from "earning full wages at the work at which he was employed" within the meaning of sect. 1, sub-sect. 2 (a), of the Workmen's Compensation Act, 1897.

Held, also, that the proper course was to make a declaration of liability, and to adjourn the question of the amount and duration of compensation.

Chandler *v.* Smith, [1899] 2 Q. B. 506; 68 [L. J. Q. B. 909; 47 W. R. 677; 81 L. T. 317; 15 T. L. R. 480—C. A.

43. *Partial Disablement — Wages the same after as before the Accident — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 1 (b), *cl.* 2.]—A workman who lost his thumb in consequence of an accident arising out of and in the course of his employment, was received back after the accident into the employment of the same employer at the same rate of wages as before the accident, though he was not put at the same kind of work. The county court judge awarded him 2*s.* 6*d.* a week from the time when he resumed work after the accident.

Held—that, as the wages after the accident were the same as those before, there was no power at that time to award any weekly payment in respect of the period after the workman resumed work.

Irons *v.* Davis and Timmins, Ld., [1899] 2 [Q. B. 330; 68 L. J. Q. B. 673; 47 W. R. 616; 80 L. T. 673—C. A.

44. *Partial Disablement — Estimate of Compensation—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 1 (b).]—Sched. 1. of the Workmen's Compensation Act, 1897, restricts the amount recoverable by an employee whose total or partial incapacity results from injury, to 50 per cent. of his average weekly wages prior to the date of the accident; cl. 2 directs the arbitrator in regulating the amount of compensation to have regard to the difference

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between the man's wage-earning capacity before and after the injury.

HELD—(1) that a workman whose wage-earning capacity had been diminished by a partial disablement resulting from an accident was not entitled to demand as of right that compensation be fixed at a difference between his average wages before and after the accident; (2) that such difference was a point of consideration, and, failing other material, might afford the sole criterion, and so become the estimate of compensation; (3) an argument that the workman was entitled to recover only 50 per cent. of the difference repelled.

GEARY *v.* DIXON, LD., (1899) 36 S. L. R. 640—[Ct. of Sess.

45. *Partial Incapacity—Earning Capacity—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1.]—A workman who has suffered an injury from accident, leading to partial disablement or incapacity, is entitled to compensation in respect of the difference between his earning capacity after the accident and his earning capacity at the time of the accident. The statutory test is earning capacity; and if it should appear upon the facts that his earning capacity is less after than it was before or at the time of the accident, he may have a claim even if he was in fact receiving the same wages at the two periods.

FREELAND *v.* MACFARLANE, (1900) 2 F. 832—[Ct. of Sess.

46. *Maximum—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., el.* 1 (b), 2.]—Sched. I., el. 1 (b), of the Workmen's Compensation Act, 1897, limits the amount of compensation to 50 per cent. of the average weekly earnings, and clause 2 says that in fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident.

HELD—that clause 2 does not operate necessarily to cut down the maximum allowed by clause 1 (b).

ILLINGWORTH *v.* WALMSLEY, [1900] 2 Q. B. [112; 69 L. J. Q. B. 519; 82 L. T. 647; 16 T. L. R. 281—C. A.

47. *Review of Award of Weekly Payment—Difference between Wages before and Wages after Accident—Apprentice—Tuition—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (2), (12).]—An apprentice to a firm of printers while at work had his hand crushed. At that time he was earning 10*s.* 6*d.* a week. He took proceedings under the Workmen's Compensation Act, 1897, and obtained an award of 3*s.* 6*d.* weekly. Owing to his injuries he was not able to work any more as an apprentice, and the deed was cancelled, but after some months he came back into the service of the same employers as a labourer, and in that capacity he earned 11*s.* 2*d.* a week, and thus was making more than he did before the accident. Thereupon the employers, under clause 12 of the 1st schedule to the Act, made an application to the county court judge to review the weekly payment and put an end to it.

HELD—that the average weekly earnings before the accident and after it were to be compared, and the difference between these amounts is to be taken as the basis of the award.

The Court made an order reducing the amount of the award to 1*d.* a week, so that the applicant would be entitled, if at any time it should become necessary, to apply to have the amount increased.

Semble, incidental advantages should in certain cases be taken into consideration—*e.g.*, clothes, board, and lodging.

Irons v. *Davis* ([1899] 2 Q. B. 330; 68 L. J. Q. B. 673; 47 W. R. 616; 80 L. T. 673—C. A., No. 43, *supra*) followed.

POMPHREY *v.* SOUTHWARK PRESS, [1901] [1 Q. B. 86; 70 L. J. Q. B. 48; 65 J. P. 148; 83 L. T. 468; 17 T. L. R. 53—C. A.

48. *Partial Incapacity—Amount—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1) (2).]—Where a workman is partially incapacitated, he may, in a fit case, be awarded as compensation the whole amount of the difference between his average earnings before and after the accident, so long as it does not exceed 50 per cent. of his average earnings before the accident, or does not exceed £1 per week.

HUGHES *v.* SUMMERLEE AND MOSSEND IRON [AND STEEL CO., (1903) 5 F. 784—Ct. of Sess.

49. *Discretion of County Court Judge—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., el.* (1) (b) (2).]—The applicant, who was injured by accident and partially incapacitated for work, was entitled to compensation under the Workmen's Compensation Act, 1897. His average weekly earnings before the accident were 24*s.* 9*d.*, and after the accident he earned the average weekly amount of 11*s.* Upon an application to fix the amount of compensation to be paid, the county court judge awarded 12*s.* 4½*d.* a week, the maximum amount allowed by the Act, stating that he always acted upon the rule of awarding the maximum amount of compensation which he could give under the Act, so long as that amount and the average amount which the workman could earn after the accident added together did not exceed the average weekly earnings before the accident.

HELD—that the county court judge was wrong in acting upon a general rule, and that the case must be sent back to him for reconsideration. The judge must exercise his discretion with regard to the circumstances of each particular case.

Decision of C. A. ([1904] 1 K. B. 218; 73 L. J. K. B. 141; 68 J. P. 140; 52 W. R. 275; 89 L. T. 627; 20 T. L. R. 121) affirmed.

WEBSTER *v.* SHARP & CO., LD., [1905] A. C. 284; [74 L. J. K. B. 776; 92 L. T. 373—H. L. (E.).

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50. *Partial Incapacity—Discretion of Arbitrator—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (12).]—A workman who was for a time totally incapacitated by an accident, and whose average weekly earnings were 36*s.* 8*d.*, was awarded a weekly payment of 18*s.* 4*d.*, being 50 per cent. of his wages. His incapacity having partially ceased, he went back to his employers' service at a wage of 17*s.* per week. The employers, thereupon, applied to the arbitrator to review the weekly payment of 18*s.* 4*d.*, but he refused to do so.

HELD—that his award must stand.

Semble, per Ld. McLaren, an arbitrator must not award to an injured workman a sum exceeding the difference between his wages before and after the accident.

BRYSON *v.* DUNN AND ANOTHER, (1906) 8 F. 226 [—Ct. of Sess.

(2) *Extras, Deductions, and Apportionments.*

51. *Apportionment—Compensation—Administratrix's Right to receive whole Sum—Investment of Sum apportioned to Dependants—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 4–7.]—In an arbitration under the Workmen's Compensation Act, the applicant was the widow of the deceased workman, and she had taken out letters of administration. The county court judge by his award ordered the respondents to pay a lump sum to and for the benefit of the dependants of the deceased, whom he declared to be the widow and the two infant sons of the deceased, and he apportioned the said sum between the widow and the sons, and he ordered the sum apportioned to the widow to be paid to her, and the sum apportioned to the sons to be paid to the registrar and to be invested by him for their benefit.

HELD—that, on the construction of paragraphs 4, 5, 6, and 7 of the first schedule to the Act, the county court judge had power to make such order, and that the applicant, although she was the legal personal representative of the deceased, had no absolute right to receive the whole of the compensation money.

DANIEL *v.* OCEAN COAL CO., [1900] 2 Q. B. 250; [69 L. J. Q. B. 567; 64 J. P. 436; 48 W. R. 467; 82 L. T. 523; 16 T. L. R. 368—C. A.

52. *Compensation—"Average Weekly Earnings"—Deductions of Sums spent for Necessaries—Lamp Oil—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1) (a).]—Employers were in the habit of supplying oil for the lamps with which their miners worked, and it was a rule of the colliery that 6*d.* should be deducted every week from each man's wages for the oil so supplied. The county court judge made an award of compensation, under the Workmen's Compensation Act, 1897, on the basis that the weekly earnings of a miner who met his death while working in the colliery were his full wages, irrespective of the deduction therefrom of 6*d.* a week for lamp oil.

HELD—that the decision of the county court judge was not wrong, as the oil was necessary to the performance of his work.

HOUGHTON *v.* SUTTON HEATH AND LEA GREEN [COLLIERIES CO., [1901] 1 Q. B. 93; 70 L. J. Q. B. 61; 65 J. P. 134; 49 W. R. 196; 83 L. T. 472; 17 T. L. R. 54—C. A.

53. *Dependants—"In Part dependent upon the Earnings of the Workman"—Funeral Expenses—Non-joinder of Father—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1) (a) (ii.), (iii.)—*Workmen's Compensation Rules*, 1898, *r.* 4 (3).]—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the deceased workman was at the time of the accident living with his father and mother, and that he was in the habit of paying his weekly earnings of 8*s.* to his mother to put into the common family fund. Shortly after the accident the father left his wife and family, and the mother gave notice of request for arbitration, claiming compensation as having been partly dependent on her son's earnings. No steps were taken for making the father a respondent to the arbitration proceedings in accordance with rule 4 (3) of the Workmen's Compensation Rules, 1898. The county court judge made an award in favour of the mother for a weekly payment of 3*s.* for the period of three years, and the sum of £6 8*s.* for funeral expenses.

HELD—that even if the father ought to have been made a respondent to the proceedings under rule 4 (3), which was doubtful having regard to rule 2, the employers, not having taken the point before the county court judge, were not entitled to take it on appeal.

HELD, also, that the county court judge, in determining what sum was reasonable and proportionate to the injury to the dependants under Sched. I. (1) (a) (ii.), was entitled to take into consideration the funeral expenses, and to award a named sum in respect of those expenses, subject to the limitations imposed by the maximum mentioned in the schedule.

BEVAN *v.* CRAWSHAY BROTHERS, CYFARTHA, [LD., (1901) 50 W. R. 98; 85 L. T. 496; 18 T. L. R. 17; [1902] 1 K. B. 25; 71 L. J. K. B. 49—C. A.

54. *"Average Weekly Earnings"—Unpaid Assistant—Wages earned during One Week only—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1) (b).]—In computing the earnings of an injured party, there is not to be deducted from those earnings a proportion of th amount, in respect that he had the assistance in his work of a boy, his son. The son, who acted as his father's drawer, was not paid any money for doing so by his father.

If there are no earnings except in one week, that amount must be taken as the basis of assessment, and is not to be cut down by the fact that the workman was in the employment in a small part of another week, during which he did not earn any sum, as his work had not proceeded so

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far in that week as to give rise to a claim for wages.

NELSON *v.* KERR AND MITCHELL, (1901) 3 F. [893—Ct. of Sess.

55. "*Earnings*"—*Agreed Deductions from Wages*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.*, 1 (a).]—By agreement between a miner and his employers certain deductions were made from his weekly wages in respect of the "check-weigh" fund, sharpening of tools, lamp-trimming and oil.

HELD—that, in order to ascertain his wages for the purposes of the Workmen's Compensation Act, no deductions ought to be made from his gross wages in respect of these items.

Houghton v. *Sutton Heath and Lea Green Collieries Co.* ([1901] 1 K. B. 93; 70 L. J. K. B. 61; 65 J. P. 134; 49 W. R. 196; 83 L. T. 472—C. A., No. 52, *supra*) approved.

ABRAM COAL CO. *v.* SOUTHERN, [1903] A. C. [306; 72 L. J. K. B. 691; 89 L. T. 103; 19 T. L. R. 579—H. L. (E.).

56. *Assessment of* "*Average Weekly Earnings*"—*Age affecting Wage-earning ability*—*General fall in Wages*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1).]—An arbitrator in fixing the amount of compensation to be paid to an injured miner is not entitled to take into account the facts (1) that he was too old to earn a miner's full wages, and (2) that, since the accident, there had been a general fall in miners' wages.

JAMIESON *v.* FIFE COAL CO., (1904) 5 F. 958—[Ct. of Sess.

57. *Assessment of Earnings*—*Lodging Allowance to a Railway Guard*—*Included in his Earnings*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.*, 1 (a) (i.).]—A railway guard received in addition to his wages a lodging allowance whenever his duties compelled him to sleep away from home; he had not in any way to show what his "out-of-pocket" expenses were on such occasions, nor to account for the allowance paid to him, and so might make a profit by taking cheap lodgings, or sleeping free with a friend.

HELD—that, in calculating his average earnings, it was right to treat sums received by him as lodging allowance on the same footing as, and as part of, his ordinary wages, and not as reimbursement for out-of-pocket expenses.

Decision of C. A. ([1903] 2 K. B. 26; 72 L. J. K. B. 486; 67 J. P. 429; 51 W. R. 481; 88 L. T. 545; 19 T. L. R. 437) affirmed.

MIDLAND RY. CO. *v.* SHARPE, [1904] A. C. 349; [73 L. J. K. B. 666; 91 L. T. 181; 20 T. L. R. 546; 53 W. R. 114—H. L. (E.).

58. *Reviewing Award*—*Average Weekly Earnings*—*Fall in Wages after Accident*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (2) (12).]—The applicant, a haulier in a colliery, was injured by an accident arising out of and in the course of his employment, and was totally incapacitated for work. His average weekly earnings before the accident were £1 14*s.* a week, and compensation under the Workmen's Compensation Act, 1897, at the maximum rate, viz., 17*s.* a week, was paid to him by the respondents. After a considerable time he partially recovered, and the respondents took him back into their employment as a lampman at wages of £1 9*s.* 5*d.* a week, and thereupon ceased to pay compensation. At that time the wages paid to hauliers had fallen to £1 9*s.* 5*d.* a week. The applicant then filed a request for arbitration in the county court to assess compensation under the Act. The application was treated as an application to review a weekly payment, under Sched. I. (12) of the Act. The county court judge held that the sum upon which the maximum compensation was based, viz., the amount of the average weekly earnings before the accident, was subject to variation from time to time in accordance with the fluctuations in the rate of wages in the same employment after the accident, and he held that as the applicant was earning as much as he would have earned if no accident had happened he was not entitled to any weekly payment of compensation.

HELD—that the amount of the applicant's average weekly earnings before the accident as ascertained for the purpose of fixing the maximum compensation was not subject to variation in accordance with the fall in the rate of wages paid to hauliers after the accident, and that as the county court judge had proceeded upon a wrong principle the case must be sent back for him to exercise his discretion as to whether he would award any, and, if so, what weekly sum, having regard to the difference between the amount of the average weekly earnings of the workman before the accident and the amount which he was able to earn after the accident.

JAMES *v.* OCEAN COAL CO., [1904] 2 K. B. 213; [73 L. J. K. B. 915; 68 J. P. 431; 52 W. R. 497; 90 L. T. 834; 20 T. L. R. 483—C. A.

59. "*Average Weekly Earnings*"—*Continuity of Employment*—*Employment by Contractor in Mine*—*Employment by Mine-owners*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.*, (1).]—An injured workman had been employed by a contractor in a coal-mine, the contractor being employed by the mine owner to win coal by contract. The man was dismissed and remained idle for one day; he was then "taken on" to work as servant of the mine-owner in the same mine, and was soon afterwards injured.

HELD—that, in calculating his weekly earnings, his earnings under the contractor could not be taken into account.

HUNTER *v.* WM. BAIRD & CO., LD., (1905) [7 F. 304—Ct. of Sess.

60. "*Average Weekly Earnings*"—*Master and Servant*—*Compensation for Injuries by Accident*—"*Earnings*"—*Railway Porter's Uniform*—

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Workmen's Compensation Act, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1) (a).]—A railway company supplied to each of their guards a certain quantity of uniform for use during his service. The uniform remained the property of the railway company, the guard merely having the use of it. A guard having been killed by an accident in his employment,

HELD—that in assessing the compensation payable to his dependants, the guard's right to wear the uniform must be treated as part of his earnings in addition to any money wages paid to him.

GREAT NORTHERN RY. *v.* DAWSON, [1905] 1 [K. B. 331 ; 74 L. J. K. B. 271 ; 53 W. R. 309 ; 92 L. T. 145 ; 21 T. L. R. 193—C. A.

61. "*Dependants*" — *Partial Dependency—Principle of Calculation—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I. cl.* 1 (a) (2).]— A workman met with a fatal accident in the course of his employment. His weekly earnings were about £1 a week, and his wife in addition earned a sum of 1*s.* 10½*d.* a week. In proceedings by the widow for the assessment of compensation under the Workmen's Compensation Act, 1897, the county court judge awarded her £150. Upon appeal the employers contended that in the case of partial dependency, in order to ascertain the sum that was "reasonable and proportionate to the injury" to the dependants within the meaning of Sched. I., cl. 1 (a) 2, to the Act, the amount required to be expended on the maintenance of the deceased workman in his lifetime should be deducted from his earnings and the maximum sum payable as compensation should be proportionately reduced.

HELD—that the principle upon which compensation should be assessed was the same in the case of partial dependency as in the case of total dependency, except that in the former case the applicant's other source of income besides the deceased man's earnings must be taken into account in assessing the compensation, and that the county court judge had acted upon a right principle in assessing the compensation.

OSMOND *v.* CAMPBELL AND HARRISON, LD., [1905] 2 K. B. 852 ; 54 W. R. 117 ; 22 T. L. R. 4 ; 75 L. J. K. B. 1 ; 93 L. T. 724—C. A.

See also Nos. 47, 107, 109, 302.

(3) *Length and Continuity of Employment.*

62. "*Average Weekly Earnings*"—*Compensation—Break in Employment—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 1 (b).]—The question whether the employment of a workman has come to an end is a question of fact. If a county court judge, on the basis of the man having been absent from work through illness for eleven weeks, found that such absence constituted a break in the employment and there clearly was evidence on which he could so find, an appeal fails.

HEWLETT *v.* HEPBURN & CO., (1899) 16 T. L. R. 56—C. A.

63. "*Average Weekly Earnings*"—*Computation*—"*If he has been so long Employed*"—*Continuous Employment—Strike—Fresh Contract—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 1 (b).—By Sched. I., cl. 1 (b), of the Workmen's Compensation Act, 1897, the compensation under the Act shall be, "(b) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

A workman was injured by an accident arising out of and in the course of his employment. During the year preceding the accident the workman went out on strike, and his employment was thereupon terminated. After the strike was over he went back into the employment of the same employer under a new contract of employment, and remained there until the accident happened.

HELD—that, in ascertaining the average weekly earnings for the purpose of assessing compensation, inasmuch as the employment before the strike was terminated, the period of employment subsequent to the strike could alone be considered, as there was no substantially continuous employment during the year preceding the accident.

JONES *v.* OCEAN COAL CO., [1899] 2 Q. B. 124 ; [68 L. J. Q. B. 731 ; 47 W. R. 484 ; 80 L. T. 582 ; 15 T. L. R. 339—C. A.

64. "*Average Weekly Earnings*"—*Computation*—"*If he has been so long employed*"—*Kind of Employment—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 1 (*b*).]—The words "if he has been so long employed" in the First Schedule, cl. 1 (*b*), to the Workmen's Compensation Act, 1897, mean, "if he has been so long employed by the same employer," and not "if he has been so long employed in the same kind of employment."

To arrive at the workman's average weekly earnings during the previous twelve months, all the earnings of the workman for the previous twelve months should be added up and the sum total divided by 52.

PRICE *v.* J. MARSDEN & SONS, [1899] 1 Q. B 493 ; [68 L. J. Q. B. 307 ; 47 W. R. 274 ; 80 L. T. 15 ; 15 T. L. R. 184—C. A.

65. "*Average Weekly Earnings*"—*Computation—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 1 (*b*).]—In order to ascertain the "average weekly earnings" within the meaning of clause (*b*) of cl. 1 of Sched. I. of the Workmen's Compensation Act, 1897, the total

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amount earned by the workman during the previous twelve months should be divided by 52.

KEAST *v.* BARROW HÆMATITE STEEL CO., [1899] 63 J. P. 56; 15 T. L. R. 141—C. A.

66. *Intermittent Employment — "Average Weekly Earnings"—Basis for calculating Compensation—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 1 (b).]—A casual dock labourer met with an accident after being in employment for three and a half days. During the previous twelve months he had worked for many employers and at various times for the respondent, who had engaged him in every week except four during a long period, but sometimes for only one day.

The county court judge added together the sums earned in respondent's employment during the twelve months, divided the total by 52, and awarded 50 per cent. as weekly compensation.

HELD—that earnings from other employers could not be taken into consideration, and that weekly compensation should not be calculated when a workman had been in employment less than a week, as if he had been in the employment for two weeks at the same rate of daily wages as he was earning at the time of the accident.

WILLIAMS *v.* POULSON, [1899] 63 J. P. 757; 16 [T. L. R. 42—C. A.

67. "*Average Weekly Earnings*"—"*Period of his actual Employment*"—*Less than Three Years—Computation—Indemnity as between Respondents—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 1 *a*, (i.)—*Workmen's Compensation Rules*, 1898, *rr.* 19–23.]—A workman who was killed by an accident on September 27th 1898, had been originally employed by his employers before September 27th, 1895, and from that date till March, 1896, he was earning wages of £2 10*s.* a week. There was then a break of eleven months in his employment till February, 1897, when he commenced a different kind of work again at wages of 30*s.* a week, and he continued to work at that rate of wages till his death.

HELD—that, in calculating the amount of compensation to which his widow was entitled under the Workmen's Compensation Act, 1897, Sched. 1. (1), (a), (i.), the period of work before the break ought not to be taken into account, and that the award ought to be for 156 times 30*s.*

Where the respondents in an arbitration under the Workmen's Compensation Act are the undertakers and a person who has contracted with them, and the undertakers claim under sect. 4 indemnity against the contractor, it is necessary under rule 23 of the Workmen's Compensation Rules, 1898, to give notice of such claim in the same way as is required by rule 19 in the case where a claim to indemnity is sought against a third party.

APPLEBY *v.* HORSELEY CO., [1899] 2 Q. B. 521; [68 L. J. Q. B. 892; 47 W. R. 614; 80 L. T. 853; 15 T. L. R. 410—C. A.

68. "*Average Weekly Earnings*"—*Piece-work at Irregular Intervals—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 1 (b).]—Where a workman has been employed on piece-work at irregular intervals during an extended period of time, in the event of his death by accident in course of his employment, assess the compensation to which his wife and children are entitled under the Workmen's Compensation Act, 1897, by dividing the total amount which he earned by the number of weeks in the extended period and multiply by 156.

SMALL *v.* M'CORMICK AND EWING, [1899] 36 [S. L. R. 700—Ct. of Sess.

70. "*Average Weekly Earnings*"—*Employment for less than Two Weeks—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *Sched. I.* (1), *cl.* 1 (b).]—A workman was employed to work in the demolition of a building. the terms of his employment being that he should work sixty hours a week—viz., eleven hours a day on five days of the week and five hours on Saturday, at the wages of 7½*d.* an hour. and that he should be liable to be discharged at an hour's notice. When he had worked for four days, for a period altogether of forty-four hours. he was accidentally injured.

HELD—that. as there was a presumption that his employment would continue from week to week, there was evidence to support the finding that his average weekly earnings within the meaning of the Workmen's Compensation Act were sixty times 7½*d.*

A workman was employed to work as a haulier at the wages of 5*s.* 2*d.* a day. He began to work on a Wednesday, and he continued to work every day, Sunday included, till the following Wednesday, when he was accidentally injured. He received as wages for the eight days £2 1*s.* 4*d.*

HELD—that, as he had worked for a period of more than a week at 5*s.* 2*d.* a day, although that period was partly in one calendar week and partly in another, there was evidence to support the finding that his average weekly earnings were six times 5*s.* 2*d.*

AYRES *v.* BUCKERIDGE; WHEALE *v.* RHYMNEY [IRON CO., LD.; JONES *v.* RHYMNEY IRON CO., LD., [1902] 1 K. B. 57; 65 J. P. 804; 50 W. R. 115; 85 L. T. 472; 18 T. L. R. 20; 71 L. J. K. B. 28—C. A.

71. "*Average Weekly Earnings*"—*Employment for less than Two Weeks—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1, *sub-s.* 1, *Sched. I., cl.* 1 (*b*).]—The leading enactment of the Workmen's Compensation Act, 1897. is that every workman in the prescribed trades shall be entitled to compensation. The compensation is given by the Act and not by the schedule, but the amount of compensation is to be "in accordance with" the schedule. which words do not restrict the obligation upon the employer to pay compensation or the right of the workman to receive it.

The word "average" is used not with strict accuracy, but loosely in the Act.

The words "average weekly earnings" mean that if a workman was only employed at irregular

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intervals or at irregular amounts the average is got at by putting them together and striking an average so as to afford a list of the weekly sum to be paid. A workman need not have been at the time of the accident for at least two weeks in the service of his employer to entitle him to the benefit of the Workmen's Compensation Act, 1897.

The decisions of the C. A. ([1900] 1 Q. B. 780; 69 L. J. Q. B. 449; 64 J. P. 292; 48 W. R. 408; 82 L. T. 189; 16 T. L. R. 250; and [1900] 2 Q. B. 95; 69 L. J. Q. B. 598; 48 W. R. 598; 82 L. T. 489; 16 T. L. R. 335) reversed.

LYSONS *v.* ANDREW KNOWLES & SONS, LD.; [STUART *v.* NIXON AND BRUCE, [1901] A. C. 79; 70 L. J. Q. B. 170; 65 J. P. 388; 49 W. R. 636; 84 L. T. 65; 17 T. L. R. 156—H. L. (E).

And see No. 196, *supra*.

72. *No Wages earned by Workman—Amount of Compensation—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1) (*a*) (*i.*).]—The deceased had entered the employment, but was killed after he had descended to work in the pit and as he was proceeding to work, but before he had done anything which gave him a claim for any sum of wages.

HELD—that a sound interpretation of the Act involved the right to compensation where there has been employment and accident in the employment, and that as no sum could be brought out at all, the sum must be fixed at £150, according to the alternative given in the Act.

Lysons v. *Andrew Knowles & Sons, Ld.* ([1901] A. C. 79; 70 L. J. Q. B. 170; 65 J. P. 388; 49 W. R. 636; 84 L. T. 65; 17 T. L. R. 156—H. L. (E), *supra*) followed.

LEONARD *v.* BAIRD & CO., (1901) 3 F. 890—Ct. of Sess.

73. "*Average Weekly Earnings*"—*Employment for Two Days a Week for more than Two Weeks—Continuous Employment—Casual Employment for same Employers or Others—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1) (b).]—A printer's cutter had a contract with a printing company under which he was to work for them on the nights of Thursday and Friday in every week at 8*s.* 8*d.* a night. No definite duration for the employment was fixed, but it was to be determinable by a week's notice, and was to continue for more than two weeks. During the rest of each week he was free to work as he pleased. He went to the same employers and also to other persons, and worked when he could get from either any casual work. In the third week of his employment he met with an accident. He applied under the Workmen's Compensation Act, 1897, for compensation, and the question arose as to how his average weekly earnings were to be computed.

HELD—that (1) there was no break in continuity in the employment under the agreement for two nights in every week, and that it was right to deal with the 17*s.* 4*d.* as weekly earnings in respect of which an award could be made; (2) there was no continuity in the casual work, and it could not be taken in consideration in the award.

HATHAWAY *v.* ARGUS PRINTING CO., [1901] 1 [Q. B. 96; 70 L. J. Q. B. 12; 64 J. P. 804; 49 W. R. 113; 83 L. T. 465; 16 T. L. R. 42—C. A.

74. "*Average Weekly Earnings*"—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1) (a) (i.).]—A workman was employed by a coal-master from day to day, his wages being payable fortnightly, although he was entitled to draw them weekly. He worked in the coal-master's pit for three days in one week, and for four days and part of a fifth in the following week. He died of injuries sustained on the last day mentioned. His widow claimed compensation.

HELD—that the requisite materials existed for ascertaining the "average weekly earnings" by the workman. Employment for two weeks is not necessary to give a claim under the Workmen's Compensation Act, 1897.

RUSSELL *v.* M'CLUSKEY, (1901) 2 F. 1312—Ct. of Sess.

75. "*Average Weekly Earnings*"—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1) (a) (i.).]—A workman received injuries at the end of his first week in his employment, arising out of and in the course of the employment, from which he ultimately died. He, however, continued to work and earn wages in the employment during the following week. His widow claimed compensation.

HELD—that the workman was for two weeks in the employment, and that there existed reasonable means of ascertaining his average weekly earnings.

DOYLE *v.* BEATTIE & SONS, (1901) 2 F. 1166—[Ct. of Sess.

Disapproved, *see* No. 77, *infra*.

76. "*Average Weekly Earnings*"—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1) (b).]—A miner entered a coal company's service on Friday, March 23rd, and earned 7*s.* 7*d.* On the 24th he did not work. He worked on Monday, 26th, and every day thereafter till the 29th, on which day he was knocked down by a hutch and so severely injured that he was unable to work till May 14th. He claimed compensation from his employers.

HELD—that the facts afforded a sufficient basis for calculating the miner's "average weekly earnings" within the meaning of Sched. I. (1) (b) of the Workmen's Compensation Act, 1897.

CADZOW CANAL CO., LD. *v.* GAFFNEY, (1901) 3 [F. 72—Ct. of Sess.

77. *Dependants — Less than Three Years' Employment — Workmen's Compensation Act*,

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1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1) (*a*) (i.).]—The First Schedule (1) (*a*) (i.) of the Workmen's Compensation Act, which settles the limits of compensation which may be awarded to the dependants of a workman who has died in consequence of an injury, both in the case of a complete three years' service and in the case of a service more limited in time, extends to £150 in any case where either the total wages of the three years' service in the one category, or the multiplication of the average wages by 156 in the other category, bring out a sum of less than £150.

Doyle v. *Beattie & Sons* ((1900) 2 F. 1166. No. 75, *supra*) disapproved.

FORRESTER & Co. *v.* M'CALLUM, (1901) 3 [F. 650—Ct. of Sess.

78. "*Average Weekly Earnings*"—*Employment for less than Two Weeks*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *Sched. I.* (1), *cl.* 1.]—The applicant for compensation was a riveter, who met with an accident in the course of his employment with the employers who were a firm of shipbuilders. He was employed consecutively for six days which were partly in one week and partly in another. The county court judge was invited by one side to say that he was bound to divide the period during which the applicant earned £2 12*s.* 6*d.* into two weeks, and by the other side to say that he was justified in treating it as one week. The county court judge awarded a weekly payment of £1, the maximum allowed by the Workmen's Compensation Act, 1897.

HELD—that the case must be governed by the course which was taken by the county court judge with the assent of both parties, and on the presumption that the employment was continuing, and dealing with the six days in question, the county court judge was justified in treating them as a week, and was not bound to divide them in two; and that it was not material whether the weeks were trade weeks, or calendar weeks.

Ayres v. *Buckeridge*; *Wheale* v. *Rhymney Iron Co., Ld.* ([1901] 1 K. B. 57; 71 L. J. K. B. 28; 65 J. P. 804; 50 W. R. 115; 85 L. T. 472; 18 T. L. R. 20—C. A., No. 70, *supra*) *followed.*

WALTERS *v.* CLOVER, CLAYTON & Co., (1902) [18 T. L. R. 60—C. A.

79. "*Average Weekly Earnings*"—*Calendar Week*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *Sched. I., s.* 1 (*a*) (i.).]—The deceased workman entered the employment of the appellants on Thursday, August 15th, 1901, and worked on Thursday, Friday, and Saturday of that week, but did not work on Sunday, August 18th. He then worked continuously from Monday, August 19th, to Sunday, September 1st, when he was killed by accident in one of the appellants' pits.

HELD—that the period of the workman's actual employment extended over four calendar weeks, and the total amount earned by him was £4 19*s.* 2*d.*, which, divided by four and multiplied by 156, amounted to £193 7*s.* 6*d.*, and that this sum must be deemed to be the deceased's earnings for three years, and was the amount of compensation to which his dependants were entitled.

PEACOCK *v.* NIDDRIE AND BENHAR COAL Co. [(1902) 4 F. 443—Ct. of Sess.

80. *Casual Dock Labourer*—*Accident on First Day of Employment*—*Weekly Payment*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 1 (*b*).]—A casual dock labourer at the port of Bristol, met with an accident in the course of his employment by stevedores. He was a person as to whom there was no presumption that his employment was to last longer than the time required to unload the particular ship. He had worked for some time on the first day of his employment before he met with an accident, and his earnings for the time that he worked were 3*s.* 3*d.* The county court judge adopted as the basis of his award the ordinary standard of wages of a dock labourer in the port of Bristol throughout the year.

HELD—that the Court could not take into consideration employment under any other employer, but must base the compensation on the earnings in the employment of the same employer as required by the First Sched., sect. 1 (*b*) of the Workmen's Compensation Act, 1897.

BARTLETT *v.* TUTTON & SONS. [1902] 1 K. B. [72; 71 L. J. K. B. 52; 66 J. P. 196; 50 W. R. 149; 85 L. T. 531; 18 T. L. R. 35—C. A.

81. "*Earnings*"—"*Average Weekly Earnings*"—*Continuous Employment*—*Break in Employment*—*Irregular Employment*—*Workmen's Compensation Act*, 1897 (60 & 64 Vict. *c.* 37), *Sched. I.*, 1 (*b*).]—A workman had been working for employers, though not continuously, for more than twelve months. During the twelve months next before the accident he had spent May, June, and July in hospital, but had worked during every other month, and indeed during a part of almost every week during the nine months. He did not, however, work during the first ten days of November; from November 11th to November 28th he worked every day, and on the latter date the accident happened. The county court judge found as a fact that there was a break in his employment at the beginning of November, and that he worked under a daily contract; and he added together his earnings for the eighteen days in November (11th to 28th), and divided them by three, and so ascertained his "average weekly earnings." The employers contended that a whole year's earnings ought to be added together and divided by 52. The Act provides for the award of a sum "not exceeding 50 per cent. of his average weekly earnings during the previous twelve

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months, if he has been so long employed, but, if not, then for any less period during which he has been in the employment of the same employer. . . . ."

HELD—that the judge's decision could not be disturbed.

GILES *v.* BELFORD, SMITH & CO., [1903] 1 [K. B. 843 ; 72 L. J. K. B. 569 ; 67 J. P. 399 ; 51 W. R. 692 ; 88 L. T. 754 ; 19 T. L. R. 422 —C. A.

82. "*Average Weekly Earnings*" — *Casual Labourer—Workmen's Compensation Act.* 1897, *Sched. I.*, (1) (*b*).]—There is no presumption, for the purposes of the Workmen's Compensation Act, 1897, that a casual labourer employed by the hour will continue in his employment for more than one hour.

CASE *v.* COLONIAL WHARVES, LD., (1905) 53 [W. R. 514—C. A.

83. "*Average Weekly Earnings*" — *Casual Employment—Workman in Same "Grade"—Absence from Work—Workmen's Compensation Act*, 1906 (6 Edw. 7, *c.* 58), *Sched. I., ss.* 1, 2.]—The "average weekly earnings" of a workman are by Sched. I., sect. 2 (a), of the Workmen's Compensation Act, 1906, to "be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." The rate of remuneration is not to be fixed by the wages the workman was earning at the date of the accident. Where such a computation is "impracticable" an estimate must be made as nearly as possible at the rate at which the workman was being remunerated, and "regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment, and in the same district." The word "grade" refers to the particular rank occupied by the workman, as, for instance, whether he is a mason, or a bricklayer, or a bricklayer's labourer, and not to his greater or less excellence in that rank. This provision affords a guide as to the average weekly earnings, but there is no obligation to accept those average wages as the basis of compensation. The personal qualities of the workman then come in, especially where the work is piecework. The wages earned at the date of the accident cannot be the sole test. The object aimed at is to estimate the normal rate of remuneration of the injured workman. Days on which no work is done and no wages are earned must be disregarded, except in the one case provided by sect. 1 (*a*). In calculating any of the periods mentioned in sect. 1, absence from illness or any other unavoidable cause is to be disregarded, and the employment is to be reckoned as continuous unless the workman has been discharged on the ground of such absence, &c., and subsequently re-engaged.

PERRY *v.* WRIGHT ; CAIN *v.* LEYLAND & CO. : [BAILEY *v.* KENILWORTH, LD. ; GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LD., (1907) 24 T. L. R. 186—C. A.

See also No. 54.

See also (*h*) JURISDICTION.

(e) Commencement of Proceedings : Claim, Notice, Dispute.

84. *Absence of Notice of Accident—Medical Examination of Workman—Condition Precedent —Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 2 ; *Sched. I., s.* (3).]—A workman had sustained injury from an accident arising out of and in the course of his employment by the appellants. He started proceedings to obtain compensation without previously giving notice of the accident, as required by the Workmen's Compensation Act, 1897, s. 2. The appellants took no objection to the proceedings on that ground, but they claimed that he should submit to a medical examination under sect. (3) of the first schedule to the Act. The respondent contended that the giving of a notice of the accident was a condition precedent to the obligation to submit to a medical examination.

HELD—that the want of notice prior to the proceedings was only cured on the assumption that the appellants were not prejudiced by it, and the appellants, though they might have waived the want of notice as a bar to the proceedings, had not thereby waived their right to any matter the absence of which might prejudice them in their defence, and that the respondent could only be admitted to carry on the proceedings subject to the obligation to submit himself to the medical examination to which he would have been subject if they had been duly preceded by the notice required by the Act.

OSBORN *v.* VICKERS, SONS, & MAXIM, [1900] [2 Q. B. 91 ; 69 L. J. Q. B. 606 ; 82 L. T. 491 ; 16 T. L. R. 333—C. A.

85. "The *Claim for Compensation*"—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 2, *sub-s.* 1.]—The applicant, a workman in the employment of the respondents, was injured on December 21st, 1898, by an accident arising out of and in the course of his employment. Notice of the accident was sent in due course. On May 2nd, 1899, the applicant sent a notice to the respondents claiming compensation under the Workmen's Compensation Act, 1897. A request for arbitration was filed on October 4th, 1899.

HELD—that the notice dated May 2nd, 1899, was "*the* claim for compensation" within the meaning of sect. 2 (1) of the Workmen's Compensation Act. 1897, and therefore that a claim for compensation had been made within six months from the occurrence of the accident, and proceedings under the Act were maintainable.

"*The* claim for compensation" in sect. 2 (1) of the Act does not mean the initiation of

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proceedings before one of the tribunals specified in the Act, by which the compensation is to be assessed.

The decision of the C. A. (Lord Morris dissenting) ([1900] 2 Q. B. 145; 69 L. J. Q. B. 542; 64 J. P. 323; 48 W. R. 534; 82 L. T. 340; 16 T. L. R. 282) reversed.

Powell *v.* Main Colliery Co., [1900] A. C. [365; 69 L. J. Q. B. 758; 49 W. R. 49; 83 L. T. 85; 16 T. L. R. 466; 65 J. P. 100—H. L. (E.).

86. *Failure to give Notice of Accident—Prejudice of Employer—Proof*—Onus—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 2 (1).]—The *onus* lies upon the plaintiff to prove that the defendants were not prejudiced in their defence by the plaintiff failing to give timeous notice under sect. 2 (1) of the Workmen's Compensation Act, 1897, or that the want of such notice was occasioned by mistake or other reasonable cause; but the Act does not contemplate separate or preliminary proceedings with the view of determining whether the employer has been prejudiced or not.

Shearer *v.* Miller & Sons, (1899) 2 F. 114 [Ct. of Sess.

87. *Claim to be made within Six Months—Estoppel—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 2, *sub-s.* 1.]—A workman was injured by an accident arising out of and in the course of his employment, which totally incapacitated him from work. His employer paid him half the amount of his average weekly wages from the second week after the accident, and negotiations took place between them as to paying the workman a lump sum in lieu of the weekly payment. The parties were unable to agree upon the amount, and after the expiration of six months from the accident, the negotiations ceased, and the weekly payment was stopped. The workman thereupon took proceedings to have the compensation assessed under the Workmen's Compensation Act, 1897, when the employer took the objection that the claim for compensation was not made within the six months, as required by sect. 2, sub-sect. 1, of the statute.

Held—that, in the circumstances, there was evidence of an agreement by the employer to pay compensation under the Act, the only question left open being the amount of compensation, and that, in such a case, the employer was precluded from taking the objection that the claim for compensation was not made in time.

Wright *v.* John Bagnall & Sons, Ld., [1900] 2 Q. B. 240; 69 L. J. Q. B. 551; 64 J. P. 420; 48 W. R. 533; 82 L. T. 346; 16 T. L. R. 327—C. A.

88. *Claim to be made within Six Months——Estoppel—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 2, *sub-s.* 1.]—In an arbitration under the Workmen's Compensation Act, it appeared that shortly after the accident the insurance company with whom the employers had insured their liability under the Act, began to make weekly payments to the injured workman of half the sum which he had been earning as weekly wages, and continued to do so for ten months, taking receipts from him for the payments on account of compensation which might be or become due to him under the Workmen's Compensation Act. The payments having ceased, the workman filed a request for arbitration.

Held—that the employers were not precluded from taking the objection that the claim for compensation was not made within six months from the occurrence of the accident, as required by sect. 2, sub-sect. 1, of the Act.

Wright v. *John Bagnall & Sons, Ld.* ([1900] 2 Q. B. 240; 69 L. J. Q. B. 551; 48 W. R. 533; 82 L. T. 346; 16 T. L. R. 327—C. A., *supra*) distinguished.

Rendall *v.* Hills' Dry Docks and Engi- [neering Co., [1900] 2 Q. B. 245; 69 L. J. Q. B. 554; 64 J. P. 451; 48 W. R. 530; 82 L. T. 521; 16 T. L. R. 368—C. A.

89. *Offer to continue to employ injured Workman at Average Weekly Earnings—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 2, *Sched. I., s.* 2.]—Within six months the appellants had a letter intimating a claim for compensation, and a formal application specifying the amount claimed.

Held—that without discussing the precise requisites of the claim, the application by itself satisfied the requirements of sect. 2 in regard to the matter.

The appellants offered to continue to employ the injured workman, who had sustained injuries resulting in the loss of an arm, at a wage equal to his average weekly earnings during the twelve months previous to the accident.

Held—that the workman was entitled to decline the offer without excluding his right to compensation.

Fraser *v.* Great North of Scotland [Ry. Co., (1901) 3 F. 908—Ct. of Sess.

90. *Failure to give Notice as soon as practicable — Excuse for — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 2.]—An injured workman first made his claim for compensation five months after the accident. He had not understood from his doctor that his accident was so serious as it really was, and, had he recovered satisfactorily, he had not intended to make any claim.

Held—that the delay ought not to be a bar to his claim.

Rankine *v.* Alloa Coal Co., (1904) 6 F. 375 [—Ct. of Sess.

91. *No Dispute — Masters making Regular Payments—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (3).]—An injured workman received regular weekly payments from his employers. On their saying that he

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was recovered and that the payments would soon be stopped, he commenced proceedings for arbitration.

HELD—that there was as yet no "dispute," and that, there being no agreement to be registered, his proceedings were premature.

GOURLAY BROS., LD. *v.* SWEENEY, (1906) 8 F. [965—Ct. of Sess.

92. *No Compensation yet due—No Dispute—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (3).]—A workman is not entitled to commence arbitration proceedings before the date at which he would become entitled to compensation, and before there is any dispute between him and his employers as to his right to compensation.

CALEDON SHIPBUILDING AND ENGINEERING [CO., LD. *v.* KENNEDY, (1906) 8 F. 960—Ct. of Sess.

93. *Verbal Claim—Evidence of—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 2.]—A claim for compensation under sect. 2 of the Workmen's Compensation Act, 1897, need not be in writing.

Three years after an accident to a workman an application was made for the assessment of compensation by arbitration. In the particulars of claim the applicant stated that he had received £6, not being wages, from his employer in respect of the injury. The employer in his answer, stated that one month after the accident the applicant agreed to accept £2 in full settlement of all claims in respect of the accident and was paid that sum, and that he intended to rely on the fact that the claim for compensation was not made within six months from the occurrence of the accident, and he denied his liability to pay further compensation. Upon the hearing the county court judge dismissed the application upon the ground that there was no evidence that any claim for compensation had been made within the six months.

HELD—that there was some evidence, upon the employer's statement in his answer that he had paid £2 in full settlement of all claims, of an admission that a claim for compensation had been made within the six months.

LOWE *v.* MYERS & SONS, [1906] 2 K. B. 265; [75 L. J. K. B. 651; 95 L. T. 35; 22 T. L. R. 614—C. A.

94. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 2 (1).]—A "claim" for compensation within the meaning of sect. 2 (1) of the Workmen's Compensation Act, 1897, must be a claim for a definite amount: a mere intimation of a demand for compensation is not sufficient.

MAYER *v.* PARK, (1906) 8 F. 250—Ct. of Sess.

95. *Not made within Six Months—Excuse for Delay — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 2 (1).]—The mere fact that an employer, in good faith and with no intention of misleading an injured workman, pays him a weekly allowance for six months after his accident, nothing being said as to any liability on the employer's part, is not in itself sufficient to excuse delay on the workman's part in making a formal claim under the Workmen's Compensation Act, 1897.

O NEILL *v.* MOTHERWELL, [1907] S. C. 1076—[Ct. of Sess.

96. *What Amounts to a Claim—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 2 (1).]—A "claim for compensation" under sect. 2, sub-sect. 1, of the Workmen's Compensation Act, 1897, must be a claim for a specific sum, and not merely an intimation of a demand for compensation.

KILPATRICK *v.* WEMYSS COAL CO., [1907] [S. C. 320—Ct. of Sess.

97. *No Notice Given — "Mistake or other Reasonable Cause" — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 2 (1).]—On November 20th, 1905, a workman in the course of his employment fell, injuring some muscles. Notwithstanding medical advice to rest, he continued working till February, 1906, when he had to go to a hospital. He designedly did not give notice of his accident at the time, believing that his injuries would not keep him from work. Realising that his injuries were more serious than he had thought, on February 14th, 1906, he gave written notice of the accident to his employers.

HELD—that the delay in giving notice was due to mistake or other reasonable cause within sect. 2, sub-sect. 1, of the Workmen's Compensation Act, 1897, and that consequently the delay in giving notice was not a bar to proceedings under the Act.

Rankine v. *Allon Coal Co.* (6 F. 375, No. 90, *supra*) followed.

BROWN *v.* LOCHGELLY IRON AND COAL CO. [[1907] S. C. 198—Ct. of Sess.

(f) Dependants.

98. *Ordinary Necessaries of Life—Class and Position—Appeal — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—"Dependants" within the meaning of sect. 7, sub-sect. 2, and Sched. I., cl. 1, of the Workmen's Compensation Act, 1897, must have been wholly or in part dependent upon the earnings of the workman for the ordinary necessaries of life, having regard to the class and position of life of the parties. Merely deriving benefit from the earnings of the deceased is not sufficient.

The question whether the applicants in any case were dependants in this sense is a question of fact to be decided by the arbitrator.

An appeal can only be allowed where the Court is satisfied that there was no evidence to support the finding of the county court judge. If there was evidence on which the county court

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judge could find as he did he did not misdirect himself, and his finding is conclusive.

SIMMONS *v.* WHITE, [1899] 1 Q. B. 1005; 68 [L. J. Q. B. 507; 47 W. R. 513; 80 L. T. 344; 15 T. L. R. 263—C. A.

99. *Claim by one partly dependent — One wholly dependent — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37, *s.* 7, *sub-s.* 2).]—The claim of a person partly dependent on an injured man for compensation under the Workmen's Compensation Act, 1897, is excluded by the fact that a person exists who was wholly dependent on him.

FAGAN *v.* MURDOCK, (1899) 36 S. L. R. 921—[Ct. of Sess.

100. *Claim by Mother—Father alive—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—The mother of a person who has been killed through the negligence of another has no title to sue for reparation during the life of the father; consequently has no claim as a "dependant" for compensation under the Workmen's Compensation Act, 1897.

BARRETT *v.* NORTH BRITISH RY. CO., (1899) [36 S. L. R. 874; 7 S. L. T. 120—Ct. of Sess.

101.—*Claim by Grandchildren—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 7, *sub-s.* 2.]—Grandchildren who are actually dependent for support upon a grandparent are entitled to compensation under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37).

MELROSE AND THOMSON *v.* HAMLIN, (1899) [36 S. L. R. 814—Ct. of Sess.

102. *Claim by Father—"Wholly or in part dependent"—Dependency on Son's Earnings—Standard of Living—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—The respondent's son was killed by an accident arising out of, and in the course of, his employment by the appellants as a haulier. He was aged 16, earned on an average 8*s.* a week, lived at home with his father and mother, and gave them all his wages, they finding him in food, lodging, clothes, &c. There were five other children, two of whom also paid their wages into the common fund. The respondent was a collier, earning about 25*s.* a week.

The county court judge awarded the respondent as a dependant £23 8*s.*

HELD—that the sole question was, whether there was any amount of dependency at all giving a right to anything: that there was a partial dependency in this case; that there was nothing in the case beyond a question of fact; what the family was in fact earning, what the family was in fact spending, for the purpose of its maintenance as a family, was the only thing which the county court judge could properly regard; that there was no hypothetical standard of living within which the judge was obliged to act.

Simmons v. *White* ([1899] 1 Q. B. 1005; 68 L. J. Q. B. 507; 47 W. R. 513; 80 L. T. 344; 15 T. L. R. 263—C. A., No. 98, *supra*) discussed.

MAIN COLLIERY CO. *v.* DAVIES, [1900] A. C. [358; 69 L. J. Q. B. 755; 83 L. T. 83; 16 T. L. R. 460; 65 J. P. 20—H. L. (E.)

103. *Death of before Claim for Compensation* —Actio personalis moritur cum personâ—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37.]—The sole total dependant of a workman who was killed by an accident arising out of his employment, died before she had filed or served a claim for compensation under the Workmen's Compensation Act, 1897. Had she lived and taken the necessary steps to recover it, she would have been entitled to £150 compensation. The personal representative of the deceased workman subsequently took proceedings in the county court to recover compensation, to be applied for the benefit of the dependant, and in payment of her debts.

HELD—that neither her personal representative nor the personal representative of the deceased workman was entitled to recover the amount.

IN RE O'DONOVAN AND CAMERON, SWAN & CO., [1901] 2 Ir. 633—C. A. (Ir.).

See No. 121, *infra*.

104. "*Wholly or in Part Dependent*" — *Husband and Wife—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* (2) *and Sched. I., s.* (1) (*a*) (*i.*).]—A relative is "in part dependent" on a deceased workman in the sense of the Workmen's Compensation Act, 1897, only when the relative has some independent means of support of a more or less permanent and substantial character.

The widow of a workman at the time of his death managed to exist without being supported by her husband except to the extent of a sum not exceeding £5 a year. She claimed compensation on account of her husband's death.

HELD—that as she had no regular and independent means of support, but only occasional and precarious employment, and her main means of support were charitable contributions by her relatives and small sums which she received from her husband, who was well able to support her had he chosen to do so, she was "wholly dependent" on her husband at the time of his death within the meaning of the Workmen's Compensation Act, 1897, Sched I., s. (1) (*a*) (*i.*).

CUNNINGHAM *v.* M'GREGOR & CO., (1904) 3 F. [775—Ct. of Sess.

105. "*Wholly or in Part Dependent*"—*Property coming to Dependant after Workman's Death—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., el.* 1 (*a*) (*i.*).]—A workman, who was killed by an accident, had during his life maintained himself and his wife out of his earnings, there being no other income whatsoever. At the time of his death he was possessed of personal estate of the value of £190, and of this his widow, who was his personal representa-

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tive, received £100. There was no evidence that this £190 produced any income during his lifetime.

HELD—that the widow was "wholly dependent upon his earnings" within Sched. I., cl. 1 (*a*) (*i.*) of the Workmen's Compensation Act, 1897.

PRYCE *v.* PENRIKYBER NAVIGATION COLLIERY [Co., (1901) 85 L. T. 477; 18 T. L. R. 54; [1902] 1 K. B. 221; 71 L. J. K. B. 192; 66 J. P. 198; 50 W. R. 197—C. A.

106. *Claim by Father—"Wholly or in Part Dependent"—Dependency on Son's Earnings—Standard of Living — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—The applicant for compensation was the father of a collier who had been accidentally killed in the course of his employment as a collier. The deceased man lived at home with his father and mother. His earnings from 25*s.* to 28*s.* a week as a collier he paid into a common family fund which was kept by his mother, who allowed him a small amount of pocket-money weekly. His father could have maintained his family without assistance from his son.

HELD—that no definite standard of living could be laid down by which to test dependency, and that the father being able to maintain his family without assistance from his son did not debar him from being a "dependant" within the Workmen's Compensation Act, 1897, Sched. I. cl. 1.

Main Colliery Co. v. *Davies* ([1900] A. C. 358; 69 L. J. Q. B. 755; 83 L. T. 83; 16 T. L. R. 460—H. L. (E.), No. 102, *supra*) followed.

HOWELLS *v.* VIVIAN & SONS, (1902) 50 W. R. [163; 85 L. T. 529; 18 T. L. R. 36—C. A.

107. *Total Wages of the Family—Standard of Living in the District—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2), *Sched. I.* (1).]—A son, living at home with his parents and brothers and sisters, and contributing his wages to the common family fund, was accidentally killed, and his father claimed compensation as a "dependant" under the Workmen's Compensation Act, 1897. The county court judge took into consideration his own knowledge of the district, and of what such a family would require for their maintenance, and he found that the family fund, excluding the earnings of the deceased, was sufficient to meet the requirements of the family; and he therefore decided against the applicant.

HELD—that the judge was not entitled to take into consideration the standard of living in the neighbourhood.

FRENCH *v.* UNDERWOOD, (1903) 19 T. L. R. 416 [—C. A.

108. *Claim by Father—Father in Workhouse—Question of Fact—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *Sched. I. par.* 1 (*a*) (*ii.*).]—A workman met with a fatal accident under such circumstances as would have entitled his "dependants" to compensation; the deceased was unmarried, and his father claimed to be a dependant; the father was blind, and an inmate of a workhouse, and the son had previously made weekly payments towards his maintenance, both in the workhouse and while he was living with a daughter, but at the time of the accident he was not making any contributions. The county court judge found that the father was not a dependant.

HELD—that it was a question of fact, and that there was no ground for reversing the finding.

Main Colliery Co. v. *Davies* ([1900] A. C. 358; 69 L. J. Q. B. 755; 48 W. R. 609; 83 L. T. 813; 16 T. L. R. 450—C. A., No. 102, *supra*) followed.

REES *v.* PENRIKYBER NAVIGATION COLLIERY [Co., Ld., [1903] 1 K. B. 259; 72 L. J. K. B. 85; 67 J. P. 231; 51 W. R. 247; 87 L. T. 661; 19 T. L. R. 113; 1 L. G. R. 173—C. A.

109. *Allotment of Compensation—Powers of Arbitrator — Power to exclude Dependant — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (4), (5), (6).]—When compensation is awarded under the Workmen's Compensation Act, 1897, to the dependants of a deceased workman, the arbitrator has no power to make an award in such a way as to exclude from a share of the compensation money any dependant who is not *sui juris* and who has not agreed to forego his or her share of such compensation.

Therefore, the arbitrator has no power to direct payment of the compensation money to trustees to be invested or otherwise applied by such trustees for the benefit of the widow and other dependants, or any one or more of them to the exclusion of any other or others, as regards principal and interest, in such manner as such trustees may from time to time deem expedient.

MANCHESTER *v.* CARLTON IRON CO., LD., (1904) [68 J. P. 209; 52 W. R. 291; 89 L. T. 730; 20 T. L. R. 155—C. A.

110. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *Sched. I.*]—A widow claimed compensation under the Act of 1897 as a "dependant" of her son, who met with a fatal accident. At the time of his death she was undergoing a sentence of confinement in a State Inebriate Reformatory. In the four previous years she had only spent ten months out of prison, and during these months had earned a little by outdoor work, but otherwise had been supported by her son.

HELD—that she was not wholly or partially dependent on her son at the time of his death within the meaning of the Act.

Per Ld. Moncrieff: to establish dependency there must be:—

(1) total or partial incapacity on the part of the alleged dependant to support herself;

(2) lack of separate means; and

(3) a legal claim for support existing at the date of death.

ADDIE & SONS' COLLIERIES, LD. *v.* TRAINER, [(1905) 7 F. 115—Ct. of Sess.

Liability of Master for Injury to Servant—*Continued.*

111. *Wife living apart from Husband and not supported by him — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—A woman had (by their mutual consent) for fourteen years lived apart from her husband, and had been supported by her illegitimate son.

HELD—that she was not a "dependant" of her husband within the meaning of sect. 7 (2) of the Workmen's Compensation Act, 1897.

TURNERS, LD. *v.* WHITEFIELD, (1905) 6 F. 822 [—Ct. of Sess.

112. *Husband having left Wife at date of death—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 ; *sub-s.* 2 ; *Sched.* I., *cl.* 1 (*a*).] —Until about four months before a workman met with an accident causing his death, he lived with his wife and children, and supported them by his earnings. About four months before his death the workman, who was then out of work, left his wife, taking one of the children with him. He sent the child back about a month before his death, but he did not come back to his wife nor did he send her anything for the support of herself and the children. During his absence his wife obtained work, and received help from her friends, and for one week was in the workhouse. In her evidence she stated that she expected her husband back every day to provide a home. The widow, on behalf of herself and the children, claimed compensation under the Workmen's Compensation Act, 1897. The county court judge held that the widow was dependent upon the deceased's man's earnings at the time of his death, and awarded her compensation.

HELD—that there was evidence upon which the county court judge could properly find that the widow was dependent upon the deceased man's earnings at the time of his death, and was therefore entitled to compensation.

COULTHARD *v.* CONSETT IRON CO., LD., [1905] [2 K. B. 869 ; 22 T. L. R. 25 ; 75 L. J. K. B. 60 ; 54 W. R. 139 ; 93 L. T. 756—C. A.

113. *Deserted Wife Unable to Support Herself — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—A husband deserted his wife in 1901 and contributed nothing to her support. In 1904, when he was accidentally killed in the course of his work, she was unable to earn anything.

HELD—that the sheriff had rightly decided that she was a "dependant" of her husband.

Turners, Ld. v. *Whitefield* (No. 111, *supra*) distinguished.

SNEDDON *v.* ADDIE & SONS COLLIERIES, LD., [(1905) 6 F. 992—Ct. of Sess.

114. *Daughter Housekeeper — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—A daughter who had lived at home but earned regular wages at a laundry, was, by reason of her mother's death, compelled to give up her work and manage her father's house, receiving from him board, lodging and clothes, but no wages. He was subsequently killed by an accident in his employment.

HELD—that the daughter was a "dependant" within the meaning of the Workmen's Compensation Act, 1897.

MOYNES *v.* WM. DIXON, LD., (1905) 7 F. 386— [Ct. of Sess.

115. *Father and Son—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 7 (2).]—A father, in somewhat precarious health, but with no dependants, was earning 25*s.* per week. His son, who did not live with his father, earned 24*s.* per week, but made a considerable extra income by bookmaking, and gave his father 10*s.* a week or thereabouts. The son having been accidentally killed in his employment.

HELD—that the father could not be said to be in part "dependent" on the son's earnings.

ARROL & CO., LD. *v.* KELLY, (1906) 7 F. 906— [Ct. of Sess.

116. *Foreigner Working and Killed in United Kingdom — Wife in Foreign Country — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—In December, 1903, a Pole came to Scotland, where in the course of his employment as a miner he was killed in August, 1904. During that period he remitted £1 a week to his wife, who remained in Poland, and who lived on her husband's remittances supplemented by her own earnings as an outdoor labourer at a wage of 9*d.* a day, and by contributions from her father.

HELD—that the wife was partially dependent upon her husband's earnings at the time of his death.

BAIRD *v.* BIRSZTAN, (1906) 8 F. 438—Ct. of [Sess.

117. *Wife living apart from Husband — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—A woman, married in July, 1904, lived with her husband in Glasgow, and was supported by him till October, 1904, when, being out of work, he went to Dublin to seek employment. He obtained employment there from the respondent in January, 1905, and shortly afterwards was accidentally killed in the course of his employment. From the time the husband left Glasgow until his death he did not contribute anything to the support of his wife, who went to reside with her father in Glasgow, and was supported by him.

HELD (Fitzgibbon, L.J., dissenting)—that the widow and her child, born after her husband's death, were wholly dependent upon the earnings of the workman at the time of his death within the meaning of sect. 7, sub-sect. 2 (a).

QUEEN *v.* CLARKE, [1906] 2 Ir. R. 135— [C. A. (Ir.)

118. "*Wholly dependent upon his Earnings*" *—Workman receiving Contributions from Son — Widow — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 ; *Sched.* I., *par.* 1 (*a*).]

Liability of Master for Injury to Servant—*Continued.*

—A widow and children of a deceased workman are none the less "dependants wholly dependent upon his earnings" within the meaning of Sch. I., par. 1 (a) (i.), of the Workmen's Compensation Act, 1897, because the workman has been enabled, by the receipt of moneys from his wage-earning sons or of moneys coming to him from other channels, to augment the fund out of which he has maintained his household. If, however, a workman's wife has, at the time of his death, independent means of support of any kind, which are not derived through him and which he could not have appropriated without her consent, such as private income or earnings of her own, the case is one of partial dependence on her husband's earnings.

SENIOR *v.* FOUNTAINS & BURNLEY, LD., [1907] [2 K. B. 563; 76 L. J. K. B. 928; 97 L. T. 562; 23 T. L. R. 634—C. A.

119. *Wife not receiving Support from Husband — Presumption — Child en ventre sa mère — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2; *Sched. I., par.* 1 (*a*).]—There is a presumption that a wife is dependent upon her husband within the meaning of the Workmen's Compensation Act, 1897. That presumption can be rebutted, but it is not rebutted by the mere fact that the husband has deserted his wife, or by the fact that the husband was not contributing towards his wife's maintenance at the time of his death; nor is it sufficient to rebut the presumption that the wife was supported by her relatives, or that she was earning small sums by her own work, or was in the workhouse at the time of his death.

A child *en ventre sa mère* at the time of the husband's death and subsequently born alive is to be deemed to have been born at the time of the death, and is therefore a "dependant" within the Workmen's Compensation Act, 1897.

WILLIAMS *v.* OCEAN COAL CO. [1907] 2 K. B. [422; 76 L. J. K. B. 1073; 97 L. T. 150; 23 T. L. R. 584—C. A.

120. *Granddaughter — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—A workman had for eight years supported A., a child of his deceased daughter. The girl's father had not been heard of during that time, and it was not known whether he was alive or dead; nor was anything known as to his parents. The workman was killed by an accident while at work, and left a son and daughter.

HELD—that A. was a dependant.

COOPER *v.* FIFE COAL CO., [1907] S. C. 564—[Ct. of Sess.

121. *Death of Dependant before Compensation Assessed—Right of Personal Representative—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 2, 7 (2), *Sched. I., cl.* 1 (a) (i.).]—A workman was killed by an accident arising out of and in the course of his employment. He left one dependant, his widow, who had been wholly dependent upon his earnings. The widow made a claim for compensation under the Workmen's Compensation Act, 1897, but before a request for arbitration was filed she died. Her administratrix thereupon commenced proceedings for arbitration under the Act, claiming to be entitled as administratrix to any sum which was due to the widow from the deceased man's employers. The county court judge made an award in her favour.

HELD—that the Act gave to the widow of the deceased workman, she having made a claim for compensation under the Act, a statutory right to receive from the deceased man's employers a sum of money ascertained by the Act, and that the statutory right to that ascertained sum passed to her personal representative.

O'Donovan v. *Cameron* ([1901] 2 Ir. R. 633, No. 103, *supra*) distinguished.

DARLINGTON *v.* ROSCOE & SONS, [1907] 1 K. B. [219; 76 L. J. K. B. 371; 96 L. T. 179; 23 T. L. R. 167—C. A.

122. *Separate Right from Workman—Workman going back to Work — Abandonment of Rights against Employer—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.*]—A collier, who was injured by an accident, by agreement with his employer was paid half the amount of his average weekly earnings during incapacity. He then returned to work, and was employed on different work in the same colliery, his former place having been filled up. Nothing was said about continuing the weekly payments or their cessation, but his wages were higher than they were before. He worked for about a year, when he died from the effects of the accident. His widow having claimed compensation under the Workmen's Compensation Act, 1897:—

HELD—(1) that there was no evidence that the workman by going back to work had agreed to abandon his rights against his employer, and that, therefore, his widow was entitled to compensation; and (2) that a workman's dependants had an independent right to claim compensation which the workman could not deprive them of, provided that the employer paid no more in all than the maximum sum as compensation.

WILLIAMS *v.* THE VAUXHALL COLLIERY CO., [LD., [1907] 2 K. B. 433; 76 L. J. K. B. 854; 97 L. T. 559; 23 T. L. R. 591—C. A.

(g) Indemnity.

123. *Indemnity by Person whose Negligence caused the Injury—Costs of Compensation Proceedings — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 6.]—Where an employer is entitled, under sect. 6 of the Workmen's Compensation Act, 1897, to indemnity from a third person in respect of compensation payable to a workman for an injury for which that third person is liable, the indemnity includes the costs of the compensation proceedings as well as the amount of the compensation awarded.

GREAT NORTHERN RY. CO. *v.* WHITEHEAD & [CO., LD., (1902) 18 T. L. R. 816—Darling, J.

Liability of Master for Injury to Servant— *Continued.*

124. *Accident caused by Negligence of Workman employed by Third Person—Liability of Third Person to Indemnify Employer—Agreement by Employer (after a Formal Claim) to pay Workman Compensation—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 6.*]—Where a workman in the course of his employment is injured by an accident caused by the negligence of a servant employed by a third person, and the workman formally claims compensation under the Workmen's Compensation Act, 1897, from his employer, and the employer agrees to pay him compensation, the employer is entitled to be indemnified by the third person under sect. 6 of the Act; such compensation, though the amount be assessed by agreement, is nevertheless paid "under the Act"; but *semble*, the third person may, when sued, in addition to denying his own liability, plead that the master was not in fact liable, or has agreed to pay an unreasonable sum.

THOMPSON & SONS *v.* NORTH EASTERN MARINE [ENGINEERING CO., LD., [1905] 1 K. B. 428; 72 L. J. K. B. 222; 88 L. T. 252; 19 T. L. R. 206—Kennedy, J.

125. *Undertaker—Sub-Contractor—Accident due to Head Contractor's Negligence—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), ss. 1, 4, 7.*]—A workman obtained an award of compensation against a contractor who had undertaken the erection of a building. The contractor then claimed to be indemnified by the workman's immediate employer, who had sub-contracted to do the ornamental carving.

HELD—that he was entitled to an indemnity.

Quære, what would have been his rights if the accident had been due, as was alleged, to his own negligence.

TOPPING *v.* BEHND, (1905) 5 F. 666—Ct. of Sess.

126. *Undertaker—Sub-Contractor—Right to Sue—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 1, sub-s. 3; s. 4.*]—The plaintiff was the contractor for the erection of a building, a portion of the work on which the defendant had sub-contracted with him to execute. While engaged on the work which the defendant had undertaken to execute a workman in the employment of the defendant was injured by an accident, and became entitled to claim compensation under the Workmen's Compensation Act, 1897. He gave notice of the accident to the plaintiff, who entered into an agreement with him to pay him a weekly sum during incapacity. The plaintiff thereupon brought an action in the High Court against the defendant, claiming indemnity from him under sect. 4 of the Act. The defendant contended that the plaintiff could only enforce his right to an indemnity by an arbitration under the Act and not by an action.

HELD—that the plaintiff was entitled to bring an action, and that the fact that the defendant was not a party to the agreement made no difference.

EVANS *v.* COOK, LANCASHIRE AND YORKSHIRE INSURANCE CO., LD., third parties, [1905] 1 K. B. 55; 74 L. J. K. B. 95; 53 W. R. 81; 92 L. T. 43; 21 T. L. R. 42—C. A.

127. *Acceptance of Terms by undertaking the Work—Building Contract—Sub-Contractor for Part of Work—Claims under Workmen's Compensation Act, 1897—Indemnity not signed by Sub-Contractor.*]—A contractor for the erection of a building agreed to employ sub-contractors selected by the architect to do certain parts of the work. The architect selected the defendant to do the carving work, and the contractor sent him a written order to execute the whole of the carving, the order concluding as follows: "You agree in accepting this order to sign and send per return of post the enclosed accident indemnity." The indemnity was to hold the contractor and any insurance company with whom he might be insured harmless against all claims under the Workmen's Compensation Act, 1897, by any person in the defendant's employment upon such work in respect of any accident. The defendant did not return any answer to the order, nor did he sign the indemnity form, but he went on with the work. An accident happened to a workman employed by him upon the work, for which the contractor had to pay compensation under the Workmen's Compensation Act, 1897. The contractor claimed indemnity from the defendant.

HELD—that the defendant executed the work upon the footing of the order given to him by the contractor and of the indemnity enclosed with it, and that he was liable to indemnify the contractor.

JOHN GREENWOOD, LD. *v.* HAWKINGS, (1905) [23 T. L. R. 72—Bigham, J.

See also Nos. 67, 331, 345, 349, 350, 357.

(h) Jurisdiction.

128. *Practice — Award "enforceable as a County Court Judgment"—Order of Committal—Judgment Summons—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), Sched. II. (8)—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.*]—The Workmen's Compensation Act, 1897, Sched. II. (8), provides that the memorandum of the compensation awarded by the arbitrator, when recorded as therein provided, "shall for all purposes be enforceable as a county court judgment."

HELD—that "enforceable as a county court judgment" means that all modes which a county court judge has for enforcing obedience to his judgments should be available to the person in whose favour the award operates, so that the debtor may be coerced into obeying by an order committing him to prison under sect. 5 of the Debtors Act, 1869.

BAILEY *v.* PLANT, [1901] 1 Q. B. 31; 70 L. J. Q. B. 63; 65 J. P. 49; 49 W. R. 143; 83 L. T. 459; 17 T. L. R. 48—C. A.

Liability of Master for Injury to Servant— *Continued.*

129. *Arbitration — Condition precedent to — Liability to pay, or Amount or Duration of Compensation — Weekly Payment during Incapacity of fifty per cent. of Average Weekly Earnings — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 3.]—A workman was incapacitated for work through an accident in the course of his employment. His employers at once began to pay him the maximum weekly payments provided for by sched. I., sect. 1 (b), of the Workmen's Compensation Act, 1897, under such circumstances, namely, one-half of the wages which he was earning previously to the accident. These payments continued for a period between five and six months, when a correspondence took place as to a settlement for a lump sum, and in the end the workman filed a request for arbitration.

HELD—that no question had arisen under sect. 1, sub-sect. 3 of the Workmen's Compensation Act, 1897, as to the liability to pay, the amount or duration of compensation: because, on the workman sustaining the injury, the employers commenced and continued to pay to him weekly all that he could possibly be entitled to by way of compensation under the Act; and that there was therefore no question for arbitration under the sub-section.

FIELD *v.* LONGDEN & SONS, [1902] 1 K. B. 47; [71 L. J. K. B. 120; 66 J. P. 291; 50 W. R. 212; 85 L. T. 571; 18 T. L. R. 65—C. A.

N.B.—See also *Jones* v. *Great Central Ry. Co.*, 18 T. L. R. 66—C. A., where the Court allowed the appeal on the same grounds as in the previous case.

130. *Death of Workman after Award of Weekly Sum—Right of Dependants to Compensation — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *Sched. I.* (a) (i.).]—Where an award of a weekly sum had been made to a workman who was injured by an accident, and some months afterwards he died, and his dependants applied for compensation under the Workmen's Compensation Act, 1897, claiming three years' wages after giving credit for the weekly payments already made to the workman:

HELD—that there was jurisdiction to entertain the claim.

O'KEEFE *v.* LOVATT, [1902] 18 T. L. R. 37—C. A.

131. *Accident happening in England — Employer Resident in Scotland — "District" — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. II.* cl. 9—*Workmen's Compensation Rules*, *r.* 15.]—A workman was injured by accident arising out of and in the course of his employment by the respondent Robertson, on a wharf, which was situate within the district of the Newport (Monmouth) County Court. The respondent Robertson was a domiciled Scotsman residing and carrying on business in Glasgow, and the workman resided in England.

HELD—that the county court judge of the district in which the workman resided had jurisdiction to hear and determine the workman's application for compensation under the Workmen's Compensation Act, 1897, as the words "if they reside in different districts" in cl. 9 of Sched. II. mean the districts of any Court of the United Kingdom which has jurisdiction under the Act: and that the procedure as to service of proceedings being effected by registered letter was applicable to the whole area which is within the ambit of the Act.

REX *v.* OWEN, [1902] 2 K. B. 436; 71 L. J. K. B. [770; 87 L. T. 298; 18 T. L. R. 701—Div. Ct.

132. *Assessment of—Able to Work at old Wages and Unwilling to do so—Right to Nominal Award — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* [1].]—A boy lost a finger by an accident, and was temporarily incapacitated; during this period his employers paid him his full weekly wages. Subsequently they offered to take him back, and on his refusal to return they discontinued the payments.

The boy then took other work, but made a claim against his late employers under the Act of 1897. He admitted that he was able to do all his old work.

HELD—that he was not entitled to insist upon a nominal award in his favour in order to preserve his rights.

HUSBAND *v.* CAMPBELL, (1904) 5 F. 1146—[Ct. of Sess.

133. *Agreement to Compound Payments—Misrepresentation — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37)—*Setting Aside Agreement.*]—The appellant, who had been employed by the respondents, sustained an accident for which he was in receipt of 18*s.* per week under a recorded agreement. He was paid this sum for nearly a year prior to September 3rd, 1903. On that date he was induced by the manager of an insurance company with whom the respondents were insured to accept £20 in full satisfaction. In an action for rescission, it was proved that the appellant could never work again, whereas the manager had led him to believe that the doctor had reported that he could resume work in October.

HELD—that on the facts there had been misrepresentation, and that the agreement should be set aside.

CALEDON SHIPBUILDING CO. *v.* CROSSAN, [1906] W. N. 104—H. L. (Sc.)

134. *Agreement — Unregistered Agreement — Stoppage of Payments on Ground that Incapacity has Ceased — Arbitration Proceedings by Workman — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37, *Sched. II.* 8).]—A firm of employers admitting their liability to pay compensation to A., agreed to pay him 12*s.* 6*d.* a week "during the period of his incapacity." The agreement was not registered; but the employers made the agreed payments down to December 14th, 1903, when they ceased to make payments, alleging that A.'s incapacity had ceased, and offering him work at full wages, which he declined. In March, 1905, A. instituted arbitration pro-

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ceedings, asking that the employers should pay him 12*s.* 5*d.* a week from December 14th, 1903, until further order of the Court.

The sheriff, as arbitrator, found that A.'s incapacity had ceased by December 14th, 1903, but ordered the employers to pay to A. 12*s.* 5*d.* a week from December 14th, 1903, to the date of his award, and held that the employers were not liable for any further compensation.

HELD—that the award could not be supported, for if A.'s application was made under the agreement, the sheriff, as arbitrator, had no power to enforce the agreement as to arrears of compensation due under it; and secondly, if the application was for the purpose of settling compensation by arbitration, A. was not entitled to the compensation awarded, the sheriff having found in fact that his incapacity had ceased by December 14th, 1903.

Quære, whether an unrecorded agreement to pay compensation under the Act remains in force until formally terminated or modified in terms of the Act.

COLVILLE *v.* TIGUE, (1906) 8. F. 179—[Ct. of Sess.

See also Nos. 271, 300, 305, 308.

(i) Medical Examination.

135. *Workman Refusing — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *Sched. I.* (2).]—Where a workman in receipt of compensation is certified by his employer's medical praetitioner to be fit for work, and he is dissatisfied with such certificate, he is not bound to submit to an examination by a "medical referee."

His refusal is not sufficient to disentitle him to continue to receive compensation. If, however, the employers apply to have the award reviewed, the arbitrator may send the workman to a "referee" to report on his condition.

Davidson v. *Summerlee and Mossend Iron Co.* (5 F. 991—Ct. of Sess.) questioned.

NIDDRIE AND BENHAM COAL CO. *v.* M'KAY, [(1904) 5 F. 1121—Ct. of Sess.

136. *Examination by Employer's Medical Practitioner — Refusal to submit to further Examination by Medical Referee—Suspension of Weekly Payments — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *Sched. I.* (11).]—By Sched. I. (11) of the Workmen's Compensation Act, 1897, a workman receiving weekly payments under the Act shall, if so required by the employer, submit himself for examination by a medical practitioner provided by the employer, but if the workman objects to an examination by that medical practitioner, or is dissatisfied by his certificate, he may submit himself for examination to one of the medical practitioners appointed for the purposes of the Act, and the certificate of that medical practitioner shall be conclusive evidence of the condition of the workman. "If the workman refuses to submit himself to such examination . . . his right to such weekly payments shall be suspended until such examination has taken place."

HELD—that the words "such examination" refer to the examination to which the employer may require the workman to submit, namely, the examination by the employer's medical practitioner, or, if the workman prefers it, by one of the medical practitioners appointed under the Act, and not to the examination to which the workman has the option of submitting if he is dissatisfied by the certificate of the employer's medical practitioner; and, therefore, that if a workman has submitted himself for examination by the employer's medical practitioner and is dissatisfied by his certificate, he cannot be required, as a condition preeedent to his right to claim further compensation, to submit himself for examination by one of the medical practitioners appointed under the Act.

NEAGLE *v.* NIXON'S NAVIGATION CO., LD., [EDWARDS *v.* GUEST, KEEN AND NETTLEFOLDS, LD., [1904] 1 K. B. 339; 73 L. J. K. B. 165; 68 J. P. 297; 52 W. R. 356; 90 L. T. 49; 20 T. L. R. 160—C. A.

137. *Reviewing Award—Weekly Payments—No Examination by Medical Referee—Effect of.*]—The employers of a workman, who had sustained injuries, agreed to pay him 13*s.* 3*d.* weekly as compensation under the Act, but no memorandum of the agreement was recorded. The workman, after being in receipt of these weekly payments for nearly a year, on the requisition of the employers, submitted himself to examination by a medical practitioner provided and paid by them. A certificate having been granted by that medical practitioner, the workman was dissatisfied therewith, but did not submit himself for examination to one of the medical practitioners appointed under the Act, whereupon the employers discontinued the weekly payments. The workman then instituted an arbitration under sect. 1, sub-sect. 3 of the Act.

HELD—that he was entitled to do so, notwithstanding his failure to submit himself to one of the medical practitioners appointed under the Act.

Niddrie and Benham Coal Co. v. *M'Kay* (5 F. 1121, No. 135, *supra*), and *Neagle* v. *Nixon's Navigation Co.* ([1904] 1 K. B. 339; 73 L. J. K. B. 165; 68 J. P. 297; 52 W. R. 3561; 90 L. T. 49; 20 T. L. R. 160—C. A., No. 136, *supra*) approved and followed.

Davidson v. *Summerlee and Mossend Iron Co.* (5 F. 991) disapproved.

STRANNIGAN *v.* BAIRD, (1905) 6 F. 784—Ct. of [Sess.

138. *Reviewing Award—Medical Practitioner appointed under Act—Finality of Certificate—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (11).]—Where employers apply for a reduction of weekly payments made by them to an injured workman, and the workman is examined by a medical practitioner appointed

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under the Act, the certificate of such practitioner is conclusive evidence of the man's condition.

Although, however, the certificate is conclusive as to what work the man is capable or incapable of doing, the employers may give evidence as to his ability to get or refusal to accept work for which he is certified to be capable.

BRYCE & Co. *v.* CONNOR, (1905) 7 F. 193—Ct. of [Sess.

139. *Obstruction of Medical Examination—Workman going Abroad—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (11), (12).]—A workman in receipt of weekly payments under the Workmen's Compensation Act, 1897, went to Australia without notifying his employers or leaving his address. The employers having applied for a review of the payments :—

HELD—that the payments should be suspended on the ground that he was "obstructing" medical examination.

FINNIE & SON *v.* DUNCAN, (1905) 7 F. 254—[Ct. of Sess.

140. *Reviewing Award—Obstruction of Medical Examination—Workman gone to Ireland—Workman's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (11).]—An injured workman in receipt of weekly payments as compensation under the Act of 1897 from employers in Scotland twice submitted to examination by a medical practitioner provided by his employers, and was certified not to have recovered. He then went to live with his father in Ireland.

Two months later the employers called upon him to submit himself for another examination in Glasgow. He refused to do so, unless his expenses were paid ; but offered to submit to an examination by any doctor in the neighbourhood of his residence.

HELD—that he had not refused to submit to examination, or obstructed the same within the meaning of Sched. I. (11).

Finnie & Son v. *Duncan* (*supra*) distinguished.

BAIRD & Co., LD. *v.* KANE, (1905) 7 F. 461—[Ct. of Sess.

See also Nos. 84, 303.

(j) On, In, or About.

(1) *Agriculture.*

141. *"Agricultural" Servant—Accident away from Master's Premises—Workmen's Compensation Acts*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *and* 1900 (63 & 64 Vict. *c.* 22), *ss.* 1, 2.]—The Workmen's Compensation Act, 1900, applies to an accident to a workman employed in agriculture, even though the accident does not occur in, on, or about his employer's premises ; so, where such a workman was exercising his master's horse at a distance from home, and was killed, the master was held liable.

SMITHERS *v.* WALLIS, [1903] 1 K. B. 200 ; 72 [L. J. K. B. 57 ; 67 J. P. 381 ; 51 W. R. 261 ; 87 L. T. 556 ; 19 T. L. R. 111—C. A.

142. *Travelling Threshing Machine—Accident in Transit—Workmen's Compensation Act*, 1900 (63 & 64 Vict. *c.* 22), *s.* 1.]—A workman employed as assistant thresher and engine driver by the owner of a travelling threshing machine, drawn and driven by a traction engine, was injured while the machine was being drawn from a farm where threshing had been finished to another farm where he was to thresh on the following day.

HELD—that the workman was entitled to compensation under the Act of 1900, either on the ground that he was at the time being employed as a thresher, or on the ground that he was a person mainly employed in threshing, but occasionally in other work.

PROCTOR *v.* CUMISKY, (1905) 6 F. 832—Ct. [of Sess.

143. *Mainly employed in Agriculture—Employment on Farm—Workmen's Compensation Act*, 1900 (63 & 64 Vict. *c.* 22), *s.* 1, *sub-ss.* 1; 3.] —The applicant, who was a skilled carpenter, was employed on a farm. He used to keep the fences and gates in repair on the farm, and did other carpentering work. For two or three months in the year he acted as gamekeeper on the farm, and he also assisted at the hay and corn harvests, and he made corn and straw ricks, and did some carting, and he sometimes helped with the threshing. The applicant, having been injured by an accident, claimed compensation under the Workmen's Compensation Acts, 1897 and 1900. The county court judge came to the conclusion that the applicant was employed in agriculture within sect. 1 of the Act of 1900, and made an award in his favour.

HELD—that there was evidence upon which the judge could so find.

SMITH *v.* COLES, [1905] 2 K. B. 827 ; 54 W. R. [81 ; 22 T. L. R. 5 ; 75 L. J. K. B. 16 ; 93 L. T. 754—C. A.

Buildings (*Statutory*).

(A) *Construction and Repair.*

144. *Building not exceeding 30 feet in Height—Machinery — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—"If machinery driven by steam, water, or other mechanical power, is being used for the purpose of construction, repair, or demolition of a building, it need not exceed 30 feet in height" in order that a workman injured at any such operation, may claim compensation in terms of the Workmen's Compensation Act, 1897.

MURNIN *v.* CALDERWOOD, (1899) 36 S. L. R. [648—Ct. of Sess.

145. *Building less than 30 feet in Height, on which Machinery is used—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—A building "on which machinery driven

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by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof," need not exceed 30 feet in height in order to come within sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897.

MELLOR *v.* TOMKINSON & Co., [1899] 1 Q. B. [374; 68 L. J. Q. B. 214; 63 J. P. 55; 47 W. R. 240; 79 L. T. 715; 15 T. L. R. 142—C. A.

146. *Completion—Removal of Scaffolding—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 7, *sub-s.* 1.]—In order to build a chimney shaft exceeding 30 feet in height it was necessary to go down to a lower level than that on which the shaft was to stand, and to erect a scaffolding on the lower level up to the foundations of the shaft for the purpose of bringing up materials for the construction of the shaft. It was necessary afterwards to get down the scaffolding outside as well as inside the shaft. The day before the accident the construction of the brickwork of the shaft had been completed, and the scaffolding inside the brickwork and the gear used in the construction had been removed. The shaft was in actual use. The respondent was engaged in removing gear, which had been used in the construction of the shaft, from the staging erected outside the shaft, when he was injured.

HELD—that the accident arose in the course of employment on a building exceeding 30 feet in height, which was "being constructed by means of a scaffolding," and that the construction was not finished until the scaffolding was taken down, and that the respondent was therefore entitled to compensation under the Workmen's Compensation Act, 1897.

FRID *v.* FENTON, (1900) 69 L. J. Q. B. 437; 82 [L. T. 193; 16 T. L. R. 267—C. A.

147. *Whitewashing—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—A workman was employed in a house exceeding 30 feet in height, and at the top of the staircase there was a structure which was admittedly a scaffold, and on this the workman was standing for the purpose of whitewashing the ceiling of the staircase, and while so employed he fell and was killed. His widow claimed compensation.

HELD—the whitewashing was a repair within the meaning of sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897.

Wood v. *Walsh & Sons* ([1899] 1 Q. B. 1009; 68 L. J. Q. B. 492; 63 J. P. 212; 47 W. R. 504; 80 L. T. 345; 15 T. L. R. 279—C. A., No. 156, *infra*), is over-ruled by *Hoddinott* v. *Newton, Chambers & Co., Ld.* ([1901] A. C. 49; 70 L. J. Q. B. 150; 49 W. R. 380; 84 L. T. 1; 17 T. L. R. 134—H. L. (E.)). (*See* No. 159, *infra*).

DREDGE *v.* CONWAY, JONES & Co., [1901] 2 K. B. [42; 70 L. J. Q. B. 494; 49 W. R. 518; 84 L. T. 345; 17 T. L. R. 355—C. A.

148. *Measuring up Plumbing Work—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A contractor for the erection of a factory sub-contracted with another contractor for the execution by the latter of the plumbing work of the building. Under the contract it was necessary to measure up the plumbing work when finished. After the plumbing work had been completed, but while the building, which exceeded 30 feet in height, was still being constructed by means of a scaffolding, a workman who was in the employment of the plumbing contractor, and who had been employed on the plumbing work, was sent by him to measure up the work. While engaged in measuring it up, he was injured by an accident.

HELD—that the measuring up of the plumbing work, being a necessary part of the work, was part of the construction of the building, and that, therefore, the workman was entitled to compensation under the Workmen's Compensation Act, 1897.

PLANT *v.* WRIGHT & Co., [1905] 1 K. B. 353; [74 L. J. K. B. 331; 53 W. R. 358; 92 L. T. 720; 21 T. L. R. 217—C. A.

149. *Temporary Wooden Structure—Crane Platform for Building Operations—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—A steam crane platform was being erected in connection with certain building operations. The platform was constructed of timber, supported by three long wooden legs, each leg consisting of four uprights connected together by crosspieces of wood nailed to the uprights so as to form a hollow square, each side measuring 4½ feet. The legs were let into the ground, and where so let in were surrounded by loose bricks to keep them firm. In order to construct the platform, planks were placed on the crosspieces and ladders were placed on the planks. The ladders and planks were the scaffolding by means of which the platform was erected. The platform was intended to carry a crane for the purpose of raising materials for use in the permanent building, and when the latter was completed the platform would be removed. A workman, who was employed in the erection of the crane platform, was injured by an accident arising out of and in the course of his employment. At the time the erection was over 30 feet in height, though the permanent building had not reached that height. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, the county court judge found that the structure was a "building" within sect. 7, sub-sect. 1, and that the workman was entitled to compensation.

HELD—that it was a question of fact whether a particular structure was a "building" within the Act, and that the Court could not hold as a matter of law that a temporary wooden structure such as the crane platform could not be a "building."

ALYWARD *v.* MATTHEWS, [1905] 1 K. B. 343; [74 L. J. K. B 336; 53 W. R. 292; 92 L. T. 189; 21 T. L. R 196—C. A.

See also No 159.

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(B) *Exceeding 30 feet.*

150. *Building in course of erection not yet 30 feet high*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—Sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897, enacts "This Act shall apply only to employment . . . on, in or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished."

HELD—that the Act does not apply to employment on a building in course of erection which, at the time of the accident, does not exceed 30 feet in height, but which, when completed, will exceed that height.

BILLINGS *v.* HOLLOWAY, [1899] 1 Q. B. 70; 68 [L. J. Q. B. 16; 47 W. R. 105; 79 L. T. 396; 15 T. L. R. 53—C. A.

151. *Internal Communication between Building less than, and one exceeding, 30 feet high*—*Demolition*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—There was a public-house called "The Bull," which was more than 30 feet high. There were two low buildings or shops on one side of it which were not nearly so high. At the time of the accident to the respondent the two shops, one of which had been turned into a beerhouse, were being pulled down and demolished, and the respondent was at work engaged in the demolition of the shops. The beerhouse communicated with "The Bull," there being an entrance through "The Bull."

HELD—that though a connection had been made internally between the two buildings, that did not make the less a part of the greater; that the mere fact that the public-house business was carried on in both buildings did not make both 30 feet high; and that the workman was not entitled to compensation under the Workmen's Compensation Act, 1897.

RIXSOM *v.* PRITCHARD AND RENWICK, [1900] [1 Q. B. 800; 69 L. J. Q. B. 494; 82 L. T. 186; 16 T. L. R. 250—C. A.

152. *Party-wall*—"*Undertakers*"—"*Ancillary or Incidental to*"—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 4, 7.]—The appellants, who were builders, entered into a contract to demolish and rebuild a house which exceeded 30 feet in height. They then made a sub-contract with one Clements to do the work of demolition. A workman in the employment of Clements was killed by an accident while engaged in the work of demolition, the building at that time being only 11 feet in height, with the exception of the party-wall, which remained standing, and exceeded 30 feet in height. It appeared that the appellants habitually entered into contracts to demolish and rebuild houses, but they never did the work of demolition themselves, always sub-contracting with another person to do that part of the work. In proceedings by the widow of the deceased man to recover compensation from the appellants under the Workmen's Compensation Act, 1897, the county court judge found that the house at the time of the accident exceeded 30 feet in height, and that the work of demolition was not merely ancillary to but was part of the business of the appellants, and he held that they were liable as "undertakers" to pay compensation under sect. 4 of the Act.

HELD—that there was evidence upon which the county court judge was justified in finding that the house at the time of the accident exceeded 30 feet in height, as the party-wall, which exceeded that height, was standing; and, further, that the work of demolition was part of and not merely ancillary to the business of the appellants, and that they were therefore liable as "undertakers" under sect. 4.

KNIGHT *v.* CUBITT & CO., (1901) 50 W. R. 113; [18 T. L. R. 26; [1902] 1 K. B. 31; 71 L. J. K. B. 65; 66 J. P. 52; 85 L. T. 526—C. A.

153. *Building being constructed "by Means of a Scaffolding"*—*Questions of Fact*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—The question whether a building exceeds 30 feet in height in proceedings under the Workmen's Compensation Act, 1897, is one of fact for the determination of the arbitrator. The question whether a building was at the time of the accident being constructed by means of a scaffolding in terms of sect. 7 (1) of the Workmen's Compensation Act, 1897, is a question of fact.

HALSTEAD *v.* ALEXANDER THOMSON & SONS, [(1901) 3 F. 668—Ct. of Sess.

154. *Measuring from Inside Level—Footings*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—In dealing with the question before the county court judge the Appeal Court can only interfere if there was no evidence to support his finding of fact, or if the judge has misdirected himself in point of law.

In considering whether the building on which a workman was at work exceeded 30 feet in height, the period to which attention is to be directed is the time of the accident.

Billings v. *Holloway* ([1899] 1 Q. B. 70; 68 L. J. Q. B. 16; 47 W. R. 105; 79 L. T. 396; 15 T. L. R. 53—C. A., No. 150, *supra*) followed.

Where at the time of the accident there is some evidence that, measuring from the inside level of the buildings—the top of the footings—the building exceeds 30 feet in height, the award in favour of the workman can be upheld.

MCGRATH *v.* NEILL & SONS, [1902] 1 K. B. 211; [71 L. J. K. B. 58; 66 J. P. 180; 50 W. A. 162; 18 T. L. R. 36—C. R.

155. *Construction of Addition to Building*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—The owners of an electrical generating station which exceeded 30 feet in height, entered into a contract whereby the contractor agreed to build an extension of the generating station. The new building was to be alongside the old building, and the outside wall of

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the old building was to have openings made in it as a means of communication between the buildings. A workman employed by the contractor on the new building was injured by an accident. At the time of the accident, most of the footings for the walls had been laid and they were in contact with the wall of the existing building, and the new building, which was not then 30 feet in height, was being constructed by means of a scaffolding. No opening had been made in the wall of the existing building.

HELD—affirming the decision of the county court judge, that the workman was at the time of the accident employed about a building exceeding 30 feet in height, and was therefore entitled to compensation under the Workmen's Compensation Act, 1897.

HARTLEY *v.* QUICK, [1905] 1 K. B. 359 ; 74 L. J. [K. B. 257 ; 92 L. T. 191 ; 21 T. L. R. 207—C. A.

(C) *Scaffolding.*

156. *Painting — Ladders — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—By sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897, the Act is to apply to employment on, in, or about any building exceeding 30 feet in height which is either being "constructed or repaired by means of a scaffolding."

HELD—that painting the outside of a building exceeding 30 feet in height, by means of a ladder with a plank, one end of which was tied to a rung, and the other end rested on a window sill at the other, including the preparation of the surface for painting, is not "repairing" the building by means of a "scaffolding" within the meaning of sect. 7, sub-sect. 1, of the Act.

WOOD *v.* WALSH & SONS, [1899] 1 Q. B. 1009 ; [68 L. J. Q. B. 492 ; 63 J. P. 212 ; 47 W. R. 504 ; 80 L. T. 345 ; 15 T. L. R. 279—C. A.

Note.—This case has been overruled by *Hoddinott* v. *Newton Chambers*, No. 159, *infra*.

157. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—The building of a house exceeding 30 feet in height was so far completed that the roof was on and the outside scaffolding was taken down, but the inside plastering work was not completed. To enable the plasterers, who were in the employment of the builder, to reach the ceilings and upper parts of the walls of rooms, movable trestles, with boards placed across the top, were used for the plasterers to stand upon. While some of the plasterers were walking on the trestles and boards, another plasterer was plastering the walls of the top landing, not standing upon trestles and boards, and while so working, he fell over the stairs and was killed.

The county court judge found that the arrangement of trestles and boards was a "scaffolding" within the meaning of sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897, and that, therefore, the building was, at the time of the accident, being constructed by means of a scaffolding.

HELD, by A. L. Smith and Rigby, L.JJ. (Collins, L.J., dissenting)—that there was evidence upon which the county court was entitled to find that the arrangement of trestles and boards was a "scaffolding" within the meaning of the section.

MAUDE *v.* BROOK, [1900] 1 Q. B. 575 ; 69 L. J. [Q. B. 322 ; 64 J. P. 181 ; 48 W. R. 290 ; 82 L. T. 39 ; 16 T. L. R. 164—C. A.

158. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A ladder used in the ordinary way by a painter in painting beams in a building over 30 feet in height is not a "scaffolding" within the meaning of the Workmen's Compensation Act, 1897, sect. 7.

MCDONALD *v.* HOBBS AND SAMUEL, (1899) 2 F. [3—Ct. of Sess.

159. "*Construction*" — "*Repair*" — *Mixed Question of Fact and Law—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—The London General Omnibus Company employed builders to erect some large stables for them. Those stables were erected according to the original design and specification some five or six months before the time of the accident, and had been taken over and used by the omnibus company for stabling their horses. It was thought desirable to put in some iron stays in order to stiffen the buildings and prevent vibration, and the defendants were employed by the omnibus company to do the work. The deceased workman was, at the time of the accident, standing on a temporary structure set up inside the building, consisting of three planks placed on two trestles and resting on ledgers, the planks being 8 feet above the ground, and fell while lifting an iron stay, and was crushed to death by the heavy stay falling upon him. It was agreed that the building exceeded 30 feet in height. The questions arose (1) whether the work upon which the deceased was employed when he met with the injury was a work either of construction or repair ? (2) whether the structure from which he fell was a "scaffolding" within the meaning of sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897 ?

HELD—that (1) the words "construction" and "repair" could not be limited to the construction and repair of a building "as a whole," and that putting the iron stays into the stables was "construction" within the meaning of the Act ; (2) the structure was "a scaffolding" within the meaning of sect. 7.

The decision of the C. A. ([1899] 1 Q. B. 1018 ; 68 L. J. Q. B. 495 ; 47 W. R. 499 ; 80 L. T. 558 ; 15 T. L. R. 299) reversed (Lords Shand and Lindley dissenting).

HODDINOTT *v.* NEWTON, CHAMBERS & CO., LD., [1901] A. C. 49 ; 70 L. J. Q. B. 150 ; 49 W. R. 380 ; 84 L. T. 1 ; 17 T. L. R. 134—H. L. (E.).

160. *Painting and Whitewashing — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—The word "repair" in

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sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897, may include painting, whitewashing, and dubbing the ceiling and walls of the interior of a building, where the painting and whitewashing is portion of the work necessary to finish the building. "Scaffolding" includes an internal staging arranged with planks resting on the steps of a ladder and upon one of the roof principals, in the centre of a room.

The plaintiff was engaged as a labourer at the Royal Barracks, Dublin, assisting in carrying out a contract made with the War Office for the periodic painting of a portion of the building. The work consisted of painting, whitewashing, and plastering the old canteen block in the Royal Barracks, a building more than 30 feet high. The plaintiff, at the time of the accident, was engaged in dubbing the ceiling to prepare it for whitewashing. To give him access to the ceiling, a ladder was placed leaning against one of the walls, and a plank resting on one of the rounds was thrown across the further end, resting upon one of the roof principals in the centre of the room, at such a height as to enable the man to work on the ceiling. The ladder slipped, and the plaintiff fell to the floor and was injured.

HELD (affirming the decision of the Recorder of Dublin)—that the plaintiff was engaged in employment on a building which was being repaired by means of a scaffolding.

Wood v. *Walsh & Sons* ([1899] 1 Q. B. 1009; 68 L. J. Q. B. 492; 63 J. P. 212; 47 W. R. 504; 80 L. T. 345; 15 T. L. R. 279—C. A., No. 156, *supra*) dissented from.

REDDY *v.* BRODERICK, [1901] 2 Ir. R. 328 [—C. A.

161. *Arrangement of Trestles and Planks—Question of Fact—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—A man who was plastering in a house by means of an arrangement of trestles and boards sustained injuries. The county court judge appointed an arbitrator to settle the matter. The arbitrator found that the arrangement of trestles and planks was not a scaffolding.

HELD—that the county court judge could not overrule the arbitrator on a question of fact any more than the C. A. could overrule the county court judge on a like question, and that whether a particular structure is a scaffolding is a question of fact.

Maude v. *Brook* ([1900] 1 Q. B. 575; 69 L. J. Q. B. 322; 64 J. P. 181; 48 W. R. 290; 82 L. T. 39; 16 T. L. R. 164—C. A., No. 157, *supra*) followed.

FERGUSON *v.* GREEN, [1901] 1 Q. B. 25; 70 L. J. [Q. B. 21; 64 J. P. 819; 49 W. R. 105; 83 L. T. 461; 17 T. L. R. 41—C. A.

162. *Ladder and Crawling-Board on Roof—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—A bricklayer was employed by the respondent, a builder, upon the repair of a roof of a building exceeding 30 feet in height, and was injured by an accident arising out of and in the course of his employment. The bricklayer had to be lifted above the ground and to be given a secure foothold while at work, and the most convenient contrivance that could be used for this purpose was a crawling-board. This was a plank about 20 feet long, with strips of wood nailed across it at intervals to afford a foothold, and another strip of wood was nailed on at the upper and lower side of the plank, which, when pushed over the ridge, kept the crawling-board in its place. At the time of the accident one man went up a ladder carrying the upper end of the crawling-board in his hand; another man followed him holding the lower end of the crawling-board; they got the crawling-board on to the roof, and if they had simply pushed it up the sloping roof, the slates at the ridge of the roof would have been pushed off. The man in advance, who was going to use the crawling-board for the purpose of his work on the roof, had to reach the ridge in order to adjust it; he therefore went up the crawling-board while the man on the ladder had to steady the crawling-board at its lowest end, and in some measure to lift it, and while this was being done the crawling-board slipped and the applicant fell from the roof and was injured.

HELD (Stirling, L.J., dissenting)—that the arrangement in question was "scaffolding" within the meaning of the Workmen's Compensation Act, 1897, s. 7.

VEAZEY *v.* CHATTLE, [1902] 1 K. B. 494; 71 [L. J. K. B. 252; 66 J. P. 389; 50 W. R. 263; 85 L. T. 574; 18 T. L. R. 99—C. A.

163. *Ladder—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—The appellant, a workman, was employed by the respondent in the work of executing certain repairs to the roof of a house, and while he was carrying slates up a ladder placed against the house, one end of which rested on the ground and the other on the parapet of the house, he fell from the ladder and sustained the injuries in respect of which compensation was claimed. It was admitted that the house was over 30 feet in height, that it was being repaired by means of a ladder, and that he fell from it a distance of over 30 feet. The county court judge found as a fact on these admissions that the ladder was not a "scaffolding" within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 1.

HELD—that unless the C. A. could say, as a matter of law, that a ladder used under the conditions which existed in this case must necessarily be a "scaffolding," they could not reverse the county court judge's decision.

MARSHALL *v.* RUDEFORTH, [1902] 2 K. B. 175; [71 L. J. K. B. 781; 66 J. P. 627; 50 W. R. 596; 86 L. T. 752; 18 T. L. R. 649—C. A.

164. *Ordinary Painter's Steps — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (1).]—A workman was engaged in painting a wall

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some 11 feet high, and for the purpose of his work he was standing upon a pair of ordinary steps, with ten flat steps and a board on the top for a man to stand upon. The steps slipped, and he was injured.

HELD (Stirling, L.J., dissenting)—that there was evidence on which the county court judge might find the steps to be a "scaffolding" within sect. 7 (1) of the Workmen's Compensation Act, 1897.

Hiddnott v. *Newton, Chambers & Co.* ([1901] A. C. 49; 70 L. J. K. B. 150; 49 W. R. 380; 84 L. T. 1; 17 T. L. R. 134—H. L., No. 159, *supra*).

Veazey v. *Chattle* ([1902] 1 K. B. 494; 71 L. J. K. B. 252; 66 J. P. 389; 50 W. R. 263; 85 L. T. 574; 18 T. L. R. 99—C. A., No. 162, *supra*).

Marshall v. *Rudeforth* ([1902] 2 K. B. 175; 71 L. J. K. B. 781; 66 J. P. 627; 50 W. R. 596; 86 L. T. 752; 18 T. L. R. 649—C. A., No. 163, *supra*) referred to and considered.

ELVIN *v.* WOODWARD & Co., [1903] 1 K. B. [838; 72 L. J. K. B. 468; 67 J. P. 413; 51 W. R. 518; 88 L. T. 671; 19 T. L. R. 410 —C. A.

165. *Ladder—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (1).]—A workman who was silicating the wall of a house over 30 feet in height fell from his ladder and was killed. Such work is usually done from a cradle or swinging scaffolding, but a ladder is sometimes used where part only of a facade is being treated. There was no evidence of a ladder being used otherwise than in the ordinary way.

HELD (Ld. Trayner dissenting) — that the ladder could not be regarded as a "scaffolding" within the meaning of the Act of 1897.

Per Ld. Trayner: It was under the circumstances a scaffolding *pro hac vice*.

CAMPBELL *v.* SILLARS, (1904) 5 F. 900—Ct of [Sess.

166. *Ladder—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (1).]—The applicant was injured by accident while whitewashing the interior of a building which exceeded 30 feet in height. The workmen engaged upon the work used a ladder by placing it against the wall and standing or sitting on the rungs of it for the purpose of applying the whitewash. Upon a claim for compensation under the Workmen's Compensation Act, 1897, the county court judge found as a fact that the ladder so used was not a "scaffolding" within the meaning of sect. 7 (1) of the Act.

HELD—that it could not be said as a matter of law that the ladder must be a "scaffolding" within the meaning of the Act, and that the finding of the county court judge was conclusive.

CROWTHER *v.* WEST RIDING WINDOW CLEAN- [ING CO., [1904] 1 K. B. 232; 73 L. J. K. B. 71; 68 J. P. 122; 52 W. R. 374—C. A.

167. *Ladder used for Workmen to stand upon —Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—A workman who was employed on the construction of a building exceeding 30 feet in height was standing upon a ladder for the purpose of doing some work, when he fell and was killed. The ladder had been used before on the same day for the same purpose. Apart from the ladder there was no scaffolding used in the construction. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, the county court judge found that, as the ladder was at the time being used, and had before been used, as a place upon which a man could stand to do some work which was necessary in the building, it was a scaffolding, and he made an award for compensation.

HELD—that the ladder as used was capable of being a scaffolding, and that therefore the award of the county court judge must stand.

A practical direction upon the question whether a ladder alone can be a scaffolding is that a ladder used exclusively for the purpose of giving access to a particular place ought not to be held to be a scaffolding, but that a ladder used throughout the work as a standpoint from which a workman might carry on his work might properly be held to be a scaffolding.

O'BRIEN *v.* DOBBIE & SON, [1905] 1 K. B. 346; [74 L. J. K. B. 268; 53 W. R. 374; 92 L. T. 721; 21 T. L. R. 218—C. A.

168. *Not Erected by Employer—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—Certain work of construction was being done under a contract to a building exceeding 30 feet in height by means of a scaffolding which the contractor erected. Another contractor was doing certain woodwork alterations in the building under an independent contract with the owner, which did not require the use of a scaffolding, and none was supplied by him. A workman in the employment of the woodwork contractor was injured by an accident while engaged on the woodwork of the building. It appeared that the workman had previously made some use of the scaffolding as a matter of convenience, but it was in no way necessary for his work, and at the time of the accident he was not using it. In proceedings against his employer to assess compensation under the Workmen's Compensation Act, 1897,

HELD—that it was not necessary that the scaffolding should have been put up by the undertakers in whose employment the workman was; that it was sufficient if the building was being constructed or repaired by means of a scaffolding, and that the workman was entitled to compensation.

FLETCHER *v.* HAWLEY, (1905) 21 T. L. R. 191— [C. A.

See also No. 153.

(3) *Engineering Work.*

169. *Harbour—Steam Dredger and Barge—Definite Locality—Workmen's Compensation Act*,

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1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-ss.* 1, 2.]—A workman was employed on a steam dredger in a harbour, part of his duty being to take a hopper or a barge filled with mud which had been dredged up, a mile and a half out to sea and to deposit the mud there. The workman, while depositing the mud a mile and a half out at sea, was knocked by the handle of a windlass into the well of the barge, and went down with the mud into the sea and was drowned.

HELD—that (assuming that the work carried on in the steam dredger constituted "engineering work" within sect. 7, sub-sects. 1, 2, of the Workmen's Compensation Act, 1897) the workman was not killed "on or in or about" the main locality of the engineering work, and was not, therefore, entitled to compensation.

The words "engineering work" in sect. 7, sub-sects. 1, 2, indicate a definite locality.

CHAMBERS *v.* WHITEHAVEN HARBOUR COMMISSIONERS, [1899] 2 Q. B. 132; 68 L. J. Q. B. 740; 47 W. R. 533; 80 L. T. 586; 15 T. L. R. 341—C. A.

170. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—The applicant was employed with other workmen upon the work of adding a new storey to a mill. A steam winch was used on the work for the purpose of hoisting up building materials, and the work was erected inside the building. The applicant was injured by an accident arising out of, and in the course of, such employment.

HELD—that the employment was on or in or about an engineering work within the definition contained in sect. 7 (2) of the Act, and that therefore the applicant was entitled to compensation.

COSGROVE *v.* PARTINGTON, (1900) 64 J. P. 788; [17 T. L. R. 39—C. A.

171. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A workman was employed to drive a water-cart, and to do other work in connection with the repairing of the roads under the charge of the appellants. His duties included the bringing of water to the engine, and the soaking of the newly metalled parts of the road in preparation for the roller. The steam-engine and its tender, in the shape of the water-cart, were both engaged in a common work upon the road to which the deceased and his cart were as necessary as the engine. On the day of the accident the deceased was working in connection with the steam-roller upon a particular section of the road under the appellants' charge, and after dinner the deceased was yoking his horse with the intention of driving water for the purpose of soaking a part of the road in preparation for the roller, when his horse bolted, and he was run over.

HELD—that the work of road repair was an "engineering work" within the meaning of sect. 7 (2) of the Workmen's Compensation Act, 1897, and that the deceased was at the time of the accident employed in or on or about such work within the meaning of sect. 7 (1) of the Act.

Chambers v. *Whitehaven Harbour Commissioners* ([1899] 2 Q. B. 132; 68 L. J. Q. B. 740; 47 W. R. 533; 80 L. T. 586; 15 T. L. R. 341—C. A., No. 169, *supra*) distinguished.

MIDDLEMISS *v.* MIDDLE DISTRICT COMMITTEE [OF THE COUNTY COUNCIL OF BERWICKSHIRE, (1900) 2 F. 392—Ct. of Sess.

172. *"Railroad"—Erection of Signal Box—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A workman was employed by contractors in erecting a signal box on a new railway, which was being constructed by another contractor. While so employed he was injured by an accident.

HELD—that the employment was on a "railroad," and, therefore, on "engineering work," within sect. 7, sub-sect. 2, of the Workmen's Compensation Act, 1897.

FULLICK *v.* EVANS, O'DONNELL & Co., LD., [(1901) 84 L. T. 413; 17 T. L. R. 346—C. A.

173. *"Railroad" — Tramway — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—Sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897, says that the employment to which the Act applies includes, among other things, "employment on or in or about engineering work." "Engineering work" is defined by sub-sect. 2 as meaning "any work of construction . . . of a railroad."

The applicant was employed on the construction of a part of a continuous line along a public road which came under different statutory provisions at different parts of its length. One part of it was a light railway, and the rest was an electric tramway. The particular part of the system upon which the injured man at the time of the accident was working was that part which was authorised as an electric tramway.

HELD—that the applicant was at the time of the accident employed on the construction of a "railroad" within the meaning of the section, and that the employment was one to which the Workmen's Compensation Act, 1897, applied.

FLETCHER *v.* LONDON UNITED TRAMWAYS, LD., [1902] 2 K. B. 269; 71 L. J. K. B. 653; 66 J. P. 596; 50 W. R. 597; 86 L. T. 700; 18 T. L. R. 639—C. A.

174. *Area of the Work — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A contractor was constructing a reservoir, and laying pipes therefrom to a town two miles distant. Machinery driven by steam power was being used at the reservoir, thus constituting it an "engineering work," and a workman actually working at the reservoir was, therefore, admittedly within sect. 7 of the Act of 1897; at no other part of the job was there any steam power. A man employed by the contractor met with an accident whilst laying pipes 500 yards from the reservoir.

HELD—that there was evidence before the county court judge upon which he was justified

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in finding that the accident happened within the physical area of one "engineering work" within sect. 7 (2), and that the man was entitled to compensation. Meaning of "work" discussed.

Middlemiss v. *Middle District Committee of Berwick* ([1900] 2 F. 392, No. 171, *supra*) approved.

ATKINSON *v.* LUMB, [1903] 1 K. B. 861 ; 72 [L. J. K. B. 460 ; 67 J. P. 414 ; 51 W. R. 516 ; 88 L. T. 789 ; 19 T. L. R. 412—C. A.

175. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A workman who was employed as a carman to cart sand from a sandpit to a place where a railway was being constructed met with an accident while driving a cart with sand in it at a place two and a half miles distant from the place where the work of construction was being carried on.

HELD — that the accident did not happen "about" the engineering work within the meaning of sect. 7 of the Workmen's Compensation Act, 1897, the word "about" signifying a physical proximity.

PATTISON *v.* WHITE & Co., LD., (1904) 20 [T. L. R. 775—C. A.

176. *Sewer—Alteration of—Connecting House Drain with Main Sewer—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A workman in the employment of the respondent, who had contracted with a local authority to connect the drain of a newly-built private house with the main sewer, was injured by accident while making a trench across the public footway for the purpose of making the connection. At the time of the accident the trench had not reached the sewer, nor had the sewer been touched.

HELD—that the workman was employed on or in or about an "engineering work" within the meaning of sect. 7 of the Workmen's Compensation Act, 1897.

"Engineering work" includes the antecedent ancillary work necessary for obtaining access to a sewer, as well as the actual work of altering the sewer.

COLES *v.* ANDERSON, (1905) 69 J. P. 201 ; 21 [T. L. R. 204—C. A.

177. *Tramway, Alteration of — Roadway between up and down Tramway Lines—Excavating Trench in Roadway—Tramways Act*, 1870 (33 & 34 Vict. *c.* 78), *ss.* 28, 32—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.] —A contractor entered into a contract with a telephone company, which had statutory powers to carry wires across a road upon which tramway lines were laid, to carry a wire across and underneath the road. The contractor excavated a trench from one side of the road nearly up to the outer rail of the down tramway line, and he also excavated a trench in the road between the up and down tramway lines for the purpose of laying the wire, and it was proposed to make a similar trench on the other side of the up tramway line. A workman in his employment was engaged in making a hole or tunnel under the down line so as to make a connection between the two trenches, when he was killed by a passing tramcar. Neither the tramway lines nor the working of the tramway were interfered with by the work.

HELD (Romer, L.J. dissenting) — that the space between the up and down tramway lines was part of the tramway, and that as a trench was excavated there this was an "alteration of a railroad"—namely, a tramway—within sect. 7, sub-sect. 2, of the Workmen's Compensation Act, 1897 ; that, therefore, the deceased workman was at the time of the accident employed on or about the work of alteration of the tramway, and his widow was entitled to compensation under the Act.

ADAMS *v.* SHADDOCK, [1905] 2 K. B. 859 ; 54 [W. R. 97 ; 22 T. L. R. 15 ; 75 L. J. K. B. 7 ; 93 L. T. 725—C. A.

178. *Repair of Electric Wires for Tramway—Accident while proceeding from one Place of Repair to Another — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—The applicant was a workman employed by the respondents in the work of repairing the overhead wires of their electric tramway system at Cardiff. For the purpose of reaching the wires he used a tall trolley, which was drawn by a horse from place to place as required. Having finished repairing the wires at one place, he was driving the trolley to another place about three-quarters of a mile away for the purpose of effecting repairs at that place, when the horse bolted, and the applicant was thrown out and injured. The accident occurred about 200 yards from the place where the repairs had been effected, in a street along which the tram lines were laid. The county court judge held that the place where the accident happened was "on or in or about an engineering work" within sect. 7 of the Workmen's Compensation Act, 1897, and he made an award in favour of the applicant.

HELD—that there was evidence which justified the county court judge in coming to the conclusion that the work of repairing the tramway wires as a whole was one engineering work, and that therefore the accident happened within the area of that work.

ROGERS *v.* CARDIFF CORPORATION, [1905] 2 [K. B. 832 ; 54 W. R. 35 ; 22 T. L. R. 9 ; 75 L. J. K. B. 22 ; 4 L. G. R. 1 ; 70 J. P. 9 ; 93 L. T. 683—C. A.

179. *Repairs to Lift—"Machinery driven by Mechanical Power"—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—The "machinery driven by steam, water, or other mechanical power" referred to in the definition of an "engineering work" in sect. 7 (2) of the Workmen's Compensation Act, 1897, includes not only mechanical power supplied by the undertakers for executing repairs, but also

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mechanical power which is part of the work on which repairs are being done.

Therefore a workman employed in repairing a lift worked by hydraulic power and using such motive power for the purpose of his task is employed upon an engineering work.

TULLOCH *v.* WAYGOOD & CO., [1906] 2 K. B. [261 ; 75 L. J. K. B. 557 ; 95 L. T. 223—C. A.

180. *Mechanical Power—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—A. contracted with B. to erect a machine on the third floor of B's. building. C., who was in the employment of A., had to superintend the carrying out of the work. The machine was delivered in parts at B.'s building, and the heavy parts of the machine were raised to the third floor by pulleys, whilst the lighter parts were carried up by the lift, to work which mechanical power was required. When all the parts were on the third floor, and whilst C. was engaged in erecting the machine, for which purpose no mechanical power was required, a piece slipped and injured C.

HELD—that the erecting of the machinery was a distinct and separate part of the contract from the delivery of the parts on to the third floor. The erection alone constituted the "construction" within the meaning of the statute, and, as no mechanical power was required for that purpose, the injured workman was not entitled to compensation under the Act.

MURPHY *v.* O'DONNEL, (1906) 54 W. R. 149—[C. A.

181. *Work ancillary to Engineering Operations — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—The words in sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897, "on or in or about an engineering work" refer to the place where the engineering work is being carried on.

Contractors had entered into a contract to take up old tramway rails in a town and lay new ones for electric working. The new rails were brought to the town by railway, and by arrangement between the railway company and the contractors they were stored in the railway company's yard until they were required for laying down. The yard opened on to a street along which the old tramway rails ran. There was no provision in the contract as to the place where the rails should be stored. The appellant, who was employed by the contractors in unloading and stacking the rails in the yard, met with an accident while so employed. At the time the only work under the contract then commenced was that of taking up the old rails in a street at a point about 700 yards distant from the scene of the accident.

HELD, by Lords Davey, Robertson, and Atkinson (the Lord Chancellor and Lord James of Hereford dissenting)—that the yard was not within or "about" the area of the place where the engineering work was being carried on, and that, therefore, the employment of the appellant at the time of the accident was not "on or in or about" the engineering work, and he was not entitled to compensation under the Workmen's Compensation Act, 1897.

Decision of the C. A. ([1905] 2 K. B. 148 ; 74 L. J. K. B. 596 ; 53 W. R. 615 ; 93 L. T. 329 ; 21 T. L. R. 483) affirmed.

BACK *v.* DICK, KERR & CO., LD., [1906] A. C. [325 ; 75 L. J. K. B. 569 ; 94 L. T. 802 ; 22 T. L. R. 548—H. L. (E.)

182. *Locality or Nature of Work—"Factory" Ship alongside Quay—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (1), (2).]—A man employed on a ship which is moored to a quay is not necessarily employed "in, on or about a factory." He is only to be deemed to be so employed if the work going on in the ship involves such a use of the quay as to bring into operation the provisions of sect. 104 of the Factory and Workshop Act, 1901.

Harrison v. *Oceanic Steam Navigation Co., Ld.* (No. 205, *infra*) followed.

The expression "engineering work" refers not only to the locality, but also to the nature of the work.

HANDFORD *v.* GEO. CLARK & CO., [1907] 2 [K. B. 409 ; 76 L. J. K. B. 958 ; 97 L. T. 124—C. A.

183. *Shipbuilding Yard — Erection of Gas Engines to Generate Electricity—Electric Power for Opening Dock Gates—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A shipbuilding yard was being constructed by a firm of contractors, and it was to contain three dry docks and one wet dock. It was intended to erect a generating station for generating electricity for lighting and power purposes, including the power necessary for opening and shutting the dock gates. In order to operate the works for generating electricity gas engines had to be erected within the shipbuilding yard. The appellants were sub-contractors for the erection and installation of the gas engines. A workman in the employment of the appellants, while working at the erection of the gas engines, was injured by an accident. The place where the accident happened was about 150 yards distant from the nearest dock. In proceedings for the assessment of compensation under the Workmen's Compensation Act, 1897 :

HELD, by Cozens-Hardy, M.R. and Sir Gorell Barnes (Kennedy, L.J. dissenting)—that the workman was not employed on or in or about engineering work—namely, the construction of a dock—when the accident happened, and that therefore he was not entitled to compensation.

RIMMER *v.* PREMIER GAS ENGINE CO., (1907) [97 L. T. 226 ; 23 T. L. R. 610—C. A.

See also No. 354.

(4) *Factory.*

(A) *Dock, Wharf, Quay.*

184. *Dock—Employment on a Ship lying in a Dock—Workmen's Compensation Act*, 1897 (60 &

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61 Vict. *c.* 37), *s.* 7.]—Employment on a ship lying in a dock is not employment on, in, or about the dock within the meaning of sect. 7 of the Workmen's Compensation Act, 1897.

FLOWERS *v.* CHAMBERS, [1899] 2 Q. B. 142 ; 68 [L. J. Q. B. 648 ; 47 W. R. 513 ; 80 L. T. 834 ; 15 T. L. R. 352—C. A.

Disapproved in *Raine* v. *Jobson*, No. 192a, *infra*.

186. *Wharf—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2—*Factory and Workshop Act*, 1878 (41 & 42 Vict. *c.* 16), *s.* 68—*Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *ss.* 18, 23.]—A workman was killed by an accident which happened in a public street just outside his employer's wharf, while he was leading a horse and cart out of the wharf in the course of his employment. The wharf was simply a yard by the side of a canal, and no machinery of any kind was used on it.

HELD—that the wharf was not a factory within the meaning of the Workmen's Compensation Act, 1897, for it did not come within the definition of "factory" in sect. 7, subsect. 2, as being a wharf to which any provision of the Factory Acts was applied by the Factory Act, 1895.

The provisions of sect. 18 of the Factory Act, 1895, with respect to accidents were not applied to the wharf by sect. 23 of that Act, for no accident had occurred on the wharf; neither were the provisions of sect. 68 of the Factory Act, 1878, with respect to the powers of inspectors thereby applied to it.

HALL *v.* SNOWDON, HUBBARD & CO., [1899] 2 [Q. B. 136 ; 68 L. J. Q. B. 645 ; 47 W. R. 486 ; 80 L. T. 554 ; 15 T. L. R. 326—C. A.

Overruled by *Raine* v. *Jobson*, No. 192a, *infra*, and see No. 203, *infra*.

187. *Factory—Ship loading from Lighter in Dock—Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A stevedore's labourer was employed in loading a ship in a dock from a lighter lying alongside the ship by means of machinery on board the ship. He sustained injuries in consequence of an accident.

HELD—that the stevedore was not the occupier of a factory within the meaning of the Workmen's Compensation Act, 1897, s. 7, the machinery not being used in the process of loading from a dock, wharf, quay, or warehouse within the meaning of the Factory and Workshop Act, 1895, s. 23, and that therefore the case was not one to which the Workmen's Compensation Act, 1897, applied.

HENNESSEY *v.* MCCABE, [1900] 1 Q. B. 491 ; 69 [L. J. Q. B. 173 ; 64 J. P. 4 ; 48 W. R. 231 ; 81 L. T. 575 ; 16 T. L. R. 77—C. A.

188. *Ship in repairing Dock—Shipbuilding Yard—Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23 (1)—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—The respondent was, when he suffered the injury in respect of which he claimed compensation, engaged as an apprentice boiler-maker in the employment of the appellants, a firm of engineers, in repairing the boiler of a steamship, which was then lying in the repairing dock of Aberdeen harbour. He was cutting out old rivets inside the fire-box of the boiler, when a piece of a rivet struck, and seriously injured, his right eye. It did not appear that in connection with the work of repairing the boiler any machinery upon the dock was used, or landed upon it. So far as appeared, the work was entirely confined to the ship.

HELD—that the provisions of the Workmen's Compensation Act, 1897, relative to a dock, did not apply to the ship, as a ship is neither a dock nor a factory for the purposes of the Act, and that the workman was not employed on or in or about a factory, even if the dock was a factory.

Flowers v. *Chambers* ([1899] 2 Q. B. 142 ; 68 L. J. Q. B. 648 ; 47 W. R. 513 ; 80 L. T. 834 ; 15 T. L. R. 352—C. A., No. 184, *supra*) followed.

HELD, also, that it was not established that the repairing-dock of Aberdeen harbour was a shipbuilding yard.

HELD, further, that the firm of engineers were not occupiers of the dock within the meaning of the Act.

LOW *v.* ABERNETHY & CO., (1900) 2 F. 722—Ct. [of Sess.

But see No. 192a, *infra*.

189. *Unloading Cargo on to Quay—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2)—*Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23, *sub-s.* 1 (v.) (a).]—A workman was at work for the appellants, the Atlantic Transport Company, as a stevedore, with others in the hold of the appellants' steamship *Mackinaw*, which was being discharged in the West India Docks. *The Mackinaw* was lying in the dock moored to the quay, and the cargo, which was in bags, was being discharged from the hold of the ship on to the quay by the dock company's hydraulic crane situate on the quay. The crane was worked by the appellants' men. The deceased workman and another were making up a set of fifteen bags in the hold, and had got twelve bags across the rope strop, and were in the act of putting another bag on to the twelve bags, when some bags from the tier behind them fell on to them. The runner of the crane, at the time the tier fell, was not attached to the top of the set which the deceased man was making up, but was ashore at the time. The deceased man died from the injuries so received.

HELD—that the employment was on or in or about machinery used in the process of unloading on to a quay, and was therefore on or in or about a factory.

Woodham v. *Atlantic Transport Co.* ([1899] 1 Q. B. 15 ; 68 L. J. Q. B. 17 ; 47 W. R. 105 ; 79

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L. T. 395 ; 15 T. L. R. 51—C. A., No. 206, *infra*) followed.

Lawson *v.* Atlantic Transport Co., (1900) [82 L. T. 77 ; 16 T. L. R. 181—C. A.

190. *Dock—Whether Dock "near" a Yard—Fact or Law—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 3, *and Sched. II., s.* 14 (c).]—The Workmen's Compensation Act, 1897, enacts that "a workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard."

Held—that whether a dock which is two miles from the shipbuilding yard is near the yard, is a question of circumstances and not a question of law.

M'Millan *v.* Barclay, Curle & Co., Ld., [(1900) 2 F. 91—Ct. of Sess.

191. "*Wharf*"—*Timber Yard*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7—*Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23.]—A workman was killed by an accident while he was engaged in removing some timber from a place where it was stored on the premises of the Mersey Docks and Harbour Board. By the side of the Canada Dock there was a large open space stretching back from the water for a distance of 150 yards, and on the farther side of this space there was a road running parallel with the water. Beyond the road there was a row of offices, to which were attached timber yards. The offices and yards were leased to timber merchants. The timber in question was stored in one of these yards.

Held (Rigby, L.J., dissenting)—that the place where the timber was stored was not a wharf so as to come, by virtue of sect. 23 of the Factory and Workshop Act, 1895, within the definition of "factory" contained in sect. 7 of the Workmen's Compensation Act, 1897.

Haddock *v.* Humphrey, [1900] 1 Q. B. 609 ; [69 L. J. Q. B. 327 ; 64 J. P. 86 ; 48 W. R. 292 ; 82 L. T. 72 ; 16 T. L. R. 143—C. A.

192. "*Shipbuilding Yard*"—*Ship in Dock being Repaired—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7—*Factory and Workshop Act*, 1878 (41 & 42 Vict. *c.* 16), *s.* 93, *Sched. IV., Part II.* (24).]—By sect. 7, subsect. 2, of the Workmen's Compensation Act, 1897, a "factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891.

By sect. 93 of the Factory and Workshop Act, 1878, non-textile factory means any premises named in Part II. of Schedule IV., which, by clause 24, includes "shipbuilding yards," that is to say, premises in which any ships are made, finished, and repaired.

Held—that an ordinary dock in which a ship is repaired is not a "shipbuilding yard," and therefore not a "factory" within the Act, 1897.

Spencer *v.* Livett, Frank & Son, [1900] 1 [Q. B. 498 ; 69 L. J. Q. B. 338 ; 64 J. P. 196 ; 48 W. R. 323 ; 82 L. T. 75 ; 16 T. L. R. 179—C. A.

192a. "*Actual Use*" *of a Dry Dock*—"*Factory*"—"*Undertakers*"—"*Arising out of and in the course of*"—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-ss.* 1, 2—*Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23, *sub-s.* 1.]—The respondents were ship repairers at Hartlepool, where they had a place of business, which they called a "manufactory for the repair of ships," having no water frontage. When employed to repair a vessel which required to be dry-docked, they hired a dock from the North Eastern Railway Company in Hartlepool. They hired a dry dock, and were cleaning or repairing a vessel in it, when a labourer employed by them on this job met with personal injury by an accident. He slipped off a sort of gangway, fell into the dock, and was killed.

Held—that the dock was a "factory" within the meaning of the Workmen's Compensation Act, 1897, s. 7, because it was a dock to which some "provision of the Factory Acts is applied by the Factory and Workshop Act, 1895" ; that the respondents were "undertakers" as defined by s. 7 of the Workmen's Compensation Act, 1897, because they had at the time the "actual use and occupation" of the dock ; and that the accident was one "arising out of and in the course of" the workman's employment.

Flowers v. Chambers ([1899] 2 Q. B. 142 ; 68 L. J. Q. B. 648 ; 47 W. R. 513 ; 80 L. T. 834 ; 15 T. L. R. 352—C. A., No. 184, *supra*) disapproved.

Merrill v. *Wilson* ([1901] 1 Q. B. 35 ; 70 L. J. Q. B. 97 ; 65 J. P. 53 ; 49 W. R. 161 ; 83 L. T. 490 ; 17 T. L. R. 49—C. A., No. 343, *infra*) approved.

Raine *v.* Jobson & Co., [1901] A. C. 404 ; 70 [L. J. Q. B. 771 ; 49 W. R. 705 ; 85 L. T. 141 ; 17 T. L. R. 627—H. L. (E.)

193. *Dock—Steam, &c., Power—Factory and Workshop Act*, 1878 (41 & 42 Vict. *c.* 16), *s.* 93—*Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—Unless it is proved that steam, water, or other mechanical power is used in aid of the manufacturing process carried on in a dock, there is no basis for a legal decision that the dock is a factory of the nature of a shipbuilding yard in the sense of the Factory Act, 1878, so as to make it a place to which the Workmen's Compensation Act, 1897, applies.

Jackson *v.* Rodger & Co., (1900) 2 F. 533—Ct. [of Sess.

194. *Dock—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7—*Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23.] —A vessel which was being unloaded at a quay

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had the services of an engine which was in a boat, and was brought alongside the vessel on the outer side from the quay, for the purpose of hoisting cargo from the hold of the vessel to the deck. After this had been done the goods were taken charge of by persons whose duty it was to have the goods put off the vessel on to the quay, and who did so without the use of machinery. They put the material in bags, and took the bags on shore. The power of the engine and its winch was not used in the work of conveying the goods to the land. A man employed on board this boat fell overboard while taking up water in a pail for use on board the boat, and was drowned.

HELD (*dissentiente* Ld. Young)—that sect. 23 of the Factory and Workshop Act, 1895, did not apply, as the boat and the engine thereon did not constitute a "factory" within the meaning of the Workmen's Compensation Act, 1897, as the work in which the deceased was engaged was not the work of loading or unloading to or from a quay, and the machinery and plant were not being used in loading or unloading to or from a quay.

LAING *v.* YOUNG AND LESLIE, (1901) 3 F. 31—[Ct. of Sess.

195. *Loading Ship in Wet Dock partly from Quay and partly from a Schooner — Costs — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 4; *s.* 7, *sub-s.* 2.]—A workman was killed while employed on a ship lying in a wet dock. An action by his widow under the Employers' Liability Act, 1880, was dismissed, and the county court judge, upon the plaintiff's application, assessed compensation under sect. 1, sub-sect. 4, of the Workmen's Compensation Act, 1897, holding that the deceased man's employment at the time of the accident was on or in or about a "factory" within sect. 7 of the Act, and he gave the plaintiff the costs of and incident to the proceedings.

HELD—(1) that the employment being on a ship in a dock was employment in a "factory" within the meaning of the Act; and (2) that the county court judge had power to give the plaintiff the costs of the proceedings.

CATTERMOLE *v.* ATLANTIC TRANSPORT CO., LD. [(1901) 50 W. R. 129; 85 L. T. 513; 18 T. L. R. 102; [1902] 1 K. B. 204; 71 L. J. K. B. 173; 66 J. P. 4—C. A.

196. *Loading Ship from Quay by Machinery —Putting on Hatchway—Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23, *sub-s.* 1 (ii.) (a)—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 1; *s.* 7, *sub-s.* 2, *Sched. I.*, 1 (a) (i.) (b).] — A workman was employed in loading a ship from a quay. The cargo had all been stowed in the hold, and the workman was engaged in putting iron beams by means of a winch across and for the support of the hatchway to close it in. While doing so he was killed.

HELD—that the workman was engaged in the action of "loading," as it was part of the duty of the person loading the vessel to put on the hatchway, and that he was engaged in the process of loading from a quay and employed about machinery used for or in relation to that purpose, and therefore about a "factory" within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 2, and sect. 23 of the Factory and Workshop Act, 1895.

Decision of C.A. ([1900] 2 Q. B. 95; 69 L. J. Q. B. 598; 48 W. R. 598; 82 L. T. 489; 16 T. L. R. 335) reversed.

LYSONS *v.* ANDREW KNOWLES & SONS, LD.; [STUART *v.* NIXON AND BRUCE, [1901] A. C. 79; 70 L. J. Q. B. 170; 65 J. P. 388; 49 W. R. 636; 84 L. T. 65; 17 T. L. R. 156—H. L. (E.) (Ld. Lindley dissenting).

And see No. 71, *supra*.

197. *Ship — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (1).]—A workman sent out from the appellants' works to do some repairs on a ship lying in a dock about 550 yards in a direct line, and about a mile by road, was held not to be at the time of an accident at that place engaged in work "on or in or about a factory."

Penn v. *Miller* ([1900) 1 Q. B. 788; 69 L. J. Q. B. 439; 64 J. P. 356; 48 W. R. 369; 82 L. T. 284; 16 T. L. R. 265—C. A., No. 212, *infra*) followed.

BARCLAY, CURLE & CO. *v.* M'KINNON, (1901) [3 F. 436—Ct of Sess.

198. "*Wharf*"—*Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37) *s.* 7.]—A workman was injured by an accident while employed in the hold of a ship, which was lying alongside a floating structure in the Thames, assisting in the unloading of the ship. The structure was moored in the river by chains fastened to piles driven into the bed of the river, and was used as a place where cargoes were loaded and discharged. There was no connection or communication with the shore except by means of boats.

HELD—that the structure was a wharf within the meaning of sect. 23 of the Factory and Workshop Act, 1895, and was therefore a "factory" within sect. 7 of the Workmen's Compensation Act, 1897.

ELLIS *v.* WILLIAM CORY & SON, LD., (1901) 50 [W. R. 131; 85 L. T. 499; 18 T. L. R. 28; [1902] 1 K. B. 38; 71 L. J. K. B. 72; 66 J. P. 116—C. A.

199. *Street immediately outside Factory— Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—An accident occurred to a quay labourer in the course of his employment on the street immediately outside a wharf shed. The wharf was a factory within the meaning of the Workmen's Compensation Act, 1897.

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HELD—that the fact that the accident in question happened on a public street "immediately outside the wharf shed" did not *per se* exclude the claim of the appellant.

Hall v. *Snowden, Hubbard & Co.* ([1899] 2 Q. B. 136; 68 L. J. Q. B. 645; 47 W. R. 486; 80 L. T. 554; 15 T. L. R. 326—C. A., No. 186, *supra*) disapproved.

STRAIN *v.* SLOAN & Co., (1901) 3 F. 663—Ct. of [Sess.

200. "*Dock, Wharf or Quay*"—*Timber Yard*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—On an appeal against the decision of a county court judge, who had held that a workman was entitled to compensation on the ground that, at the time when he met with an accident in a timber yard he was employed in a "factory" within the meaning of the Workmen's Compensation Act, 1897, in respect of which the appellants were the undertakers, and who had arrived at that conclusion on the ground that the place in question was a "dock, wharf or quay," to which the elaborate system of legislation contained in the Factory Acts applied.

HELD—that the C. A. was bound by his decision on the question of fact, if there was evidence upon which the judge could come to the conclusion that the place in question was capable of being described as a dock, wharf, or quay.

HELD, also, that where a place is by its physical situation and other circumstances such as to be in its nature a dock, wharf, or quay, it is no answer to say that, at the particular time when the accident occurred, it was being temporarily used for a purpose not strictly that of a dock, wharf, or quay.

Haddock v. *Humphrey* ([1900] 1 Q. B. 609; 69 L. J. Q. B. 327; 64 J. P. 86; 48 W. R. 292; 82 L. T. 72; 16 T. L. R. 143—C. A., No. 191, *supra*) distinguished.

KENNY *v.* HARRISON, [1902] 2 K. B. 168; 71 [L. J. K. B. 783; 87 L. T. 318—C. A.

201. "*Undertakers*"—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 7 (2)—*Factory and Workshop Act*, 1901 (1 Edw. 7, *c.* 22), *s.* 104.]—A firm of carriers were employed to carry parcels for the post office. The post office had temporarily hired a "transit shed" in docks for the storage of parcels, and one of the carriers' servants was accidentally killed in the roadway leading to such shed. The roadway in question was a private road, which the post office had the right (but not the exclusive right) to use in order to reach the shed.

HELD—that the shed was a "dock" within the meaning of the Factory Act, 1901, although not at the time being used as such; and that it was therefore a "factory" within the meaning of the Workmen's Compensation Act, 1897; and that the carriers had the "actual use and occupation of it," and therefore must be regarded as "undertakers."

Raine v. *Jobson* ([1901] A. C. 404; 70 L. J. K. B. 771; 49 W. R. 705; 85 L. T. 141—H. L., No. 192a, *supra*) and *Merrell* v. *Wilson* ([1901] 1 K. B. 35; 70 L. J. K. B. 97; 65 J. P. 53; 49 W. R. 161; 83 L. T. 490—C. A., No. 343, *infra*) followed.

FOGARTY *v.* WALLIS & Co., [1903] 2 Ir. R. 522 [—C. A.

202. *Wharf*—*Employment* "*on or in or about*"—*Seaman*—*Fireman on Steamer Moored to Wharf*—*Factory and Workshop Act*, 1901 (1 Edw. 7, *c.* 22), *s.* 104—*Workmen's Compensation Act*, 1897 (60 & 61 Vict, *c.* 37), *s.* 7 (1).]—The applicant, a seaman employed on a steamship as a fireman, was injured by accident while attending to the boilers. At the time of the accident the ship was made fast by ropes to a pontoon and gangways were out, connecting the pontoon with the ship, for the purpose of embarking passengers. In proceedings under the Workmen's Compensation Act, 1897:—

HELD, by Collins, M.R., and Romer, L.J. (Mathew, L.J., dissenting)—that the employment of the applicant had no connection with the purpose for which his employees had the use of the pontoon, and that, therefore, he was not employed "about" a wharf, and consequently not "about" a "factory" within the meaning of sect. 7 (1) of the Act.

OWENS *v.* CAMPBELL. LD., [1904] 2 K. B. 60; [73 L. J. K. B. 634; 68 J. P. 410; 52 W. R. 481; 90 L. T. 811; 20 T. L. R. 459—C. A.

203. *Wharf*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—Every wharf is a "factory" within the meaning of sect. 7 (2) of the Workmen's Compensation Act, 1897, whether any provision of the Factory Acts is applied to it or not.

Hall v. *Snowdon, Hubbard & Co.* [1899] 2 Q. B. 136; 68 L. J. Q. B. 645; 47 W. R. 486; 80 L. T. 554—C. A., No. 186, *supra*) is overruled by the decision of H. L. in *Raine* v. *Jobson & Co.* ([1901] A. C. 404; 70 L. J. K. B. 771; 49 W. R. 705; 85 L. T. 141—H. L., No. 192a, *supra*).

BARRETT *v.* KEMP BROS., [1904] 1 K. B. [517; 73 L. J. K. B. 138; 68 J. P. 196; 52 W. R. 257; 90 L. T. 305; 20 T. L. R. 162 —C. A.

204. *Ship in Dock*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—Shipowners hired a dry dock to do repairs to a vessel. A workman, who had served as ship's carpenter on her last voyage and had re-engaged for the next voyage, was employed by the owners in the interval to work on the repairs.

Whilst so engaged and whilst occupied in turning the ship's cable, he was killed by falling into the dock.

HELD—that he was employed at the time in or about a "factory" and that the owners were liable to compensate his dependants.

CAYZER, IRVINE & Co. *v.* DICKSON, (1905) 7 F. [723—Ct. of Sess.

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205. *Ship alongside Quay—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—The mere fact that a ship is moored alongside a quay does not necessarily lead to the consequence that a man employed on the ship is employed on, in, or about a factory.

HARRISON *v.* OCEANIC STEAM NAVIGATION CO., [LD., [1907] 2 K. B. 420 (n.) ; 97 L. T. (n.)—C. A.

See also Nos. 182, 337, 342, 348, 362.

(B) *Warehouse, Machinery, Plant, &c.*

206. *Unloading on the Quay—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 1, 7—*Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23, *sub-s.* 1 (v.) (a).]—A workman was employed by shipowners on board a ship to assist in unloading cases of cartridges or percussion caps by means of a crane on to a quay. The crane, which was standing on the quay, was worked by means of a chain, at the end of which was attached a basket. The workman placed the cases in the basket, and the basket and its contents were hoisted on to the quay. When one of the cases was being placed in the basket, it exploded and killed the workman. Upon a claim by his widow for compensation under the Workmen's Compensation Act, 1897 :—

HELD—that the workman was killed by an accident arising out of, and in the course of his employment in or about machinery used in the process of unloading on to a quay within the meaning of the Act ; and that, therefore, the Act applied.

WOODHAM *v.* ATLANTIC TRANSPORT CO., [1899] 1 Q. B. 15 ; 68 L. J. Q. B. 17 ; 47 W. R. 105 ; 79 L. T. 395 ; 15 T. L. R. 51—C. A.

207. *Ship—Machinery on Board — Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *ss.* 4, 23—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—When a man works winch machinery on board a ship he is not working in a "factory" in the sense of the Factory and Workshop Act, 1895, s. 23 (*a*), and he is not entitled to compensation for injury under the Workmen's Compensation Act, 1897.

ABERDEEN STEAM TRAWLING CO. *v.* PETERS, (1899) 1 F. 786 ; 36 S. L. R. 573—Ct. of Sess.

208. *Propinquity to the Factory—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—In an arbitration under the Workmen's Compensation Act, 1897, it was proved that the deceased was a carter in the employment of the defendants, who were the occupiers of a timber yard, and that he was accidentally killed while engaged in storing timber on a cart belonging to the defendants, which was standing immediately outside the defendants' premises.

The county court judge held that the deceased was employed "on or in or about" a factory within sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897, and made an award in favour of the widow of the deceased.

HELD—that the decision of the county court judge must be affirmed.

POWELL *v.* BROWN, [1899] 1 Q. B. 157 ; 68 [L. J. Q. B. 151 ; 47 W. R. 145 ; 79 L. T. 631 ; 15 T. L. R. 65—C. A.

209. *Propinquity to the Factory—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—In an arbitration under the Workmen's Compensation Act, 1897, it was proved that the workman sustained personal injury in the course of his employment as a carter whilst delivering sacks of flour a mile and a half away from his employer's factory.

The county court judge held that the employment of the workman at the time of the accident was not "on or in or about a factory," within sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897.

HELD—that the decision of the county court judge must be affirmed.

Powell v. *Brown* ([1899] 1 Q. B. 157 ; 68 L. J. Q. B. 151 ; 47 W. R. 145 ; 79 L. T. 631 ; 15 T. L. R. 65—C. A., *supra*) followed.

LOWTH *v.* IBBOTSON, [1899] 1 Q. B. 1003 ; 68 [L. J. Q. B. 465 ; 47 W. R. 506 ; 80 L. T. 341 ; 15 T. L. R. 264—C. A.

210. *Propinquity to the Factory—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—A carter in the employment of wood craftsmen was driving a load of wood for building operations to a place at some distance from his master's factory, but when he had travelled about two miles upon his journey his cart was overturned by a landslip upon the public road, and he was killed.

HELD—that he had not met with the accident when "about a factory," and that his representatives had no claim for compensation under the Workmen's Compensation Act, 1897.

WHITTON *v.* BELL AND SIME, LD., [1899] 36 [S. L. R. 754—Ct. of Sess.

211. *Steam-engine in a Shed Temporarily Used for Constructing a Building—Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *ss.* 4, 23—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 1, 7.]—A workman, who was employed at a steam-engine in a shed temporarily used in connection with the construction of a building close to, was killed by an accident while so employed. In proceedings to assess compensation under the Workmen's Compensation Act, 1897 :—

HELD—that the shed was constituted a factory by sect. 23, sub-sect. 1 (v.) (*b*), of the Factory and Workshop Act, 1895, for the purpose of applying thereto the powers of the Act with reference to dangerous machines, and that therefore, by virtue of sect. 7, sub-sect. 2, of the Workmen's Compensation Act, 1897, the engine in the shed was itself a factory ; and that, consequently, the deceased man was killed while employed "on or in or about a factory" within the meaning of sect. 7, sub-sect. 1, of the last-mentioned Act, and the employers were liable to pay compensation.

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If the workman shows that the accident arose out of and in the course of his employment, his case can only be met by the employer by showing that the injury was attributable to his serious and wilful misconduct.

McNicholas *v.* Dawson & Son, [1899] 1 Q. B. [773 ; 68 L. J. Q. B. 470 ; 47 W. R. 500 ; 80 L. T. 317 ; 15 T. L. R. 242—C. A.

212. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 1.]—A workman was employed to fetch water in a water-cart from a brook to a steam-engine in a shed connected with a mortar mill for mixing for use in the construction of a building. While he was conducting the horse and cart along a public road from the brook to the engine, the horse ran away and the cart went over him. The place where the accident happened was at least 110 yards distant from the engine.

Held—that, though the engine was a "factory" within sect. 7 of the Workmen's Compensation Act, 1897, there was no evidence that the workman was, at the time of the accident, employed "about" a factory within the meaning of subsect. 1 of that section, and that, therefore, compensation was not payable.

Fenn *v.* Miller, [1900] 1 Q. B. 788 ; 69 [L. J. Q. B. 439 ; 64 J. P. 356 ; 48 W. R. 369 ; 82 L. T. 284 ; 16 T. L. R. 265—C. A.

213. *City Refuse Dispatch Works—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 7 *—Factory and Workshop Act*, 1878 (41 & 42 Vict. *c.* 16). *s.* 93 (3) (*c*).]—A workman met his death while he was carting manure from stables and byres for the City of Glasgow Cleansing Department to their refuse dispatch works. While waiting in those works for his turn he fell into a tank and was injured, from the effects of which he died.

Held—that the Refuse Dispatch Works were a "factory" within the meaning of the Workmen's Compensation Act, 1897, in respect that the material in question was there adapted for sale, and afterwards sold.

Henderson *v.* Glasgow Corporation, (1901) [2 F. 1127—Ct. of Sess.

214. "*Non-Textile Factory*"—*Movable Steam-engine used on a Farm—Meal Ground for Food for Stock*—"*By Way of Trade or for Purposes of Gain*"—*Factory and Workshop Act*, 1878 (41 & 42 Vict. *c.* 16), *s.* 93—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—The respondent was a workman, who had been in the employment of the appellant, a farmer. The appellant had upon his farm a movable steam engine, which was used for the purpose of threshing, chaff-cutting, and grinding meal. The meal was consumed as food by the stock on the farm, and was not sold. The respondent, whose duty it was to attend to the working of the engine, met with an accident while so engaged.

Held—that the farmer did not carry on the business of a "non-textile factory" within the meaning of the Factory and Workshop Act, 1878, and consequently the case was not brought within the Workmen's Compensation Act, 1897.

Nash *v.* Hollinshead, [1901] 1 Q. B. 700 ; 70 [L. J. K. B. 571 ; 75 J. P. 357 ; 49 W. R. 424 ; 84 L. T. 483 ; 17 T. L. R. 352—C. A.

215. *Factory of Third Persons—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—The deceased workman was in the employ of a firm of engineers who had contracted with a firm of cotton spinners to supply and fix a new driving wheel for the steam engine belonging to their cotton spinning factory. A hand winch and pulley were used for the purpose of lifting the new driving wheel, and while directing that operation the deceased workman met with an accident which caused his death.

Held—that what was being done was done by a person sent by the original manufacturers, entirely away from their own place of manufacture when the accident happened, and was not done "in a factory" at all.

Francis v. *Turner Brothers* ([1900] 1 Q. B. 478 ; 69 L. J. Q. B. 182 ; 64 J. P. 53 ; 48 W. R. 228 ; 81 L. T. 770 ; 16 T. L. R. 105—C. A., *see* No. 338, *infra*) approved.

Decision of C. A. (*sub nom. Wrigley* v. *Bagley and Wright*) ([1901] 1 K. B. 780 ; 70 L. J. K. B. 538 ; 65 J. P. 372 ; 49 W. R. 472 ; 84 L. T. 415) affirmed.

Wrigley *v.* Whittaker & Sons, [1902] A. C. [229 ; 71 L. J. K. B. 600 ; 66 J. P. 420 ; 50 W. R. 656 ; 86 L. T. 775 ; 18 T. L. R. 559 —H. L. (E.)

And see No. 38, *supra.*

216. *Workshop or Machine-room—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7—*Factory and Workshop Act*, 1878 (41 & 42 Vict. *c.* 16), *s.* 93 (3) (*b*).]—The respondent was in the employment of the appellants as a car driver, and while engaged in oiling his car preparatory to its being taken out for the day he was struck by a travelling platform called a "car traverser," and his right leg was so injured between the car traverser and a side wall that it had eventually to be amputated below the knee, and in consequence he suffered permanent disablement from his then employment. The place where this accident occurred was in the car sheds. These sheds consisted of a covered-in building 550 feet long by 160 feet wide. Down the centre of this erection there ran a well 33 feet wide and 27 inches lower than the flooring on each side of it. In this well the travelling platforms or car-traversers were moved backwards and forwards by means of a cable driven by a steam engine in the immediate vicinity of the car sheds. At the west end of these sheds, where the traverser well ceased to be covered in by a roof and to be closed in from the open air, was what was variously called a machine-room or workshop, which was divided by a somewhat heavier brick wall than those which partitioned off the spaces in the sheds. No mechanical power was used in

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the sheds themselves apart from the power employed for moving the car traverser. The car was 374 feet from the wall of the machine shop when the accident happened.

HELD (Ld. Monerieff dissenting)—that the works of the tramway company fell within the definition of the Workmen's Compensation Act, 1897, and were a factory; and that the place at which the accident happened was part of the factory.

MOONEY *v.* EDINBURGH AND DISTRICT TRAM-[WAYS CO., LD., (1902) 4 F. 390—Ct. of Sess.

217. *Machinery — "Or other Mechanical Power"—Travelling Crane worked by Hand Power—Warehouse—Old Iron Store—Not contiguous to Dock, Wharf or Quay—Factory and Workshop Act*, 1878 (41 & 42 Vict. *c.* 16), *s.* 93—*Workmen's Compensation Act*, 1897 (60 & 61 Vict, *c.* 37), *s.* 7.]—Premises were used for the purpose of breaking up old iron by means of a machine which raised and let fall a weight of several tons, and a quantity of old iron, amounting to several thousand tons, was stored there. The premises were also used for the purpose of selling the iron and for its inspection by buyers, and the iron was undoubtedly kept and stored there. An accident happened to a workman in the employ of the owners of the premises, caused by his endeavouring to stop a trolley by putting a crowbar in between the wheels so as to prevent its running into a horse, and it happened close to the said premises. The mechanical power relied on to bring the premises within the definition of "factory" was the above-mentioned machine, a travelling crane worked by hand power.

HELD—that the premises were not a "factory" where machinery driven by steam, water, or other mechanical power was used, within sect. 93 of the Factory and Workshop Act, 1878.

Wrigley v. *Bagley and Wright* ([1901] 1 K. B. 780; 70 L. J. K. B. 538; 65 J. P. 372; 49 W. R. 472; 84 L. T. 415—C. A., No. 215, *supra*) followed.

HELD, also, that the premises were a warehouse within the meaning of sect. 7 of the Workmen's Compensation Act, 1897, though they were not in contiguity with a dock, wharf, or quay.

WILLMOTT *v.* PATON, [1902] 1 K. B. 237; 71 [L. J. K. B. 1; 66 J. P. 197; 50 W. R. 148; 85 L. T. 569; 18 T. L. R. 48—C. A.

218. *Threshing Machine attached to Engine for Haulage Purposes only—Factory and Workshop Act*, 1878 (41 & 42 Vict. *c.* 16), *s.* 93, *sub-s.* 3 —*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—Two parts of some mechanism which when geared together would have made a mill which could thresh, were not so geared together, nor were they intended to be, at the place where an accident to a workman occurred. They were going to fulfil a contract at a place three miles from where the accident occurred. The two things there were, the threshing mill and the traction engine which was intended to haul it to the place. While the workman was fitting the wire rope round the drum with a view to haulage he met with the accident.

HELD—that there was no "factory" within the definition in sect. 93 or any other section of the Factory Act or the Workmen's Compensation Act.

GEORGE *v.* MACDONALD, (1902) 4 F. 190—Ct. of [Sess.

219. *Burden of Proof—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—It lies upon an injured workman to prove that the accident happened "on, in, or about" a factory, &c. Where a man met with an accident whilst on his way from the building on which he was employed, to his master's yard, but no evidence was given as to the exact spot or distance:—

HELD—that there was no evidence justifying the county court judge in finding that the accident happened "in, on, or about" the building.

MCADAM *v.* HARVEY, [1903] 2 Ir. R. 511—C. A.

220. *New Definition — Factory Act*, 1901—*Machinery used in Loading, or Unloading, Ship in a Navigable River—Interpretation Act*, 1889 (52 & 53 Vict. *c.* 63), *s.* 38—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7—*Factory and Workshop Act*, 1901 (1 Edw. 7, *c.* 22), *s.* 104.]—A "factory" for the purposes of the Workmen's Compensation Act, 1897, is now defined, not by the Factory Acts in force in 1897, but by the Factory and Workshop Act, 1901. The latter Act has repealed and re-enacted the earlier Acts with modifications; and, therefore, references to the original provisions must now be construed as references to the provisions so re-enacted (Interpretation Act, 1889, s. 7). It follows that machinery used for loading or unloading a vessel in a navigable river or harbour constitutes a "factory" for the purposes of the Workmen's Compensation Act.

STEVENS *v.* GENERAL STEAM NAVIGATION CO., [LD., [1903] 1 K. B. 890; 72 L. J. K. B. 417; 67 J. P. 415; 51 W. R. 578; 88 L. T. 542; 19 T. L. R. 418—C. A.

221. *Washing Bottles in Hotel Cellar—"Bottle Washing Works"—Factory and Workshop Act*, 1901 (1 Edw. 7, *c.* 22), *Sched.* VI.—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—An hotel cellarman was corking a bottle by hand in the cellar, when it burst and injured his hand. In the cellar, which was primarily used for storage, was a contrivance of revolving brushes, worked, if desired, by water from a tap, for the purpose of cleaning the insides of bottles.

HELD—that this did not constitute the cellar a "bottle-washing work" within Sched. VI. of the Factory and Workshop Act, 1901, and that it was, therefore, not a "factory" within the Act of 1897.

KAVANAGH *v.* CALEDONIAN RY. CO., (1904) 5 [F. 1128—Ct. of Sess.

Liability of Master for Injury to Servant— *Continued.*

222. *Warehouse—Store—Wholesale Business—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A place used in connection with a wholesale business for storing goods to be sold in the course of the business is a warehouse, and therefore a "factory" within the meaning of sect. 7, sub-sect. 2, of the Workmen's Compensation Act, 1897.

There is a distinction between such a place and a place where goods are kept for the purposes of a retail business carried on in a shop.

Burr v. *Whiteley* ((1903) 19 T. L. R. 117—C. A., *see* No. 41, *supra*) followed.

Colvine v. *Anderson* ((1902) 5 F. 255—Ct. of Sess.) considered.

GREEN *v.* BRITTEN AND GILSON, [1904] 1 K. B. [350; 73 L. J. K. B. 126; 68 J. P. 139; 52 W. R. 198; 89 L. T. 713; 20 T. L. R. 116—C. A.

223. *Building exceeding thirty feet in height wherein more than twenty Persons are Employed—Factory and Workshop Act*, 1901 (1 Edw. 7, *c.* 22), *s.* 105 (2)—*Workmen's Compensation Act*, 1897 (61 & 62 Vict. *c.* 37), *s.* 7 (2).]—The fact that a building which exceeds thirty feet in height and in which more than twenty persons, not being domestic servants, are employed for wages, comes within sect. 105 (2) of the Factory and Workshop Act, 1901, so that certain provisions of that Act apply to it as if it were a factory, does not make such a building a "factory" within the meaning of sect. 7 (2) of the Workmen's Compensation Act, 1897.

DYER *v.* SWIFT CYCLE CO., LD., [1904] 2 K. B. [36; 73 L. J. K. B. 566; 68 J. P. 394; 52 W. R. 483; 90 L. T. 613; 20 T. L. R. 429—C. A.

224. "*Warehouse*"—"*Dumping ground*" *for Waste Material—Factory and Workshop Act*, 1901 (1 Edw. 7, *c.* 22), *s.* 149, *sub-s.* 1, 5; *Sched. VI., Part* 1 (11)—*Workmen's Compensation Act*, 1897, (60 & 61 Vict. *c.* 37), *s.* 7.]—The respondents were the owners of a yard, which was open to the sky, where they chiefly kept stacks of old wood-paving and stacks of old scrap-iron. There was also a blacksmith's forge and shop, and some stables in the yard, and the yard was also used by the respondents' servants for the purpose of sharpening picks, facing hammers, and repairing and painting carts. The respondents sometimes sold the old wood-paving to dealers as firewood. A workman in the employment of the respondents was injured by an accident while shifting scrap-iron in the yard. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, the county court judge found that the yard was a general "dumping ground" for waste and other materials, and was not a "warehouse" within the definition of "factory" in sect. 6, sub-sect. 2, of the Act.

HELD—that the county court judge was justified in so finding, a mere "dumping ground" being outside anything which could be called a warehouse.

BUCKINGHAM *v.* MAYOR, &C., OF FULHAM, [(1905) 69 J. P. 297; 53 W. R. 628; 21 T. L. R. 511; 3 L. G. R. 926—C. A.

225. *Warehouse—Yard of Local Authority—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A corporation owned an uncovered yard, with a large shed on one side in which tools were kept and work was done in wet weather. The yard was chiefly used for storing road and drainage materials. Stone for the roads was broken there by hand.

HELD—that the yard was not a factory or warehouse.

M'EWAN *v.* PERTH MAGISTRATES, (1905) 7 F. [714—Ct. of Sess.

226. *Factory — Gasworks — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A workman was employed by a gas company to open up a road where a gas main belonging to the company was laid for the purpose of doing some work on the main. The place was about a quarter of a mile away from the gas works where the gas was made, and which was admittedly a "factory" within sect. 7 of the Workmen's Compensation Act, 1897. While so employed the workman was injured by an accident. No steam, water, or other mechanical power was used at the place.

HELD—that the main was not part of the factory, nor was the workman at the time of the accident employed "about" the factory, and that therefore the Act did not apply.

SPACEY *v.* DOWLAIS GAS AND COKE CO., LD., [1905] 2 K. B. 879; 22 T. L. R. 29; 75 L. J. K. B. 5; 54 W. R. 138; 93 L. T. 685—C. A.

227. *Adapting Article for Sale—Use of Steam Power—Factory and Workshop Act*, 1901 (1 Edw. 7, *c.* 22), *s.* 149, *sub-s.* 1 (c)—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—An employer carried on business as a tripe manufacturer at premises which consisted of a shop and parlour, with a yard behind. In the yard there was a roofed shed containing a copper in which the tripe was prepared. There was also a boiler in the shed in which steam was generated by means of a coal fire, and from which steam was carried to pipes coiled round the bottom of the copper, thus heating the water in the copper. The boiler was supplied with cold water by means of an injector, which was worked by the steam from the boiler. A workman, in the course of his employment, accidentally fell into that copper when full of boiling water and was killed.

HELD—that by reason of the use of "steam power" the premises were a factory within the meaning of sect. 149, sub-sect. 1 (c), of the Factory and Workshop Act, 1901 and sub-sect. 2 of the Workmen's Compensation Act, 1897, and that the deceased man's widow was entitled to compensation under the latter Act.

DOSWELL *v.* COWELL, (1906) 95 L. T. 38; 22 [T. L. R. 628—C. A.

Liability of Master for Injury to Servant—*Continued.*

228. "*Warehouse*"—*Store Attached to Retail Business*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—There is no absolute rule of law that a store attached to a retail business cannot be a warehouse within the meaning of sect. 7 (2) of the Workmen's Compensation Act, 1897.

Green v. *Britten and Gilson* ([1904] 1 K. B. 350; 73 L. J. K. B. 126; 68 J. P. 139; 52 W. R. 198; 89 L. T. 713; 20 T. L. R. 116—C. A., No. 222, *supra*) explained.

Moreton *v.* Reeve, [1907] 2 K. B. 401; 76 L. J. K. B. 850; 97 L. T. 63—C. A.

See also Nos. 41, 196, 330, 339, 344.

(5) *Mine.*

229. *Private Railway—Coal Mines Regulation Act*, 1887 (50 & 51 Vict. *c.* 58), *s.* 75—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (1) (2).]—A workman was employed in driving a train containing coal along a private railway from a mine to a coal depot. The railway, which was twelve miles long, and the depot were the property of the respondents, and were used for dealing with the traffic from various collieries worked by them. The workman was killed by accident at a point three-quarters of a mile distant from the mine from which he was driving the train.

Held—that at the time of the accident the man was not employed "on or in or about" a mine within the definition contained in sect. 75 of the Coal Mines Regulation Act, 1887, and therefore was not in an employment to which the Workmen's Compensation Act, 1897, applies.

Turnbull *v.* Lambton Collieries, Ld., (1900) 64 J. P. 404; 82 L. T. 589; 16 T. L. R. 369—C. A.

230. *Siding adjacent to and belonging to Mine—Work extraneous to proper Business of Employers*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 1 (1), 7—*Coal Mines Regulation Act*, 1887 (50 & 51 Vict. *c.* 58), *s.* 75.]—A colliery company, owners of a coal mine and siding connecting the mine with a main line of railway, contracted with the owner of a sand-hole, situated on the main line, to remove sand from the sand-hole by a pug engine and railway waggons to the colliery siding, preparatory to removal by the railway company. The haulage was to be done by a pug engine belonging to the colliery company, and used in connection with their mine and siding. The siding was about eighty yards in length, and served only the one mine. The sand-hole was 300 or 400 yards from the siding. In the discharge of his duty and in the course of executing the work he was employed to do, the brakesman of the pug engine, who was in the employment of the colliery company, was killed while uncoupling waggons on the main line in the immediate vicinity of the siding, which admittedly was a part of the mine.

Held—that (1) the employment of the deceased was locally "in or about" a mine within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. (1); and (2) (*dissentiente* Ld. Adam), a claim for compensation arose, although the character of the work upon which the deceased was employed at the time of the accident was not incidental to the proper business of the colliery.

Monaghan *v.* United Collieries, Ld., (1901) [3 F. 149—Ct. of Sess.

231. *Employment in Making Road to Work Mine—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7—*Metalliferous Mines Regulation Act*, 1872 (35 & 36 Vict. *c.* 77), s. 41.]—A workman met with an accident while he was at work on Loxley Common blasting large boulders of stone for the purpose of making a road, in the employment of the defendants who were lessees of coal and ganister under the common. The explosion which was the cause of the accident took place about six or seven yards from the mouth of a tunnel running into the side of a hill. The county court judge found as a fact that the road-making was part of the necessary work of preparing and working the mine, and that the mine was worked in the usual way, by the sinking of a shaft, by driving levels and inclined planes for commencing and opening the mine, and for searching for and proving minerals, and by driving a heading into the hillside.

Held—that the workman was employed on or in or about a mine within the meaning of sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897, and having regard to the definition of a "mine" in sect. 41 of the Metalliferous Mines Regulation Act, 1872.

Ellison *v.* Longden & Son, (1902) 18 T. L. R. [48—C. A.

232. *Siding—Private Road to Mine—Coal Mines Regulation Act*, 1887 (50 & 51 Vict. c. 58), *s.* 75—*Workmen's Compensation Act* (60 & 61 Vict. *c.* 37), *s.* 7.]—A workman employed as a carter at a coal mine was killed while unloading timber on to a colliery cart from a railway waggon at a siding belonging to and occupied by a railway company. The accident happened at a place 120 yards inside the gate of the railway company's premises: from that gate it was necessary to cross a public highway and then to go 250 yards down a private colliery road in order to reach the pit.

Held—that the workman was not injured whilst employed "on, in, or about the mine."

Coylton Coal Co. *v.* Davidson, (1905) 7 F. [727—Ct. of Sess.

233. *Railway Siding—Private Line—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7—*Coal Mines Regulation Act*, 1887 (50 & 51 Vict. *c.* 58), *s.* 75.]—A private railway line 1¼ miles long connected a mine with a main line. About half-way along the private line were a drum house and sidings.

Held—that this spot came within the definition of a "mine" contained in sect. 75 of the

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Coal Mines Regulation Act, 1887, and incorporated by reference in sect. 7 of the Workmen's Compensation Act, 1897, viz., "includes . . . tramways and sidings . . . in and adjacent to and belonging to the mine."

ANDERSON *v.* LOCH GELLY IRON AND COAL [CO., LD., (1905) 7 F. 189—Ct. of Sess.

See also No. 244.

(6) *Railway.*

234. *Refreshment Room — Barmaid — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7—*Regulation of Railways Act*, 1873 (36 & 37 Vict. *c.* 48), *s.* 3.]—A barmaid in the employment of a railway company, while attending to her duties in a refreshment room at one of their stations, sustained accidental injury in consequence of a framed advertisement falling from the wall.

HELD—that she was not employed on or in or about a railway within the meaning of sect. 7 of the Workmen's Compensation Act, 1897, and that, therefore, her employment was not an employment to which the Act applied.

MILNER *v.* GREAT NORTHERN RY. CO., [1900] [1 Q. B. 795 ; 69 L. J. Q. B. 427 ; 64 J. P. 291 ; 48 W. R. 387 ; 82 L. T. 187 ; 16 T. L. R. 249 —C. A.

235. *Station used "for the Purpose of Public Traffic" — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 — *Regulation of Railways Act*, 1873 (36 & 37 Vict. *c.* 48), *s.* 3.]—A workman was in the employment of a railway company as a blacksmith and horse shoer. The company kept seventy-four horses at their terminus, and the respondent was kicked by one of these horses while engaged in shoeing it. These horses were kept in stables within the area of the station, and the smithy was part of the station buildings. The horses were used in lorries and carts for collecting and delivering goods and hauling trucks.

HELD—that the horses were employed in the business of the company as carriers or "for the purpose of public traffic" within the meaning of the Workmen's Compensation Act, 1897, and the Regulation of Railways Act, 1873, s. 3, and that the company were liable.

CALEDONIAN RY. CO. *v.* BRESLIN, (1901) 2 F. [1158—Ct. of Sess.

236. *Private Railway—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—A goods guard in the employment of a railway company claimed from them compensation for injuries received by him while in their employment. The accident occurred upon a siding on a private line of railway belonging to an iron company. This private line had a connection with the railway company's main line, and the place where the accident occurred was at a distance of three-quarters of a mile from the connection.

HELD—that the accident did not occur upon a railway to which the Regulation of Railways Act of 1873 applied, and therefore the accident did not take place "on or in or about" a railway within the meaning of the Workmen's Compensation Act, 1897.

BRODIE *v.* NORTH BRITISH RY. CO., (1901) 3 F. [75—Ct. of Sess.

237. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (1).]—A carter was in the employment of a firm of contractors who had a contract with a railway company for the cartage of goods to and from one of their stations. On the day of the accident the carter had been, in accordance with his usual practice, collecting goods from various firms in town, and had carted them to the station and delivered them there. As he was leaving the station with his horse and lorry the horse took fright and bolted at the gate of the station. The horse continued on its course without any interruption until it dashed into an apothecary's shop, and the carter's left leg was crushed between the wall and the lorry and had to be amputated. The carter had finished his day's work and was proceeding to the stables when the accident occurred.

HELD—that the accident did not happen when the carter was employed "on or in or about" the railway within the meaning of sect. 7 (1) of the Workmen's Compensation Act, 1897.

RATHFATE *v.* CALEDONIAN RY. CO., (1902) 4 F. [313—Ct. of Sess.

(k) Out of and in the Course of Employment.

238. *Accident happening before Workman had got to or begun his work—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 1.] —In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the workman was in the employment of a firm of contractors, who had contracted with a railway company for the ballasting of a siding. While he was walking to his work along the main line —upon which he need not have got—the weather being foggy, he was run over by an express train and killed on the main line, about seven minutes before the time for the commencement of work, and at a distance of about 150 yards from the place of work.

HELD, by A. L. Smith and Vaughan Williams, L.JJ. (Romer, L.J., dissenting)—that it was not part of the contract of employment that the employment should extend till the deceased got to the place where his work was, nor should include the time taken in getting to that place, and that the workman had not, in contemplation of law, begun his work when he had not got to the place where his work lay and the time for commencing had not arrived, and that there was nothing to justify the county court judge in holding that the accident arose out of and in the course of the workman's employment within the meaning of sect. 1, sub-sect. 1, of the Workmen's Compensation Act, 1897.

HOLNESS *v.* MACKAY AND DAVIS, [1899] 2 Q. B. [319 ; 68 L. J. Q. B. 724 ; 47 W. R. 531 ; 80 L. T. 831 ; 15 L. T. 831 ; 15 T. L. R. 351— C. A.

Liability of Master for Injury to Servant— *Continued.*

239. *Jurisdiction of Court of Appeal — Questions of Law — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1. *sub-s.* 1.]—In an arbitration under the Workmen's Compensation Act, 1897, in respect of the death of a railway servant, who was killed in consequence of getting on to the foot-board of a train in motion to speak to a passenger, the county court judge found as facts that the deceased was, on the day of the accident, in the employment of the defendants, and that his day's duty was not finished at the time of the accident, but that he did not get on to the foot-board for any object of the defendants, but for his own pleasure.

HELD—that by sect. 1, sub-sect. 1, the Act only applied to accidents arising both out of the employment and in the course of employment; and that, on the findings of the county court judge, the accident did not arise out of the employment of the deceased.

In cases under the Workmen's Compensation Act, 1897, the C. A. has jurisdiction to entertain questions of law only.

SMITH *v.* LANCASHIRE AND YORKSHIRE RY. CO., [1899] 1 Q. B. 141; 68 L. J. Q. B. 51; 47 W. R. 146; 79 L. T. 633; 15 T. L. R. 64—C. A.

240. *Workman acting in the Interest of his Master in an Emergency — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1. *sub-s.* 1.]—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the workman, who was a fireman employed in a mine, while in the course of his employment taking a report from the pit to the office got on to a tram truck running in the direction to which he was going—he had no business to be upon it. The tram horse ran away; the workman endeavoured to stop it and in doing so was killed.

HELD—that the workman was acting in the interest of his master in an emergency which suddenly arose, and that the accident arose out of and in the course of his employment within the meaning of sect. 1, sub-sect. 1, of the Workmen's Compensation Act, 1897.

REES *v.* THOMAS, [1899] 1 Q. B. 1015; 68 L. J. [Q. B. 539; 47 W. R. 594; 80 L. T. 578; 15 T. L. R. 301—C. A.

241. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1. *sub-s.* 1.]—A workman was employed in pottery works to make the clay into balls and to hand them to a woman who was at work at a machine moulding the clay. The workman had nothing to do with the machine, and was expressly told not to interfere with it. The workman, while the woman was temporarily absent from the machine, attempted to clean it, and his hand was caught in the machinery and injured.

HELD—that the accident did not arise "out of and in the course of the employment" within sect. 1, sub-sect. 1, of the Workmen's Compensation Act, 1897, and that, therefore, the employer was not liable to pay compensation.

LOWE *v.* PEARSON, [1899] 1 Q. B. 261; 68 L. J. [Q. B. 122; 47 W. R. 193; 79 L. T. 654; 15 T. L. R. 124—C. A.

242. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1.]—A railway carter who is injured while stopping his horse which had started off inside the railway company's goods shed had been injured "in the course of his employment."

DEVINE *v.* CALEDONIAN RY. CO., (1899) 36 [S. L. R. 877—Ct. of Sess.

243. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 7.]—"A man does not cease to be in the course of his employment merely because he is not actually engaged in doing what is specially prescribed to him, if in the course of his employment an emergency arises, and, without deserting his employment, he does what he considers necessary for the purpose of advancing the work in which he is engaged in the interest of his master." (Per Ld. Kinnear.)

DURHAM *v.* BROWN BROTHERS & CO., LD., [(1898) 1 F. 279; 36 S. L. R. 190—Ct. of Sess.

244. *Master providing Train as Convenience for Workmen going Home — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1. *sub-s.* 1.]—The plaintiff was a collier in the employment of the defendants. The defendants owned a line of railway about one mile and a quarter in length, from their colliery, and they ran a train to take the colliers from their work in the colliery to their homes. The plaintiff was going home by the train, and when alighting from it at a point about three-quarters of a mile from the colliery he fell and was slightly injured. The county court judge found (1) that the accident did not arise out of and in the course of the plaintiff's employment. He found as a fact that it was not a condition of the plaintiff's employment that he should be carried to and from his work by the train, and that the defendants provided the train as a convenience only for their workmen, and that they were not under any contract, duty, or obligation to provide it. He also found (2) that the accident did not happen to the plaintiff on or in or about the mine.

HELD—that, upon the findings of the county court judge, the accident did not arise out of and in the course of the plaintiff's employment.

DAVIES *v.* RHYMNEY IRON CO., LD., (1900) 16 [T. L. R. 329—C. A.

245. *Assisting a Fellow-Servant of a Higher Grade in an Emergency — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1 (1).]—The deceased was employed in a joinery shop as a labourer to carry wood and sweep chips from the floor of the machine room, and generally to do work auxiliary to that of the skilled men. In assisting the machine man to put a belt right he received fatal injuries. The foreman, to whose orders the deceased was bound to conform,

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could have ordered him to assist in replacing the belt, but he had not done so.

HELD—that the accident arose out of and in the course of the employment within the meaning of the Workmen's Compensation Act, 1897, sect. 1.

MENZIES *v.* M'QUIBBAN, (1900) 2 F. 732—Ct. of [Sess.

246. *Difference between the Beginning of Employment and of Work—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1. *sub-s.* 1.]—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the deceased workman, who was in the employment of a railway company and lived near K. station, being under orders to work in an engine shed at H. station, went by train from K. to H. station free of charge, arriving at H. a quarter of an hour before the time for beginning work. Instead of making use, as he might have done, of either a bridge or a subway for the purpose of reaching the engine shed, he proceeded to cross the line on the level, and while doing so was knocked down by a train and killed.

HELD—that the accident arose out of and in the course of the employment of the deceased.

HOLMES *v.* GREAT NORTHERN RY. CO., [1900] [2 Q. B. 409; 69 L. J. Q. B. 854; 64 J. P. 532; 48 W. R. 681; 83 L. T. 44; 16 T. L. R. 412—C. A.

247. *Horse-play — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1 (1).]—A workman was employed as a blacksmith in works which were a factory within the meaning of the Workmen's Compensation Act, 1897. While he was working at the works two of his fellow-workmen, who were engaged in horse-play, stumbled against him and knocked him over a bucket of water, whereby his left leg was broken. He was no party to the pushing or knocking that took place.

HELD (Ld. Moncrieff dissenting)—that the accident could not be held to have arisen "out of and in the course of the employment" in the sense of the Workmen's Compensation Act, 1897, s. 1 (1), and that the injured workman was not entitled to compensation under the Act.

FALCONER *v.* LONDON AND GLASGOW EN- [GINEERING AND IRON SHIP BUILDING CO., (1901) 3 F. 564—Ct. of Sess.

248. *Blood-poisoning—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1 (1).]—A collier was working in a 2 feet 6 inches seam of coal, where it was necessary to kneel to carry on his work. He complained of pain in his knee, and after about a fortnight it was discovered that a small piece of coal had got inside his trousers and penetrated the skin of his knee. Blood-poisoning set in, and he died. The county court judge held that the deceased man was injured by accident arising out of and in the course of his employment.

HELD—that there was evidence upon which the county court judge could find that the deceased man's death was caused by an accident arising out of and in the course of his employment.

THOMPSON *v.* ASHINGTON COAL CO., LD., (1901) [65 J. P. 356; 84 L. T. 412; 17 T. L. R. 345—C. A.

249. "*Where Death results from the Injury*"—*Erysipelas supervening—Natural and probable Consequence of the Injury*—Novus actus interveniens—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1. *Sched. I., cl.* 1 (a).]—A workman admittedly met with an accident arising out of and in the course of his employment, which caused a wound to his toe. He was treated for that wound at the hospital as an out-patient. After a certain interval erysipelas set in, and he died of blood-poisoning caused by the erysipelas. At the time of the accident it seemed improbable, and it might even be unnatural, that erysipelas would supervene and that death would ensue.

HELD—that the county court judge, by inquiring whether death was the natural or probable consequence of the injury, had applied the wrong standard to the solution of the question: that if no new cause, no *novus actus*, intervened, death had in fact "resulted from the injury" within the meaning of Sched. I., cl. 1 (*a*), of the Workmen's Compensation Act, 1897; and that the county court judge had misdirected himself.

DUNHAM *v.* CLARE. [1902] 2 K. B. 293; 71 [L. J. K. B. 683; 66 J. P. 612; 50 W. R. 596; 86 L. T. 751; 18 T. L. R. 645—C. A.

250. *Wrongful Act of Fellow Workman outside Scope of Employment—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1. *sub-s.* 1.]—An accident caused to a workman while engaged in his work by a fellow workman doing a wrongful act entirely outside the scope of his employment is not an accident "arising out of and in the course of the employment." A boy in the same employment as the respondent, having a grudge against another boy, threw something at him, which missed him and hit the respondent.

HELD—that this was not an accident "arising out of and in the course of his employment" within the meaning of the Workmen's Compensation Act, 1897, but it was an accident caused by a wrongful act entirely outside the scope of employment.

ARMITAGE *v.* LANCASHIRE AND YORKSHIRE [RY. CO., [1902] 2 K. B. 178; 71 L. J. K. B. 778; 66 J. P. 613; 86 L. T. 883; 18 T. L. R. 648—C. A.

251. *Girl injured in starting Engine—No part of Duty to touch Engine—Question of Fact—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1.]—It is a question of fact whether an accident does, or does not, arise "out of and in the course of" the workman's employment.

A girl was employed to pick dirt out of coal passing along a belt moved by engine power. In

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the temporary absence of the engineer she attempted to re-start the engine, and was injured. She had not herself been warned not to touch the engine, but her companions had been so warned, and had informed her of the fact.

The county court judge found that the accident did not "arise out of and in the course of" her employment.

HELD (Mathew, L.J., dissenting)—that there was evidence to justify such finding, and that it could not be disturbed.

LOSH *v.* RICHARD EVANS & CO., LD., (1903) [51 W. R. 243 ; 19 T. L. R. 142—C. A.

252. *Workmen Suspended for the Day—Loitering in Pit on the Way to the Cage—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s* 1.]—A workman was suspended at 1.15 p.m. ; at 1.30 p.m. he was seen by a deputy sitting in a "refuge" or "pass-by," and told to go to the foot of the shaft. He, however, remained, and at 3.40 p.m. was injured by a "fall." Had he gone to the shaft bottom when ordered to do so, he would not have found a cage ascending before 4 p.m. The county court judge held that the order was not distinct enough to make his act "wilful and serious misconduct" ; but found as a fact that the accident did not arise "out of or in the course of his employment."

HELD—that it was a question of fact when the employment ended ; and that it could not be said that in point of law there was no evidence to support the judge's finding as to it.

SMITH *v.* SOUTH NORMANTON COLLIERY CO., [LD., [1903] 1 K. B. 204 ; 72 L. J. K. B. 76 ; 67 J. P. 381 ; 51 W. R. 209 ; 88 L. T. 5 ; 19 T. L. R. 128—C. A.

253. *Burden of Proof—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—A railway fireman living at N. H. was entitled to travel by any train to N. H. from the place at which he left his engine for the night. On the evening of the accident he entered a train at C., and was placing a basket in the rack when the train started ; he was standing with his back to the window, and his fellow passenger heard a noise, and saw that the door was open and that he had disappeared.

HELD—that the onus was upon the applicant (his widow) to show that the accident arose "out of" his employment ; but that there was sufficient evidence to justify the county court judge in finding in her favour.

POMFRET *v.* LANCASHIRE AND YORKSHIRE RY. [CO., [1903] 2 K. B. 718 ; 72 L. J. K. B. 729 ; 52 W. R. 66 ; 89 L. T. 176 ; 19 T. L. R. 649—C. A.

254. *Miner going to Work—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—A line of rails on the surface led to the doorway of a horizontal passage giving access to a mine.

A miner on his way to work slipped on these rails at a spot about four yards from the doorway and hurt himself.

HELD—an accident arising out of and in the course of his employment.

MACKENZIE *v.* COLTNESS IRON CO., (1904) 6 [F. 8—Ct. of Sess.

255. *Injury done by a Fellow Workman—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—C., observing that a brush belonging to his machine was in the hands of a fellow workman, M., who was oiling it, asked for it angrily, and pulled it out of M.'s hand. By his act M.'s hand was brought into contact with, and injured by, a sharp piece of iron.

HELD—an injury due to an accident "arising out of and in the course of" M.'s employment.

MCINTYRE *v.* RODGER, (1904) 6 F. 176—Ct. of [Sess.

256. *Accident during Dinner Hour — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—The applicant, who was employed upon a building exceeding 30 feet in height, was paid each week for the number of hours that he had actually worked, the dinner hour being excluded in calculating his wages. During the dinner hour he was at liberty either to remain on the premises or to leave them. He remained on the premises and sat down under a wall to eat his dinner, and while so doing the wall fell and injured him.

HELD—that the applicant continued to be in the employment of the respondent during the dinner hour and that the accident arose out of and in the course of the employment within the meaning of sect. 1 (1) of the Workmen's Compensation Act, 1897.

BLOVELT *v.* SAWYER, [1904] 1 K. B. 271 ; 73 [L. J. K. B. 155 ; 68 J. P. 110 ; 52 W. R. 503 ; 89 L. T. 658 ; 20 T. L. R. 105—C. A.

257. *Disease contracted from Employment—Anthrax—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1.]—A workman employed in a wool-combing factory contracted anthrax from certain wool therein which was infected with that disease.

HELD—that the workman was injured by accident arising out of and in the course of his employment within the meaning of sect. 1 of the Workmen's Compensation Act, 1897.

Decision of C. A. ([1904] 1 K. B. 328 ; 73 L. J. K. B. 158 ; 68 J. P. 193 ; 52 W. R. 195 ; 89 L. T. 690 ; 20 T. L. R. 129) affirmed.

BRINTONS. LD. *v.* TURVEY, [1905] A. C. 230 ; [74 L. J. K. B. 474 ; 53 W. R. 641 ; 92 L. T. 578 ; 21 T. L. R. 444—H. L. (E.).

258. *Workmen going to Work — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—An engine-driver in the employment of a railway company had, in order to commence his day's work, to go to an engine-shed at 7.45 a.m., and "sign on" there. His proper way from his home to the engine-shed was through a gate

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which led from the road on to the railway, and thence along a pathway which did not cross the lines of rails. One morning, instead of going along the pathway to the engine-shed, he went in the opposite direction along the railway to a signal-box, which had lines on both sides of it, to obtain some information from the signalman for his own purposes. After speaking to the signalman he left the box, and started to walk along the railway towards the engine-shed. He was shortly afterwards found lying on the line seriously injured, having been knocked down by an engine, and he subsequently died of his injuries.

HELD (reversing the decision of the county court judge)—that the accident did not arise "out of and in the course of" the deceased man's employment, which had not commenced at the time, and that therefore his dependants were not entitled to compensation under the Act.

BENSON *v.* LANCASHIRE AND YORKSHIRE RY. CO., [1904] 1 K. B. 242; 73 L. J. K. B. 122; 68 J. P. 149; 52 W. R. 243; 89 L. T. 715; 20 T. L. R. 139—C. A.

259. *Injury by Lightning—Risk incidental to Employment—Bricklayer working on Scaffolding—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—A bricklayer employed upon the construction of a building exceeding 30 feet in height was killed by lightning while working upon a scaffolding at a height of 23 feet from the ground. Evidence was given that a man working in such a position runs a greater than ordinary risk of being struck by lightning. The county court judge found that, as the place and circumstances in which the deceased man was employed involved an increased risk of his being struck by lightning, the accident arose "out of" the employment within the meaning of sect. 1 (1) of the Workmen's Compensation Act, 1897.

HELD—that the principle applied by the county court judge was correct, and that he had properly found that the accident was "out of" the employment.

ANDREW *v.* FAILSWORTH INDUSTRIAL SOCIETY, [LD., [1904] 2 K. B. 32; 73 L. J. K. B. 511; 68 J. P. 409; 52 W. R. 451; 90 L. T. 611; 20 T. L. R. 429—C. A.

260. *Accident happening before Commencement of Work—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 1.]—A number of workmen who were employed on a building had to come to their work by a train which arrived twenty minutes before the time for beginning work. The employers, knowing this, provided a cabin where the men could get refreshment before beginning work. Each man had to deposit a ticket at an office before beginning work each morning, and it was necessary to pass this office on the way to the refreshment cabin. Upon the morning in question the applicant, one of these workmen, arrived by train twenty minutes before work began, and went to the office to deposit his ticket before going to the refreshment cabin. Just as he reached the office he slipped and fell into a hole and was injured.

HELD—that the accident arose out of and in the course of the employment within sect. 1, sub-sect. 1, of the Workmen's Compensation Act, 1897, and the workman was entitled to compensation.

SHARP *v.* JOHNSON & CO., LD., [1905] 2 K. B. [139; 74 L. J. K. B. 566; 53 W. R. 597; 92 L. T. 675; 21 T. L. R. 482—C. A.

261. *Watchman—Cooking Food at Night—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1.]—The applicant was a watchman in the employment of a borough council, and was employed to watch at night some sewer work, his duty being to look after tools and traffic lamps, and to prevent accidents. There was a watch-box for him to sit in. The tools were kept in a shanty which was constructed of scaffold poles, trestles, planks, and a tarpaulin. Upon the night in question there was a fire outside the watch-box, but as it was raining the applicant lighted a fire in the shanty, and proceeded to cook his food there. While so engaged the shanty fell down and injured him. The evidence showed that the workmen were in the habit of having their food in the shanty in the daytime, and there was no evidence that the applicant was expressly prohibited from making use of the shanty, though the borough engineer gave evidence that the applicant had no business in the shanty at all, and that he would discharge a watchman if he had a fire in the shanty at night. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, the county court judge found that the applicant was not properly in the shanty, having regard to his duties, and that therefore the accident did not arise out of the employment.

HELD—that in the absence of a prohibition against the applicant using the shanty the evidence showed that the accident arose out of and in the course of the employment, and the Act applied.

MORRIS *v.* LAMBETH BOROUGH COUNCIL, (1905) [22 T. L. R. 22—C. A.

262. *One Workman performing Another's Duties before his own Hours of Work—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—The applicant was employed by a road authority, and his hour for commencing work was 7 a.m. His sole duties, at the date of his accident, were to sweep and put material on the road for a steam roller to level. It was the duty of the enginemen to attend early enough to break up the boiler fire so as to have steam ready by 7 a.m. By arrangement with the enginemen, who had gone home for a night and did not wish to return before 7 a.m., he broke up the fire one morning before 7 a.m., and fell from the engine after so doing.

HELD—that his accident was not one arising out of and in the course of his employment.

M'ALLAN *v.* PERTHSHIRE COUNTY COUNCIL, [(1906) 8 F. 783—Ct. of Sess.

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263. *Workman going to receive his Pay—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 1.]—The appellant was employed as a collier by the respondents, and it was part of his contract of employment that the employers should pay him his wages at their pay office. The appellant left work on Saturday at 5 a.m. At 12.30 p.m. he was going for his wages along a path which had been made by the respondents for their workmen, and while going along a railway company's line which ran through the respondent's premises he was knocked down by an engine and injured.

HELD—that he was injured "in the course of the employment" within sect. 1, sub-sect. 1, of the Workmen's Compensation Act, 1897, and was entitled to compensation.

LOWRY *v.* THE SHEFFIELD COAL CO., LD., (1907) [24 T. L. R. 142—C. A.

264. *Workman going Home from Work—Workmen's Compensation Act*, 1906 (6 Edw. 7, *c.* 58), *s.* 1, *sub-s.* 1.]—A large number of workmen employed at the appellants' colliery lived some six miles from the colliery. The appellants supplied a train composed of carriages belonging to them each morning and evening to bring the workmen to and from their work without charge, and this train was run upon the line of a railway company by a locomotive provided by the company. The appellants erected a platform on the line, upon land belonging to the railway company, about a quarter of a mile from the colliery, and the workmen walked from the platform to the colliery by a public road. The platform was repaired and lighted by the appellants. While waiting at the platform for the train on his way home from work one of the workmen was accidentally pushed off the platform and was killed by the train. In proceedings by his widow to have compensation assessed under the Workmen's Compensation Act, 1906, the county court judge found that it was an implied term of the contract of service that the trains should be provided by the appellants, and that the workmen should be entitled to travel in them to and fro without charge, and he held that the relationship of master and servant existed at the time of the accident, and that the case came within the Act.

HELD—that in those circumstances the accident arose "out of and in the course of the employment" within the meaning of sect. 1, sub-sect. 1, of the Act, and the appellants were liable to pay compensation.

CREMINS *v.* GUEST, KEEN, AND NETTLEFOLD, [(1907) 24 T. L. R. 189—C. A.

265. *Workmen going Home by Short Cut across Railway—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—A miner started to go home by crossing a railway siding on the mine premises, and by trespassing along a railway; he was injured while crossing the siding. There were two exits provided for leaving the mine, neither of which crossed the siding. The workman was aware that the short cut was not the proper exit, but there was no express prohibition against workmen leaving the mine at this spot.

HELD—that the accident did not arise out of and in the course of the workman's employment.

HALEY *v.* UNITED COLLIERIES, (1907) S. C. 214 [—Ct. of Sess.

266. *Tortious Act of Strangers—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—A. was in the employment of B., a contractor, as foreman of sewage works. Certain pipes which had been laid in the street in the course of the work were wantonly broken. B. directed A. to protect the pipes, and while A. was so engaged further damage was done, for which A., under B.'s direction, demanded payment from the wrongdoers. This led to an altercation, in the course of which B. was struck and fell, and A. on going to his rescue was stabbed, and died.

HELD—that A.'s death was not caused by an accident arising out of and in the course of his employment.

COLLINS *v.* COLLINS, [1907] 2 Ir. R. 104—C. A.

267. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—H. was employed as a fish porter by X., who had a contract with a railway company for the porterage of fish delivered at one of their stations. He had left the siding where the trucks were discharged, and was walking along the line near a shunter's bothy, to which the fish porters were in the habit of going in order to find out the number of fish boxes that were in transit. While so walking he was killed by an engine. The sheriff found that the fish porters had no right to walk along the railway, that they had never been instructed by any one to go to the bothy to find out the number of fish boxes that were in transit, and that the information was not of any use to them, or to their employer, in their work.

HELD—that H. had not been killed through an accident arising out of and in the course of his employment.

HENDRY *v.* CALEDONIAN RY., (1907) S. C. 732 [—Ct. of Sess.

268. *Evidence—Inference—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 1.—A workman, who was employed in a colliery, died from blood poisoning resulting from an injury to his finger. He was working at night, and on the evening of the accident he left his home, which was just over a mile from the pit, with his finger well. He arrived at the pit with his finger uninjured. He arrived home early next morning with his finger crushed. He continued to work for some days, when blood poisoning set in, and he died. His widow claimed compensation under the Workmen's Compensation Act, 1897, but the county court judge held that he was not entitled to draw the inference that the accident arose in the course of his employment, as it might have occurred on the way home.

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HELD—that the judge was at liberty to draw the inference that the accident arose in the course of the employment.

By Sir Gorell Barnes: The probability was that the accident happened at the time when the workman was at the pit, because accidents did happen there, rather than at a time when in the ordinary course of life accidents did not happen.

MITCHELL *v.* THE GLAMORGAN COAL CO., LD., [(1907) 23 T. L. R. 588—C. A.

See also Nos. 11, 12, 13, 206, 309, 311, 312, 313, 315, 321.

(I) Practice.

(1) *Appeals and New Trials.*

269. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—Where the question whether the plaintiffs were, and the county court judge has found that they were, "in part dependent upon the earnings," an appeal can only be allowed if the Court is satisfied that there was no evidence to support the finding of the county court judge. If there was evidence on which the county court judge could find as he did, he did not misdirect himself, and his finding is conclusive.

Simmons v. *White* ([1899] 1 Q. B. 1005; 68 L. J. Q. B. 507; 47 W. R. 513; 80 L. T. 344; 15 T. L. R. 263—C. A., No. 98, *supra*) followed.

DAVIES *v.* MAIN COLLIERY CO., (1899) 80 L. T. [674—C. A.

270. *Poverty—Security for Costs of Appeal under Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *R. S. C., Ord.* 58, *r.* 15.]—The ordinary rule of the Court that the poverty of the appellant is a reason for ordering security to be given for the costs of the appeal extends to appeals under the Workmen's Compensation Act, 1897.

HALL *v.* SNOWDON, HUBBARD & CO., [1899] 1 [Q. B. 593; 68 L. J. Q. B. 363; 47 W. R. 322; 80 L. T. 256; 15 T. L. R. 244—C. A.

271. *Arbitration—Jurisdiction of County Court Judge—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 3; *Sched. II., ss.* 2, 4—*Workmen's Compensation Rules*, 1898, *rr.* 1 (4), 24, 64.]—A county court judge who has made an award has no jurisdiction to grant a new trial in an arbitration under the Workmen's Compensation Act, 1897. The county court judge in such applications sits merely as an arbitrator.

MOUNTAIN *v.* PARR, [1899] 1 Q. B. 805; 68 [L. J. Q. B. 447; 47 W. R. 353; 80 L. T. 342; 15 T. L. R. 262—C. A.

272. *Poverty—Security for Costs of Appeal under Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37).]—The workman appeared to be without means to pay the costs if he failed in his appeal from an award of a county court judge in an arbitration under the Workmen's Compensation Act, but the county court judge had ordered a stay of execution pending an appeal, and had thereby, in effect, invited the parties to come to the Appeal Court to have a point of law determined.

HELD—that under the circumstances the workman ought to be allowed to appeal without giving security for costs.

HUBBALL *v.* EVERITT AND SONS, LD., (1900) [16 T. L. R 168—C. A.

And see PRACTICE AND PROCEDURE, No. 246.

273. *Appeal to the House of Lords from Court of Session—Competency—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. II., s.* 14 (*c*).]—In cases within sect. 14 (*c*) of Sched. II. to the Workmen's Compensation Act, 1897, no appeal lies to the House of Lords from a decision of the Court of Session.

OSBORNE *v.* BARCLAY, CURLE & CO., [1901] [A. C. 269; 85 L. T. 286—H. L. (Sc.).

274. *Refusal to direct Insurance Company to pay the Insurance Money into Savings Bank—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 5, *sub-s.* 1; *Sched. II., cl.* 4.]—After an award had been made against an employer under the Workmen's Compensation Act, 1897, the employer became bankrupt. The county court judge refused to make an order under sect. 5 of the Act directing the insurance company, with whom the employer had insured, to pay the sum due under the insurance into the Post Office Savings Bank. The workman appealed.

HELD—that the only appeal given by clause 4 of the Second Schedule to the Act is from the decision of the county court judge on a question of law, either on the submission of a question of law by an arbitrator, or in any case where the judge himself settles the matter under the Act; and that the case was not within clause 4.

LEECH *v.* LIFE AND HEALTH ASSURANCE [ASSOCIATION, [1901] 1 K. B. 707; 70 L. J. K. B. 544; 49 W. R. 482; 84 L. T. 414; 17 T. L. R. 354—C. A.

275. *Order of County Court Judge directing Insurance Company to pay Weekly Payments—Appeal to Divisional Court—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 5—*County Courts Act*, 1888 (51 & 52 Vict. *c.* 43), *s.* 120.]—An appeal lies to a Divisional Court against an order made by a county court judge under sect. 5 of the Workmen's Compensation Act, 1897.

MORRIS *v.* NORTHERN EMPLOYERS' MUTUAL [INDEMNITY CO., [1902] 2 K. B. 165; 71 L. J. K. B. 733; 66 J. P. 644; 50 W. R. 545; 86 L. T. 748; 18 T. L. R. 635—C. A.

276. *County Court—Order of County Coury Judge directing Insurance Company to part Weekly Payments—Appeal to Divisional Court—Workmen's Compensation Act*, 1897 (60 & 61

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Vict. *c.* 37), *s.* 5—*County Courts Act*, 1888 (51 & 52 Vict. *c.* 43), *s.* 120.]—An award was made against a company in favour of the plaintiff for the payment of a weekly sum of 14*s.* 9*d.* during incapacity under the Workmen's Compensation Act, 1897. The company had commenced to wind up and no payments were made to the plaintiff under the award. The plaintiff applied to the county court judge, who made an order that the defendants, with whom the company had insured, should pay to the plaintiff the arrears of the weekly payments, and should continue the payments under the award.

HELD—that under sect. 5 of the Workmen's Compensation Act, 1897, there was a statutory subrogation of the workman to the rights of the employer, and, the matter being within the purview of the county court judge, there was the ordinary right of appeal, under sect. 120 of the County Courts Act, 1888, to the Divisional Court.

KNIVETON *v.* NORTHERN EMPLOYERS' MUTUAL [INDEMNITY CO., [1902] 1 K. B. 880 ; 71 L. J. K. B. 588 ; 50 W. R. 704 ; 86 L. T. 721 ; 18 T. L. R. 504—Div. Ct.

277. *Rule as to Requiring Security for Costs.*] —The general rules as to ordering security for costs apply to an appeal against an award of compensation under the Workmen's Compensation Act, 1897: it does not, therefore, follow that security will not be ordered because a stay of execution has been granted by the county court judge.

Hubball v. *Everitt & Sons, Ld.* ((1900) 16 T. L. R. 168, No. 272, *supra*) explained.

SHEA *r.* DROLENVAUX AND ANOTHER, (1903) [88 L. T. 679 ; 19 T. L. R. 473—C. A.

278. *Taxation of Costs—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. II.* (4).] —A county court judge gave judgment against a plaintiff in an action under the Employers' Liability Act, 1880 ; but awarded him, and assessed, compensation under the Workmen's Compensation Act, 1897 ; he also ordered the plaintiff's taxed costs of the award to be set off against the defendant's taxed costs of the action. The plaintiff applied to the judge to review the registrar's taxation, and upon his refusal appealed.

HELD—that no appeal lies to the C. A. against such a decision.

Leech v. *Life and Health Assurance Association* ([1901] 1 K. B. 707 ; 70 L. J. K. B. 544 ; 49 W. R. 482 ; 84 L. T. 414—C. A., No. 274, *supra*) followed.

KEANE *r.* NASH, (1903) 88 L. T. 790 ; 19 T. L. R. [419—C. A.

279. *Award by Arbitrator appointed by County Court Judge—No Appeal from direct to Court of Appeal — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. II., cl.* 2, 3, 4.] —An appeal will not lie direct to the Court of Appeal from the award of an arbitrator appointed by a county court judge under the Workmen's Compensation Act, 1897, Sched. II., cl. 2.

GIBSON *r.* WORMALD & WALKER, LD., [1904] [2 K. B. 40 ; 73 L. J. K. B. 491 ; 68 J. P. 382 ; 52 W. R. 661 ; 91 L. T. 7 ; 20 T. L. R. 452—C. A.

280. *Costs — Taxation — Refusal of County Court Judge to order Review of Taxation of Costs—No Appeal lies to Court of Appeal—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (12) ; *Sched. II.* (4).]—An appeal will not lie to the Court of Appeal under Sched. II. (4) of the Workmen's Compensation Act, 1897, from the refusal of a county court judge to order a review of the taxation of the costs of an application, under Sched. I. (12) of the Act, to review a weekly payment.

RIGBY & CO. *r.* COX (1), [1904] 1 K. B. 358 ; 73 [L. J. K. B. 80 ; 68 J. P. 195 ; 52 W. R. 195 ; 89 L. T. 717 ; 20 T. L. R. 136—C. A.

281. *Agreement—Refusal to Register—Appeal —Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. II.* (8).]—Where application is made to a sheriff (whose duties under the Act of 1897 resemble those of an English county court judge) to register an agreement as to compensation, and he refuses to register it (its genuineness being in dispute), no appeal lies from his decision, which is a ministerial act.

BINNING *r.* EASTON, (1906) 8 F. 407—Ct. of [Sess.

282. *Alternative Remedies—Deduction of Costs —Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 4 ; *Sched. II., par.* 4.]—In an action under the Employers' Liability Act, 1880, the county court judge nonsuited the plaintiff, and his decision was affirmed by the Divisional Court. The county court judge, upon the application of the plaintiff, assessed compensation under the Workmen's Compensation Act, 1897, and deducted from the amount awarded the costs incurred by the defendants in the action under the Employers' Liability Act and in the appeal to the Divisional Court. The plaintiff appealed to the Divisional Court against the order as to the deduction of the costs.

HELD—that the appeal lay to the C. A. under Sched. II., par. 4, to the Workmen's Compensation Act, 1897.

WILLIAMS *r.* ARMY AND NAVY AUXILIARY [CO-OPERATIVE SOCIETY, (1907) 23 T. L. R. 408—Div. Ct.

283. *Agreement — Recording Memorandum — Disputing Genuineness—Order of County Court Judge that Memorandum be Recorded—Appeal—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. II., pars.* 8, 10—*Workmen's Compensation Rules*, 1898, *rr.* 43, 45.]—Where the genuineness of a memorandum of agreement as to the amount of compensation payable by an employer to his workman in respect of injuries by accident is disputed, and the county court

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judge, upon an application made to him, hears evidence and orders the memorandum to be recorded, the judge is acting in a judicial capacity, and not in the capacity of adviser to his registrar, and an appeal lies upon a point of law from his decision to the Divisional Court under sect. 120 of the County Courts Act, 1888.

Decision of Div. Ct. ((1907) 97 L. T. 308 ; 23 T. L. R. 607) affirmed.

JOHNSTON *v.* MEW, LANGTON & CO., (1907) [24 T. L. R. 175—C. A.

284. *Agreement — Recording Memorandum — Decision to Register or not—Finality—Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37), *Sched. II.*]—No appeal lies from the decision of a sheriff granting, or refusing to grant, a warrant to record a memorandum of agreement under the Workmen's Compensation Act.

LOCHGELLY IRON AND COAL CO. *v.* SINCLAIR [(1907) S. C. 3—Ct. of Sess.

See also Nos. 53, 98, 154, 200, 239, 285.

(2) *Costs.*

285. *Discretion — Workmen's Compensation Rules,* 1898, *r.* 33, *sub-s.* 3.]—The plaintiff, in the employment of the defendants, sought compensation for personal injury accidentally sustained by him in the course of his employment. The defendants admitted liability under the Workmen's Compensation Act, 1897, and offered the plaintiff a weekly payment of 7*s.* 6*d.*, but this offer was not accepted. The judge of the county court thought the plaintiff ought to have accepted the offer, and refused to make an award. The plaintiff appealed to the Court of Appeal, who remitted the case to the county court judge to further proceed thereon, and ordered that the defendants should pay to the plaintiff his costs of the former hearing before the county court judge. The county court judge made an award in favour of the plaintiff for a weekly payment of 7*s.* 6*d.*, and he ordered that the defendants should pay the plaintiff's costs, which he fixed at £5. The plaintiff applied for an order calling on the county court judge to show cause why he should not give directions for taxation of costs.

HELD—that the applicant was seeking an order in the nature of a *mandamus* to the county court judge to do his duty, and he ought to go to the High Court for that, and the C. A. had no jurisdiction to entertain the matter.

HELD, further, that the county court judge had done his duty under rule 33, sub-sect. 3, of the Workmen's Compensation Rules, 1898.

WELLAND *v.* GREAT WESTERN RY. CO., (1900) [16 T. L. R. 297—C. A.

286. *Death of Workman—Admission by Employers of Liability—Duty of Widow to take out Letters of Administration— Compensation paid into Court—Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37), *Sched. II., par.* 6—*Workmen's Compensation Rules,* 1898, *r.* 5.]—A workman was killed by an accident. A claim having been made by the applicant, his widow, on behalf of herself and her children for compensation in respect of the death of her husband, the respondents agreed that the maximum amount—£300—was payable, but refused to pay it to the applicant until she had taken out letters of administration. The applicant refused to take out letters of administration and commenced proceedings for the recovery of compensation under the Workmen's Compensation Act, 1897. The respondents thereupon paid £300 into Court under rule 5 (3) of the Workmen's Compensation Rules, 1898. The applicant then applied to the county court judge for an order for the payment by the respondents of her costs up to the time of the payment into Court and of the costs of the application. The county court judge ordered the respondents to pay both sets of costs.

HELD—that the respondents were not entitled to refuse to pay the compensation to the applicant until she had taken out letters of administration, and that the county court judge had a discretion to order the respondents to pay both sets of costs.

CLATWORTHY *v.* R. AND H. GREEN, LD., (1902) [66 J. P. 596 ; 50 W. R. 610 ; 86 L. T. 702; 18 T. L. R. 641—C. A.

287. *Reviewing Award—Costs of Application —Interlocutory or Original Proceeding — Discretion—Rule of Judge—Workmen's Compensation Act,* 1897, *Sched. I., cl.* 12 ; *Sched. II., cl.* 6 *—Workmen's Compensation Rules,* 1898, *r.* 33 (1).]— A county court judge dismissed an employer's application to review a weekly payment under clause 12 of Sched. I. of the Workmen's Compensation Act, 1897, with costs on scale B of the county court scale of costs. On taxation the registrar taxed the costs as those of an interlocutory proceeding, stating that the county court judge had made a standing rule that the costs of such an application should be so taxed. The county court judge, acting on his own rule, refused to direct a review of taxation.

HELD—that the county court judge had no power to make any such rule. He must exercise his discretion under clause 6 of Sched. II. of the Act, in each particular case, to see whether the costs of such an application should be taxed as those of an original or of an interlocutory proceeding.

Case sent back with this direction for a review of taxation.

RIGBY & CO. *v.* COX (No. 2), [1904] 2 K. B. 208 ; [73 L. J. K. B. 690 ; 91 L. T. 72 ; 68 J. P. 385 ; 20 T. L. R. 461—Div. Ct.

288. *Reviewing Award—Costs of Application to Review—No Set-off against Weekly Payment - Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (14.).]—An employer cannot set off against weekly payments due from him to an injured workman the sum awarded to him as

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costs against the workman upon an application to review.

Rosewell Gas Co., Ld. *v.* M'Vicar, (1905) 7 [F. 290—Ct. of Sess.

289. *Costs of Appeal—Set-off—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (1) (b).]—Where an applicant under the Workmen's Compensation Act, 1897, appeals unsuccessfully against the amount of compensation awarded to him, the costs of the appeal will, as a rule, be set off against the costs in the arbitration.

Case *v.* Colonial Wharves, Ld., (1905) 53 [W. R. 514—C. A.

See also Nos. 195, 270, 272, 277, 278.

(m) Redemption of Payment.

290. *Redemption of Weekly Payment—Request for Arbitration limiting Amount—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (13).]—Where an employer applies under clause 13 of Sched. I. to the Workmen's Compensation Act, 1897, to have a weekly payment redeemed by the payment of a lump sum, he cannot, in his request for arbitration for that purpose, fix a sum as the *maximum* to be awarded. If he chooses to make the application he must be content to leave the question of amount entirely to the arbitrator's discretion.

Castle Spinning Co., Ld. *v.* Atkinson, [1905] [1 K. B. 326; 74 L. J. K. B. 265; 53 W. R. 366; 92 L. T. 147; 21 T. L. R. 192—C. A.

(n) Registration of Agreement.

291. *Agreement as to Compensation—Subsequent Partial Recovery—Lapse of Time—Right to nevertheless register Memorandum of the Agreement—"Genuineness"—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. II., s.* 8.]—Where a workman entitled to compensation under the Workmen's Compensation Act, 1897, agrees with his master as to the amount of compensation to be paid to him, he is entitled at any future time to have a genuine memorandum of the agreement registered at the county court, notwithstanding the fact that he has in the meantime personally recovered, and is able to again earn some wages. A memorandum is "genuine" if it is an accurate record of the actual agreement, although, owing to the man's recovery, he is no longer entitled to the amount of compensation fixed by the agreement.

Cammick v. *Glasgow Iron and Steel Co., Ld.* ((1901) 4 F. 198) followed.

Blake *v.* Midland Ry. Co., [1904] 1 K. B. [503; 73 L. J. K. B. 179; 68 J. P. 215; 90 L. T. 433; 20 T. L. R. 191—Div. Ct.

292. *Application to Register—Alleged error in Agreement—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. II., s.* 8.]—When an injured workman applies under the procedure applicable in Scotland to register an agreement arrived at between himself and his employers as to the amount of compensation payable to him, the employers cannot object to its registration on the ground that it was entered into under a mistake of fact.

Quaere, what would be the proper mode of taking such an objection.

Macdonald *v.* Fairfield Shipbuilding and [Engineering Co., Ld., (1906) 8 F. 8—Ct. of Sess.

293. *Agreement Recorded—Modified by Later Unrecorded Agreement—Effect.*]—An injured workman agreed to accept 16*s.* 6*d.* per week, and this agreement was duly recorded. Subsequently he agreed that the payment should be reduced to 11*s.* 6*d.*; this agreement was not recorded. The masters having refused any further payments, the workman sued upon the earlier agreement, but restricted his claim to 11*s.* 6*d.* per week.

Held—that his action was maintainable.

Fife Coal Co., Ld. *v.* Davidson, (1907) [S. C. 90—Ct. of Sess.

294. *Subsequent Death of Workman—Death not due to Accident—Estoppel—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37.]—A workman met with an accident in the course of his employment, and tumours on the neck ensued. He was incapacitated for work, and his employers paid him half his weekly wages under an agreement to that effect, a memorandum of which was registered under the Workmen's Compensation Act, 1897. The workman continued incapable of working, and died in a year. His widow claimed compensation under the Act, and the county court judge found that the workman's death was not caused or accelerated by the accident, the sole cause of his incapacity for work being a disease from which he was suffering, and of which disease alone he died; but he held that the employers were estopped from denying that the disease which caused his death was the result of the accident by reason of the agreement and the payments made by them.

Held—that the agreement did not amount to an admission that the death was caused by the accident, and therefore there was no estoppel.

Cleverly *v.* Gas Light and Coke Co., (1907) [24 T. L. R. 93—H. L. (E.).

295. *Ministerial Act—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. II.*] —The order of a sheriff for the registration of a memorandum of agreement for compensation is a purely administrative act.

Per Ld. Salvesen: Wherever there is a *bonâ fide* dispute as to whether a verbal agreement in terms of the memorandum presented for registration has been in fact entered into, the sheriff should decline to order the memorandum to be recorded.

Hughes *v.* Thistle Chemical Co., (1907) [S. C. 607—Ct. of Sess.

See also Nos. 281, 283.

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(o) Reviewing Award.

296. *Change in Circumstances—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 12.]—An application under par. 12 of Sched. I. of the Workmen's Compensation Act, 1897, for a review of a weekly payment can only be made where some change in the circumstances of the case has taken place since the making of the award.

So held—Vaughan Williams, L.J., doubting.

Crossfield & Sons, Ld. *v.* Tanian, [1900] [2 Q. B. 629; 69 L. J. Q. B. 790; 48 W. R. 609; 82 L. T. 813; 16 T. L. R. 476—C. A.

297. *Weekly Payments—Diminishing or Increasing Payments—Date of Incapacity of Workman ceasing or substantially diminishing—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., ss.* 1 (b), 12.]—A workman, while in the course of his employment as a riveter engaged in boiler-making, met with an accident by which he lost the sight of one eye. An agreement was come to fixing the amount of compensation by way of a weekly payment to which the workman was to be entitled, and this agreement was registered under the provisions of the Workmen's Compensation Act, 1897. In November, 1901, an application was made by the employers, under sect. 12 of Sched. I. of the Act, for a review of the weekly payment, with a view of putting an end to it. The hearing took place in December and was adjourned till April, 1902, when the judge gave his final decision.

Held—that the dispute as to the man's incapacity for work arose in November, 1901, when the matter was first initiated before the Court; that the essential question was his condition, not in April, 1902, when the Court was able to give its attention to the matter, but in November, 1901, when the dispute was formulated as to whether the man's incapacity had ceased or not, which was when the proceedings were commenced; and the county court judge should have determined at what date prior to the hearing the incapacity ceased altogether, or at what date it was substantially diminished, so that there ought to be a reduction in the amount of the allowance: and that the judge should have made an award accordingly.

Morton & Co., Ld. *v.* Woodward, [1902] 2 [K. B. 276; 71 L. J. K. B. 736; 66 J. P. 660; 51 W. R. 54; 86 L. T. 878—C. A.

298. *Subsequent Request by Master for Review—Workman refusing to undergo Operation—Workmen's Compensation Act*, 1897, *Sched. I.* (12).]—A master is not entitled to require an injured workman to undergo a serious operation, on the chance of his incapacity being cured thereby. An award of 17*s.* per week during incapacity had been made in a workman's favour; subsequently the master called upon him to undergo an operation which entailed some risk, but was likely to be successful. Upon the workman refusing, the master claimed to have the award reviewed, but the county court judge declined to interfere.

Held—that he was right, and that there was no obligation on the workman to undergo such an operation.

Rothwell *v.* Davies, (1903) 19 T. L. R. 423—[C. A.

299. *Refusal of Servant to Submit to Treatment—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (12).]—Although a servant cannot be compelled to submit to some serious operation, under penalty of forfeiting his compensation, yet, if the continuance of his incapacity is due to neglect of simple medical directions, he may be held to have forfeited his right to receive any further payments.

Dowds *v.* John Bennie & Co., (1903) 5 F. 268 [—Ct. of Sess.

300. *Award reviewed once—Application to Review again*—Res judicata—*Change of Circumstances—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 12.]—Upon an application by employers under Sched. I. (12) of the Workmen's Compensation Act, 1897, for the review of a weekly payment, made under the Act, to an injured workman, the county court judge, acting upon the evidence of medical experts that the workman was not incapacitated for work, reduced the weekly payment to a nominal sum. The workman afterwards applied for a further review of the weekly payment on the ground that he was totally incapacitated for work, and tendered evidence that since the previous hearing he had repeatedly applied for work, and had been unable to obtain it on account of his condition in consequence of the accident. The county court judge refused to entertain the application on the ground that the matter was *res judicata*, and that there had been no change of circumstances since the previous hearing so as to give him jurisdiction to review the weekly payment.

Held—that the doctrine of *res judicata* did not apply, the evidence tendered showing a change of circumstances sufficient to give the county court judge jurisdiction to entertain the application.

Crossfield & Sons v. *Tanian* ([1900] 2 Q. B. 629; 69 L. J. Q. B. 790; 82 L. T. 813; 48 W. R. 609—C. A., No. 296, *supra*) distinguished.

Sharman *v.* Holliday & Greenwood, Ld., [1904] 1 K. B. 235; 73 L. J. K. B. 176; 68 J. P. 151; 90 L. T. 46; 20 T. L. R. 135—C. A.

301. *Enforcing Award though able to Work—Decree for Weekly Payment "until further Order"—Employers taking Workman back at same Wages—No "Further Order" asked for—Workman leaving Employment—Attempt to enforce Decree for Whole Period*]—An injured workman was awarded 17*s.* per week as compensation "until further orders of the Court." The employers took him back at his original wages of 34*s.* per week, but took no steps to have the award varied by the Court.

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Subsequently he left their service and claimed to enforce payment of the 17*s.* per week from the date of the award.

HELD—that during the time he was receiving 34*s.* per week as wages he was entitled to nothing under the award.

BEATH & KEAY *v.* NESS, (1904) 6 F. 168—[Ct. of Sess.

302. *Average Amount Workman able to earn after Accident—Profits of Business carried on by Workman—Whether to be taken into Consideration—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (2) (12).]—Upon an application by an employer under Sched. I. (12) of the Workmen's Compensation Act, 1897, for the review of a weekly payment, the fact that since the accident the workman has set up a business of his own and is deriving profits therefrom ought to be taken into consideration for the purpose of deciding whether or not the weekly payment should be ended or diminished.

The expression "average amount which he is able to earn after the accident" in Sched I. (2) of the Act is not limited to earnings from an employer.

NORMAN & BURT *v.* WALDER, [1904] 2 K. B. [27 ; 73 L. J. K. B. 461 ; 68 J. P. 401 ; 52 W. R. 402 ; 90 L. T. 531 ; 20 T. L. R. 427—C. A.

303. *Evidence—What Admissible—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (12), *II.* (13).]—Where employers apply to review an award, the workman is entitled to call evidence as to his condition ; and there is no jurisdiction to remit the case to a medical referee and to adopt his report without hearing the evidence tendered by the workman.

Niddrie and Benhar Coal Co. v. *M'Kay* ((1903) 5 F. 1121, No. 135, *supra*) followed.

JOHNSTONE *v.* COCHRAN & Co., LD., (1905) 6 F. [854—Ct. of Sess.

304. "*Incapacity for Work*" — *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., cl.* 1, 2.] — A gasworks coal porter in the employment of a gas company was, in December, 1899, injured by an accident, which resulted in the loss of four fingers of his left hand. His weekly wages were 41*s.* 9*d.*, and the company agreed to pay him £1 a week compensation under the Workmen's Compensation Act, 1897. In January, 1901, the company offered him employment as a gateman and timekeeper at weekly wages of 27*s.*, which he refused. In April, 1901, at the instance of the company, the county court judge made an award reducing the weekly amount of compensation to 14*s.* 9*d.* Subsequently the workman accepted the employment which he had previously refused, but in consequence of his refusing to note down the times of arrival of the workmen he was dismissed. The workman thereupon made an application to the county court judge to increase the weekly payment of 14*s.* 9*d.*, which was refused. More than a year later a further application was made to increase the weekly payment, when the judge found that the workman had not since the accident been capable of earning wages as a gas works porter ; that he was capable of earning wages as a gate-keeper, time-keeper, watchman, or in any similar work, and that he had made reasonable efforts, but had been unable to get such employment. The judge accordingly held that the workman was entitled to have the £1 weekly compensation restored.

HELD—that the county court judge was entitled to find that the workman's opportunity of finding employment had been narrowed in consequence of the accident, and that the weekly payment of £1 should be restored.

CLARK *v.* THE GAS LIGHT AND COKE CO., [(1905) 21 T. L. R. 184—C. A.

305. *Nominal Award—Power of Arbitrator to make except by Consent—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.*, 1, 12, 13.]—On an application by a master to have the amount of a weekly payment to an injured workman reviewed and ended, the arbitrator cannot, except by consent, postpone the determination of the question by making a nominal award of 1*d.* per week.

CLELLAND *v.* SINGER MANUFACTURING CO., [(1906) 7 F. 975—Ct. of Sess.

306. *Order for Compensation to Cease at a Future Date—Validity—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I.* (2) (12).]—Upon an application to review an award the arbitrator must have regard only to the workman's present condition ; and he cannot validly make a prospective order for the compensation to cease at a future date by which he is of opinion from the expert evidence that all incapacity will have ceased.

ALLAN *v.* THOMAS SPOWART & CO., LD., (1906) [8 F. 811—Ct. of Sess.

307. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *Sched. I., II.*]—An injured workman under a recorded agreement received 13*s.* 3*d.* per week, *i.e.*, one-half of his weekly wages, viz., 26*s.* 6*d.*

On January 12th, 1906, he returned to work at a wage of 20*s.*, and on April 26th a petition was presented to the sheriff for a review of the weekly payments.

On May 3rd his wages were raised to 27*s.* 6*d.*

On October 18th the sheriff reduced the payment to 1*s.* per week.

On November 10th the workman sued for payment of compensation at 13*s.* 3*d.* per week from January 17th to October 18th. The masters offered 6*s.* 6*d.* per week up to May 3rd.

HELD—that nothing more was due, since the compensation was only payable during incapacity.

NIMMS & CO. *v.* FISHER, (1907) S. C. 890—[Ct. of Sess.

308. *Weekly Payment Terminated — Jurisdiction — Workmen's Compensation Act*, 1897

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(60 & 61 Vict. *c.* 37), *Sched. I., par.* 12.]—A workman having been injured by an accident, his employer agreed to pay him a certain sum per week, and a memorandum of this agreement was duly registered. Upon an application by the employer more than a year afterwards the county court judge ordered that the agreement "be this day terminated, and that the weekly payments to the workman thereunder be ended accordingly." The workman subsequently applied to the county court judge to review and increase the weekly payments.

HELD—that, as the weekly payments had been ordered to be ended and the agreement terminated, the Court had no jurisdiction to interfere.

Quaere, whether an award merely "suspending" the payments would have kept alive the workman's claim.

Decision of C. A. (76 L. J. K. B. 230 ; 96 L. T. 75 ; 23 T. L. R. 199) affirmed.

NICHOLSON *v.* PIPER, [1907] A. C. 215 ; 76 L. J. [K. B. 856 ; 97 L. T. 119 ; 23 T. L. R. 620—H. L.

See also Nos. 47, 50.

(p) Serious and Wilful Misconduct.

309. *Breach of Rule—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-ss.* 1, 2 (c).]—A rule for the guidance of miners directed them to wait for thirty minutes before approaching any mine which, having been fired, failed to explode. This rule was not observed strictly, but on such occasions the miners were in the habit of examining the shot-hole within what they considered to be a reasonable time from the moment of igniting the fuse. A miner who had the means of knowledge, but who did not actually know the rule in question, sunk a drill, inserted a charge, fired the fuse, and retired. No explosion followed ; within six minutes he ventured up to examine ; the charge went off ; he was injured seriously.

HELD—(1) that he had been injured by "an accident arising out of and in the course of the employment" ; (2) that his ignorance of the thirty minutes rule did not amount to "serious and wilful misconduct."

M'NICOL *v.* SPIERS, GIBB & CO., (1899) 1 F. 604 ; [36 S. L. R. 428—Ct. of Sess.

310. *Breach of Rules and Regulations of a Mine—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 2 (c).]—Any conduct which is a breach of the rules and regulations of a mine, of such a character as would render the person who was guilty of breaking them liable to punishment on conviction, is not, when the question of personal compensation comes before the arbitrator, to be held as *primâ facie* evidence that the act of the workman which caused the injury was "serious and wilful misconduct" within the meaning of the Workmen's Compensation Act, 1897, s. 1, sub-s. 2 (c). The reason that led the injured man to break the rules must be carefully considered.

RUMBOLL *v.* NUNNERY COLLIERY CO., (1899) [63 J. P. 132 ; 80 L. T. 42—C. A.

311. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-ss.* 1, 2 (c).]—An engine-driver whose home was in Perth was relieved at Forfar. It was then his duty to report himself at the goods shed and receive a pass to take him to Perth. Until he reached Perth he was entitled to wages for overtime.

The approach from the spot where the relief driver came on board to the goods shed lay across a line of rails down which the express trains ran. There was another and a safer access by a narrow footway, but that was sometimes closed by a locked gate.

The driver was informed that the train by which he intended to travel to Perth was signalled, when he, in crossing the line, was knocked over and killed by it.

HELD—(1) that he was acting within the scope of his employment ; (2) that he had not been guilty of serious and wilful misconduct.

TODD *v.* CALEDONIAN RY. CO., (1899) 36 [S. L. R. 784 ; 7 S. L. T. 118—Ct. of Sess.

312. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-ss.* 1 *and* 2 (c).]—The applicant, a boy, was employed to grease the wheels of railway trucks. Having greased all that were ready, and while waiting for more to come up, he went and sat on a point lever in front of a fire which was a short distance away. Seeing an engine coming up, and thinking that the points were in the wrong position, the boy pulled the lever, but the engine forced the points open, with the result that he was thrown against the engine by the lever and injured.

HELD—that the county court judge was right in finding that the accident arose "out of and in the course of the employment," and that the boy had not been guilty of serious and wilful misconduct.

HARRISON *v.* WHITAKER BROTHERS, LD., (1900) [64 J. P. 54 ; 16 T. L. R. 108—Div. Ct.

313. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37).]—A girl was sent to assist in handing sheaves to the man in charge of a threshing machine. Her place was pointed out to her, and she was specially warned of the danger of leaving that place. She left the place during the absence of the man in charge, and attempted to step across the opening above the revolving drum of the threshing machine, with the result that she was caught in the machinery and received injuries.

HELD—that she was not acting in the course of her employment, that she was guilty of serious and wilful misconduct, and that the accident did not arise out of or in the course of her employment within the meaning of sect. 1 of the Workmen's Compensation Act, 1897.

CALLAGHAN *v.* MAXWELL, (1900) 2 F. 420—[Ct. of Sess.

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314. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (2) (c).]—A collier whose lamp had gone out, and who had been to the lamp station to obtain a light, was obliged, in order to get back to where his work was, to pass along a way over which trams were hauled by a rope. On reaching the way, he was told that a journey of trams was approaching. He proceeded, and, when making for a manhole, was injured in consequence of the rope jumping from a sheave, striking him, and breaking his leg.

HELD—that there was no evidence of serious and wilful misconduct.

REES *v.* POWELL DUFFRYN STEAM COAL CO., [LD., (1900) 64 J. P. 164—C. A.

315. "*Arising out of and in the Course of the Employment*"—*Violation of Master's Orders*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1.]—A workman, a carpenter, was employed in a factory within the meaning of the Workmen's Compensation Act, 1897, and as part of his employment he had to grind his tools at a grindstone which was being rotated by a band driven by steam power. Whilst he was so employed the band slipped off, and the man endeavoured to adjust it, and whilst so doing he was injured. The man had been told not to touch the machinery. The county court judge came to the conclusion that the injury to the workman arose from an accident in the course of the employment, and that in disregarding the master's orders not to touch the machinery he was not guilty of serious and wilful misconduct. On appeal:—

HELD—that in the circumstances the Court could not interfere with the finding of the county court judge.

Lowe v. *Pearson* ([1899] 1 Q. B. 261: 68 L. J. Q. B. 122; 47 W. R. 193; 79 L. T. 654; 15 T. L. R. 124—C. A., No. 241, *supra*) distinguished.

WHITEHEAD *v.* READER, [1901] 2 K. B. 48; 70 [L. J. K. B. 546; 65 J. P. 403; 49 W. R. 562; 84 L. T. 514; 17 T. L. R. 387—C. A.

316. *Breach of Factory Rule* — *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 2 (c).]—There was a strict rule and practice in a factory—a spinning mill—that no cleaning of machinery was to be done unless the machinery was stopped. Of this rule and practice the appellant was aware. She had been employed in the machine-room for a period of five years. The appellant, having started the machinery, immediately removed the guard, and, although a brush was provided for the purpose, she proceeded to clean out a teaser card machine with her hand. In so doing, her hand was caught in the machinery, and she received the injuries on account of which she claimed compensation.

HELD—that her injuries were attributable to "serious and wilful misconduct" on her part within the meaning of sect. 1, sub-sect. 2 (c), of the Workmen's Compensation Act, 1897, and that her employers were not liable.

GUTHRIE *v.* BOASE SPINNING CO., LD., (1901) [3 F. 769—Ct. of Sess.

317. *Question of Law*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (2) (c); *Sched. II., s.* 14 (c).]—A workman met with an accident, from the effects of which he died. At the time of the accident he was carrying several cartridges of gunpowder in his hand for firing shots, and had at the same time a lighted naked lamp in his cap, a spark from which ignited the cartridges and caused an explosion, which resulted in the accident. A special canister was provided to carry cartridges. The workman was acting contrary to the special rules of the mine.

HELD—that the workman must be assumed to have known the special rules of the mine; and that the workman was guilty of "serious and wilful misconduct" within the meaning of the Workmen's Compensation Act, 1897, s. 1, sub-s. 2 (c), and his representatives were not entitled to compensation.

DAILLY *v.* JOHN WATSON, LD., (1901) 2 F. 1044 [—Ct. of Sess.

318. *Sudden Impulse*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (2) (c).] —The applicant was a lad who worked at a machine and used to cut slits in the heads of screws. He had been frequently warned not to put his hand near the wheel while it was in motion. There was no guard on the wheel. A screw having fallen out on to the table before it was cut, he leaned over the machine to pick it up and replace it, and two of his fingers were cut off.

The county court judge found that, though the lad was negligent, he was not "guilty of serious and wilful misconduct."

HELD—that the element of wilfulness did not enter at all into what the lad did, as he seemed to have acted on a sudden impulse, and therefore the award could be supported.

REEKS *v.* KYNOCH, LD., (1901) 50 W. R. 113; [18 T. L. R. 34—C. A.

319. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (2) (c).]—A miner was proceeding along the main haulage road of the mine when he was warned by a fellow-workman to get into a manhole as a journey of trams was approaching. He disregarded the warning and went on, with the result that he was overtaken by the trams and killed. The county court judge found that the accident was attributable to the serious and wilful misconduct of the deceased man.

HELD—that there was evidence to support the finding.

JOHN *v.* ALBION COAL CO., LD., (1901) 65 J. P. [788; 18 T. L. R. 27—C. A.

320. *Collier*—*Failure to set Props*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37),

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s. 1 (2) (c).]—A workman was injured by a fall of coal whilst holing out coal; he and his mates had holed out a space of over 20 feet, and had set no props, though there was ample room for them to have done so, and though the rules required props to be put in at a distance of not more than 6 feet apart.

HELD—that his accident was due to "serious and wilful misconduct."

O'HARA *v.* CADZOW COAL CO., LD., (1903) 5 F. [439—Ct. of Sess.

321. *Boys larking in Play-time*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1.]—Some boys employed in steel works were allowed an interval for rest between two jobs. During such interval they got into a waggon standing on an incline in the yard of the works. The waggon began to move, and one of the boys was killed in trying to sprag it.

HELD—(1) that the accident did not "arise out of" his employment, and (2) that it was attributable to his "serious and wilful misconduct."

POWELL *v.* LANARKSHIRE STEEL CO., (1905) [6 F. 1039—Ct. of Sess.

322. *Opening Gate in Breach of Rules—Falling Down Shaft*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37). *s.* 1 (2) (c).]—A miner, working in a middle seam of a mine, brought a hutch along the level to the vertical shaft; in breach of a distinct rule, he opened the gate although the cage was not opposite his level; he then pushed forward the hutch, which fell down the shaft and dragged him with it. There was light enough to show him that the cage was not in position.

HELD—that, in the absence of any explanation of his conduct, he must be deemed to have been guilty of serious and wilful misconduct.

UNITED COLLIERIES *v.* M'GHIE, (1905) 6 F. 808 [—Ct. of Sess.

323. *Accident not attributable thereto—Miner riding on Waggon*—*Workmen's Compensation Act*. 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (2).]—A miner was killed by a fall of stone from the roof of a tunnel. He was at the time riding on the top of a loaded waggon, and the sheriff found that in so doing he was guilty of serious and wilful misconduct; but that the accident was not attributable to such misconduct.

HELD—that the widow was entitled to compensation; the sheriff's decision was one of fact, and, *semble*, the Court agreed with it.

GLASGOW COAL CO., LD. *v.* SNEDDON, (1905) [7 F. 485—Ct. of Sess.

324. *Disobedience to Orders*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 2 (c).]—A workman was employed by the respondents in their factory. There was a lift leading from one floor of the building to another, and a notice was posted up on the lift that no one was allowed to use it except in charge of a load. The workman was found in the lift without a load crushed between the floor of the lift and the top of the doorway, and he died of the injuries so received. The workmen frequently used the lift without loads, though this was not known to the respondents. In an application by his widow for compensation under the Workmen's Compensation Act, 1897, the county court judge found that the injury was attributable to the serious and wilful misconduct of the workman within sect. 1, sub-sect. 2 (c), of the Act, and made an award in favour of the respondents.

HELD—that the onus of proving serious and wilful misconduct lay on the respondents, and that the mere breach of the rule, from which no injury could reasonably be anticipated, was not serious and wilful misconduct, and that therefore the widow was entitled to compensation.

Misconduct is not "serious" merely because the actual consequences in the particular case are serious: the misconduct must be serious in itself.

JOHNSON *v.* MARSHALL, SONS & CO., LD., [1906] [A. C. 409; 75 L. J. K. B. 868; 94 L. T. 828; 22 T. L. R. 565—C. A.

325. *Drunk and Unfit to Work*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (2) (c).]—A workman went to his work on board a vessel in dock "drunk and unfit to work." He was at once told to go home, and on his way fell from a ladder which was safe and suitable for sober workmen.

HELD—that his drunkenness amounted to serious and wilful misconduct: and that, as his accident was attributable thereto, he could sustain no claim to compensation.

M'GROARTY *v.* JOHN BROWN & CO., LD., (1906) [8 F. 809—Ct. of Sess.

326. *Breach of Rule causing Danger*—*Workmen's Compensation Act*. 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 2 (c).—A workman was employed in a factory at a circular saw which was driven by machinery. His duty was to hold the wood and guide it while it was being sawn. He was told on several occasions, both by his employer and by the factory inspector, to keep the guard upon the saw when it was in use. The object of the guard was to prevent wood, if jerked up, from being caught by the teeth at the back of the saw and hurled about the workshop, to the danger of those at work there. The workman had worked for several years at circular saws before the guard was invented, and he had a great aversion to using a guard. Upon the day in question he intentionally did not place the guard upon the saw when using it, and a piece of wood jerked up and was hurled by the saw against him, and he was killed. The county court judge found that the injury to the workman was not attributable to his serious and wilful misconduct within sect. 1, sub-sect. 2 (c), of the Workmen's Compensation Act, 1897, and made an award of compensation in favour of his widow.

HELD—that there was no evidence to support such a finding, that the injury was caused by

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the serious and wilful misconduct of the workman, and that his widow was not entitled to compensation under the Act.

BROOKER *v.* WARREN, (1907) 23 T. L. R. 201—[C. A.

327. *Naked Light in Mine—Proximate Cause of Accident — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (2) (c).]—A ganger and a workman were carrying naked lights in a mine contrary to rules, but in a place where there was no danger of explosion. The workman, without receiving orders, left the ganger and carried his light to a dangerous place. An explosion occurred, and the ganger was killed.

HELD—that the arbiter was justified in finding that his death was not due to his serious and wilful misconduct.

WALLACE *v.* GLENBOIG UNION FIRE CLAY CO., [LD., (1907) S. C. 967—Ct. of Sess.

328. *Disobedience to Rule of Railway Company — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1, *sub-s.* 2 (c).]— A rule of a railway company provided that "enginemen and firemen must not leave the footplate of the engine when the latter is in motion." The driver of an engine of a passenger train, who was in the employment of the railway company, left the footplate and got upon the tender of the engine while the train was travelling at a fast speed, and while on the tender he was struck by the arch of a bridge under which the train was passing at the time, and killed. There was no evidence as to the reason for which the driver got upon the tender, but it was suggested that, as the train was a little late and as the pressure of steam was lower than what it ought to have been, the driver got upon the tender for the purpose of picking better coal than that in the well of the tender. In proceedings by his widow to recover compensation under the Workmen's Compensation Act, 1897, the county court judge found that the deceased man was fully aware of the above rule; that at the time the deceased man went on the tender there was a sufficient supply of coal in the well of the tender, and it was not proved that either the low pressure of the steam or the loss of time on the journey was caused by any inferiority in the coal; and, being of opinion that the injury was attributable to the serious and wilful misconduct of the deceased, he made an award in favour of the railway company.

HELD—that, as the rule was an important rule for the safety both of the railway company's servants and of the public, there was evidence upon which the county court judge could find that in breaking it the deceased man was guilty of "serious and wilful misconduct" within the meaning of sect. 1, sub-sect. 2 (c), of the Act.

BIST *v.* LONDON AND SOUTH WESTERN RY. CO., [1907] A. C. 209; 76 L. J. K. B. 703; 96 L. T. 750; 23 T. L. R. 471—H. L.

See also No. 252.

(q) Undertakers.

329. "*Ancillary or Incidental*" *—Servant of Contractor — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 4, 7.]—A workman was, at and prior to his death, in the employment of railway signal makers. While he was at work fitting signal wires on the Edinburgh Suburban Railway he was knocked down by a passenger train and killed. The respondents were making new sidings and a new connection with their main line on the said railway, of which they were the owners, and they had employed the railway signal makers to fit up new signals in connection with the sidings.

HELD—that the respondents were in terms of sect. 4 of the Workmen's Compensation Act, 1897, liable as undertakers; that the deceased was employed on the railway, and that his work was not merely ancillary and incidental, but was part of, or process in, the business carried on by the respondents.

BURNS *v.* NORTH BRITISH RY. CO., (1900) 2 F. [629—Ct. of Sess.

330. "*Ancillary or Incidental to*" *Trade or Business — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss*, 4, 7.]—The appellants carried on business as manufacturers and dealers in feeding stuffs and chemical manures. There was a considerable amount of carting to and from their works, both to bring material which they had purchased to the works for manufacture and to take out goods after manufacture. For this work they did not use carts and horses of their own, but contracted with a carting company. The respondent was a carter who was in the employ of such a carting company regularly and practically daily engaged in the appellants' work under directions of their foreman, and while so engaged was injured.

HELD—that the appellants' works were a factory, and the appellants undertakers in the sense of the Factory and Workshops Act, and of the Workmen's Compensation Act, 1897; that the work upon which the respondent was engaged was not ancillary or incidental to, but was part of the trade or business carried on by the appellants, and that they were liable in compensation to the respondent.

BEE *v.* OVENS & SONS, (1900) 2 F. 439—Ct. of [Sess.

331. *Sub-Contractor — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 4, 7.]—A builder contracted with a building owner to construct a building. The builder entered into a sub-contract with the respondent which provided that the respondent should execute the whole of the painting work of the building. A workman, while in the employ of the respondent, and engaged in painting the building, fell from a scaffolding and was killed. The widow of the deceased now claimed compensation against the respondent.

HELD—that the respondent, being a sub-contractor, was not an "undertaker" within the

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meaning of the definition in sect. 7 (2) of the Workmen's Compensation Act, 1897, and that, therefore, the appellant was not entitled to recover compensation against him.

Cass *v.* Butler, [1900] 1 Q. B. 777; 69 L. J. [Q. B. 362; 64 J. P. 261; 48 W. R. 309; 82 L. T. 182; 16 T. L. R. 227—C. A.

Overruled by *Cooper and Crane* v. *Wright*, No. 345, *infra*.

332. *Sub-Contractor — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 4, 7.]—A builder contracted with the Warrington Guardians to build a workhouse infirmary. He sub-let the plumbing work of the building to W. A workman employed by W. was at work on a scaffolding on some of the plumbing work when the scaffolding gave way and he fell and was killed. The deceased's widow claimed compensation against the builder, who thereupon claimed to be indemnified by W., under sect. 4 of the Workmen's Compensation Act, 1897.

Held—that W., the sub-contractor, was not an "undertaker" within sect. 7 of the Act, and, therefore, was not liable to indemnify the builder under sect. 4 of the Act.

Cass v. *Butler* ([1900] 1 Q. B. 777; 69 L. J. Q. B. 362; 64 J. P. 261; 48 W. R. 309; 82 L. T. 182; 16 T. L. R. 227—C. A., *supra*) followed.

Cooper *v.* Davenport, Winstanley third [party, (1900) 16 T. L. R. 266—C. A.

333. *Person supplying Labour to Firm putting up New Building on their own Premises—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—A building was being built on B. & Co.'s land from the plans of their own architect, and under the supervision and control of their own foreman; they wanted labour for the building, and went to the appellant to supply it, which, under an agreement with them, he did. The deceased, who was one of the bricklayers so supplied by the appellant, fell from a scaffolding while at work on the building, and was killed.

Held—that B. & Co. were the only persons who came within the definition of undertakers in sect. 7, sub-sect. 2, of the Workmen's Compensation Act, 1897.

Percival *v.* Garner, [1900] 2 Q. B. 406; 69 [L. J. Q. B. 824; 64 J. P. 500; 16 T. L. R. 396—C. A.

334. "*Employer*"—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 4, 7.]—A workman, who was a blacksmith or fitter, was at the time of his death in the employment of the respondent, an iron founder and forger, and in the course of his employment as a workman to the respondent was engaged in certain soap works repairing from a scaffolding certain steam-pipes connected with the soap vats, when he fell from the scaffolding and was killed. His widow claimed compensation under the Workmen's Compensation Act, 1897, from the respondent.

Held (Ld. Trayner dissenting)—that though the respondent was an employer he was not an undertaker as defined by the Act, and was not liable to the claimant.

Malcolm *v.* M'Millan, (1900) 2 F. 525—Ct. [of Sess.

335. *Scaffolding — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that a firm of builders had undertaken to build a theatre, and that the building owners, under powers reserved to them in the contract, had placed a substantial portion of the work, including the fixing of a ceiling and the erection of a proscenium, in the hands of a firm of decorators. A workman in the employment of the decorators, while working on a scaffolding erected by the builders, and while engaged in painting the ceiling of the theatre (the building being over 30 feet in height), accidentally fell to the floor and was killed. In proceedings against the decorators:—

Held—that the employment of the deceased man was an employment to which the Act applied, and that the respondents were undertakers within the Act.

Mason *v.* A. R. Dean, Ld., [1900] 1 Q. B. 770; [69 L. J. Q. B. 358; 64 J. P. 244; 48 W. R. 353; 82 L. T. 139; 16 T. L. R. 212—C. A.

336. *Factory—Engineers—Trial of Machinery erected by Engineers—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.] — The respondents were engineers and machinists who had substantially completed the erection of certain ice-making, refrigerating, and other machinery in the premises of a cold storage and ice company. A "preliminary run of the plant" was in the course of being made when, while one of the respondents' employees was engaged in the work, he was killed.

Held—that, assuming that the machinery by itself was a factory, it did not constitute a factory in the occupation of the respondents within the meaning of the Workmen's Compensation Act, 1897, and they were, therefore, not liable for the workman's death.

Purves *v.* Sterne & Co., Ld., (1900) 2 F. 887—[Ct. of Sess.

337. *Ship not a "Dock"—Shipping Agents—Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23 (1)—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—The appellant's husband was a workman in the employment of the respondents, who were shipping agents, and had contracted with the owners of a ship lying at the Old Dock, Leith Harbour, to load her. The workman fell into the hold of the vessel and was killed, in consequence of his having overbalanced himself while dragging after him a barrow-load of goods which he had wheeled from the wharf. His widow claimed compensation against his employers.

Held—that the ship was not a dock for the purposes of the Workmen's Compensation Act, 1897, and that the respondents in performing what was merely porterage from the quay to the

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ship could not be reasonably held to be the "occupiers" either of the dock or the ship, any more than a passenger walking on board, or a porter carrying his luggage, nor were they "undertakers" in the sense of sect. 7 (1) of the Act, and that the respondents were not liable.

Bruce *v.* Henry & Co., (1900) 2 F. 717—Ct. of [Sess.

338. *Factory of Third Person—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—Sect. 7, sub-sect. 1, of the Workmen's Compensation Act, 1897, which provides that the Act shall apply only to employment by the undertakers "on or in or about a . . . factory," applies only to a factory ocaupied by the employer where he carries on his business, and does not include a factory belonging to a third person to which the workman is sent on his employer's business.

Francis *v.* Turner Brothers, [1900] 1 Q. B. [478; 69 L. J. Q. B. 182; 64 J. P. 53; 48 W. R. 228; 81 L. T. 770; 16 T. L. R. 105—C. A.

339. "*Factory*" — *Gas-engine for driving Grindstone—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 — *Factory and Workshop Act*, 1878 (41 & 42 Vict. *c.* 16), *s.* 93, *sub-s.* 3.]—A workman was employed in a stone-dressing yard. The stones were dressed by manual labour. The employer had a small gas-engine on the premises for the purpose of driving a grindstone on which the tools used by the workmen were sharpened from time to time. No other mechanical power was used in or upon the premises. The workman while engaged in dressing stones was accidentally struck on the left eye by a piece of metal from a chisel, and was so severely injured that his eye had to be removed.

Held—that the employer was an undertaker within the meaning of the Workmen's Compensation Act, 1897, and that the premises were a "factory" within the meaning of the Act.

Petrie *v.* Weir, (1901) 2 F. 1041—Ct. of Sess.

340. *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 4, 7.]—A building was being constructed, at the time an accident happened to a workman, by W. on his own ground and for his own behoof, the mason and joiner work being executed by his own men. The workman who was injured by the accident was employed, not by W., but by a firm of plasterers who had contracted with W. to execute the plaster work.

Held (*dubitante* Lord Justice-Clerk)—that as W. had contracted with the firm of plasterers for the execution of the plaster work upon the building, he was the "undertaker" within the meaning of the Workmen's Compensation Act, 1897, and was liable in respect of the injuries to the workman.

Stalker *v.* Wallace, (1901) 2 F. 1162—Ct. of [Sess.

341. *Factory—Loading Ship from Quay by Machinery — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7—*Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23, *sub-s.* 1.]—The appellants were coal shippers. The respondent met with an accident, in respect of which he claimed compensation, in the course of his employment as one of a gang of men employed by the appellants for the purpose of unloading coal from trucks into ships lying alongside the quay. The county court judge found that the appellants were by their servants for the period of two days, during which the accident happened, in sole possession and control of the machinery by means of which the coal was unloaded from the trucks and shot into the ships. It was not disputed that it constituted under the circumstances a factory within the meaning of the Workmen's Compensation Act, 1897.

Held—that the appellants were, upon the finding of the county court judge, clearly persons using the machinery in question for the purposes mentioned in clause (a) of sect. 23, sub-sect. 1, of the Factory and Workshop Act, 1895, and were occupiers of a factory within the latter part of the sub-section, and were therefore undertakers.

Carrington *v.* Bannister & Co., [1901] 1 [Q. B. 20; 70 L. J. Q. B. 31; 83 L. T. 457—C. A.

342. "*Actual Use*" *of a Dry Dock*—"*Factory*"—"*Arising out of and in the Course of*"—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-ss.* 1, 2—*Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23, *sub-s.* 1.]—The respondents were ship repairers at Hartlepool, where they had a place of business, which they called a "manufactory for the repair of ships," having no water frontage. When employed to repair a vessel which required to be dry-docked, they hired a dock from the North Eastern Railway Company in Hartlepool. They hired a dry dock, and were cleaning or repairing a vessel in it, when a labourer employed by them on this job met with personal injury by an accident. He slipped off a sort of gangway, fell into the dock, and was killed.

Held—that the dock was a "factory" within the meaning of the Workmen's Compensation Act, 1897, s. 7, because it was a dock to which some "provision of the Factory Acts is applied by the Factory and Workshop Act, 1895"; that the respondents were "undertakers" as defined by sect. 7 of the Workmen's Compensation Act, 1897, because they had at the time the "actual use and occupation" of the dock; and that the accident was one "arising out of and in the course of" the workman's employment.

Flowers v. *Chambers* ([1899] 2 Q. B. 142; 68 L. J. Q. B. 648; 47 W. R. 513; 80 L. T. 834; 15 T. L. R. 352—C. A., No. 184, *supra*) disapproved.

Merrill v. *Wilson* ([1901] 1 Q. B. 35; 70 L. J. Q. B. 97; 65 J. P. 53; 49 W. R. 161; 83 L. T.

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490; 17 T. L. R. 49—C. A., No. 343, *infra*) approved.

RAINE *v.* JOBSON & Co., [1901] A. C. 404; 70 [L. J. K. B. 771; 49 W. R. 705; 85 L. T. 141; 17 T. L. R. 627—H. L. (E.).

343. "*Actual Use*" *of a Dock*—"*Plant*"—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-ss.* 1, 2—*Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23, *sub-s.* 1.]—A steamship belonging to the respondents was moored alongside of a quay for the purpose of discharging her cargo of cattle into lighters. The respondents acted as their own stevedores for the purpose of unloading their ship. The deceased man was at the time of the accident employed by them in unloading, and, while engaged with others in placing a gangway from the quay side to the ship for the purpose of going on board and commencing the work of discharging, tripped against something on the quay side, and, falling over the side, was so crushed between the quay and the ship that he died. The gangway was not used for the purpose of unloading, but merely as an access from and to the ship. It was not disputed that the quay on or about which he was so employed was a "factory" for the purpose of the Workmen's Compensation Act, 1897.

HELD—that the respondents had the "actual use" of part of the quay at the time the accident happened within the meaning of the Factory and Workshop Act, 1895, s. 23, sub-s. 1, and therefore they were "undertakers" in respect of a "factory" within the meaning of the Workmen's Compensation Act, 1897, and liable to compensate the dependants of the deceased.

HELD, also, that the gangway was not "plant" used in the process of unloading the ship to the quay within sect. 23, sub-sect. 1 (a), of the Factory and Workshop Act, 1895.

MERRILL *v.* WILSON, SONS & Co., LD., [1901] [1 Q. B. 35; 70 L. J. Q. B. 97; 65 J. P. 53; 49 W. R. 161; 83 L. T. 490; 17 T. L. R. 49—C. A.

344. "*Work Ancillary or Incidental to*" *Business*—*Employment* "*on or in or about*" *a Factory*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 4, 7.]—A carter in the employment of the Glasgow and South Western Railway Company was lifting goods with his lorry from C. & Co.'s premises, to be carted to the railway station and thence conveyed to London. The premises were occupied by C. & Co. as sausage works. The carter was standing on the opposite side of the street, close to C. & Co.'s premises, the street being 32½ feet broad from kerb to kerb. While engaged in this work the carter got jammed between his own lorry standing close to it, and sustained injuries from which he ultimately died.

HELD—that C. & Co. were the "undertakers" of the work in which the carter was engaged at the time of the accident within the sense of the Workmen's Compensation Act, 1897; that the work in which the carter was engaged at the time of the accident was part of the trade or business carried on by C. & Co., and was not merely ancillary or incidental thereto; and that the accident to the carter occurred "on or in or about" C. & Co.'s factory in the sense of the Workmen's Compensation Act, 1897.

Powell v. Brown ([1899] 1 Q. B. 157; 68 L. J. Q. B. 151; 47 W. R. 145; 79 L. T. 631; 15 T. L. R. 65—C. A., No. 208, *supra*) followed.

Bee v. *Ovens & Sons* ((1900) 2 F. 439, No. 330, *supra*) and *Greenhill* v. *Caledonian Ry. Co.* ((1900) 2 F. 736, No. 35, *supra*) followed.

M'GOVERN *v.* COOPER & Co., (1902) 4 F. 249—[Ct. of Sess.

345. *Sub-Contractor*—*Right of Contractor to be Indemnified by Sub-Contractor*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 1, 4, 7.]—A building was being constructed for B. & Co. by the appellants, a firm of builders. The appellants contracted with the respondent to supply slates for the roof and perform the work of completing the roof. The respondet, in his turn, employed a labourer to convey the slates to the roof by means of a hoist or lift, and in the course of that employment the lift broke and caused the labourer fatal injuries. His widow having recovered compensation under the Workmen's Compensation Act, 1897, from the appellants, the appellants claimed to have a right of indemnity against the respondent, who was the actual employer.

HELD, by the Earl of Halsbury, L.C., and Lords Shand and Davey (Lords Brampton and Robertson dissenting)—that the respondent was an "undertaker," and would have been liable under the general provisions of the Workmen's Compensation Act, 1897; and that the appellants were entitled to be indemnified by the respondent.

Cass v. Butler ([1900] 1 Q. B. 777; 69 L. J. Q. B. 362; 64 J. P. 261; 48 W. R. 309; 82 L. T. 182; 16 T. L. R. 227—C. A., No. 331, *supra*) overruled.

COOPER AND CRANE *v.* WRIGHT, [1902] A. C. [302; 71 L. J. K. B. 642; 51 W. R. 12; 86 L. T. 776; 18 T. L. R. 622—H. L. (E.)

346. *Factory*—*Coal Dealer supplying Ship in Harbour*—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A dealer in coal, who has contracted to supply a ship with coal free on board at a harbour, at a particular berth, sending it from his own premises to the place where it is required by the buyer, whether on contract or otherwise, is not the occupier of the dock or quay, or any part of it, and therefore not an "undertaker" within the meaning of sect. 7 of the Workmen's Compensation Act, 1897.

STEWART *v.* DARNGAVIL COAL CO., LD., (1902) [4 F. 425—Ct. of Sess.

347. *Quay*—"*Actual Use*"—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7—*Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23, *sub-s.* 1.]—A quay porter was

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accidentally killed on one of the quays of the Mersey Docks while employed in discharging a cargo of wheat, of which the defendants were consignees, from a vessel of which they were the owners. The deceased was one of a gang of men, and his duty was to receive the wheat on the quay and pile it in a shed.

HELD—that the defendants had sufficient use of the quay to constitute them owners of a factory within the meaning of the Workmen's Compensation Act, 1897, s. 7, and as they had the "actual use" of a portion of the quay within the meaning of sect. 23 of the Factory and Workshop Act, 1895; and that the defendants were liable as "undertakers."

Merrill v. *Wilson, Sons & Co., Ld.* ([1901] 1 Q. B. 35; 70 L. J. Q. B. 97; 65 J. P. 53; 49 W. R. 161; 83 L. T. 490; 17 T. L. R. 49—C. A., No. 343, *supra*) followed.

HAINSBOROUGH *r.* RALLI BROTHERS, (1902) 18 [T. L. R. 21—C. A.

348. *Ship lying in Dock—"Actual Use or Occupation"—Contractors Painting and Plumbing Ship—Non-exclusive Occupation—"Undertakers"—Factory and Workshop Act*, 1895 (58 & 59 Vict. *c.* 37), *s.* 23, *sub-s.* 1—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—A transport was lying in the Royal Albert Dock alongside a wharf and being made ready for a voyage. The defendants were doing the painting and plumbing work, and one of the partners stated that they were contractors for that work, and were in possession of the ship so far as was necessary for the work that they had contracted to do. All that appeared on the evidence as to occupation by others was that the owners of the ship had control for other purposes by means of the sailors who were on board. The workman who was injured was employed in painting the booby-hatch.

HELD—(1) that there was evidence that the defendants were occupiers of a factory within the meaning of the Workmen's Compensation Act, 1897. *Raine* v. *Jobson & Co.* ([1901] A. C. 404; 70 L. J. K. B. 771; 49 W. R. 705; 85 L. T. 141; 17 T. L. R. 627—H. L. (E.), No. 342, *supra*) followed, notwithstanding that the defendants had not exclusive possession of the ship; and (2) that the defendants were undertakers within the meaning of the Act.

BARTELL *r.* W. GRAY & CO., [1902] 1 K. B. [225; 71 L. J. K. B. 115; 66 J. P. 308; 50 W. R. 310; 85 L. T. 658; 18 T. L. R. 70—C. A.

349. *Indemnity—Construction of Building—Sub-Contractor an Undertaker—Indemnity by Sub-Contractor—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 4, 7.]—In the case of the construction of a building, a "sub-contractor" may be an "undertaker" in respect of that part of the building which he has undertaken to construct. If he supplies labour (though not materials) for work on a substantial part of the building, he is an "undertaker."

The defendants, having undertaken to construct a house, made a sub-contract with the third party to do the whole of the plastering work for a fixed sum, he supplying all the labour, but no materials. A workman employed by the sub-contractor in the work of plastering was injured by accident and recovered compensation from the defendants under the Workmen's Compensation Act, 1897.

HELD—that the sub-contractor was himself an undertaker, who would have been liable to pay compensation to the workman, and that he was liable to indemnify the defendants, under sect. 4 of the Act.

Cooper and Crane v. *Wright* ([1902] A. C. 302; 71 L. J. K. B. 642; 51 W. R. 12; 86 L. T. 776; 18 T. L. R. 622—H. L., No. 345, *supra*) applied.

WAGSTAFF *r.* PERKS & SON, FRITH THIRD [PARTY, (1903) 51 W. R. 210; 87 L. T. 558; 19 T. L. R. 112—C. A.

350. *Sub-Contractor for Supply of Scaffolding—Indemnity—Liability of Sub-Contractor—Workmen's Compensation Act*, 1897 (60 & 61 Vict. c. 37), *ss.* 4, 7.]—A builder, who had contracted to paint the outside of a building which exceeded 30 feet in height, entered into a sub-contract with another person for the supply, fixing, and removal of scaffolding for the purpose of carrying out the work. The painting having been finished, the sub-contractor's workmen proceeded to remove the scaffolding, and, while engaged upon that work, one of them met with an accident which caused his death. The deceased man's dependants having been awarded compensation under sect 4. of the Workmen's Compensation Act, 1897, against the principal contractor:—

HELD—that the supply, fixing, and removal of the scaffolding was an essential part of the work of repair, and that therefore the sub-contractor was an "undertaker" within the meaning of sect. 7 (2), and consequently liable to indemnify the principal contractor under sect. 4 of the Act.

MCCABE AND OTHERS *r.* JOPLING AND [ANOTHER, [1904] 1 K. B. 222; 73 L. J. K. B. 129; 68 J. P. 121; 52 W. R. 358; 89 L. T. 624; 20 T. L. R. 119—C. A.

351. *"Persons having actual Use or Occupation of a Warehouse"—Factory and Workshop Act*, 1901 (1 Edw. 7, *c.* 22), *s.* 104—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—The respondents contracted with the Government to erect certain pigeon-holes upon the upper floor of a warehouse which had just been built within the precincts of Woolwich Dockyard by other contractors. A workman who, with other men, was employed by the respondents upon that work was killed by an accident arising out of and in the course of his employment. At the time when the accident happened the lower floor of the warehouse was already used by the Government for the storage of military accoutrements; the foreman and two workmen of the contractor for the building were working on the upper floor; and the Government by their own men were fixing

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hydraulic cranes at each end of the upper floor. The Government clerk of the works was in charge of the work to see that the men did their duty and that the contractors complied with the specifications. The warehouse was locked and unlocked by the person in charge of the dockyard, and the keys were kept by the man at the gates. Upon a claim by the wife of the deceased man for compensation :—

HELD—that the respondents had the actual use or occupation of the warehouse so far as was necessary to enable them to execute the work they had contracted to do, and that they were therefore occupiers of a factory within the meaning of sect. 4 of the Factory and Workshop Act, 1901 ; and consequently "undertakers" within sect. 7 (2) of the Workmen's Compensation Act, 1897.

Bartell v. *Gray & Co.* ([1902] 1 K. B. 225 ; 71 L. J. K. B. 115 ; 66 J. P. 308 ; 50 W. R. 310 ; 85 L. T. 658 ; 18 T. L. R. 70—C. A., No. 348, *supra*) followed.

WEAVING *v.* KIRK AND RANDALL, [1904] 1 [K. B. 213 ; 73 L. J. K. B. 77 ; 68 J. P. 91 : 52 W. R. 209 ; 89 L. T. 577 ; 20 T. L. R. 152—C. A.

352. "*Workman*"—*Seaman—Ship in Dock—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A ship, having finished taking in bunker coal in a dock for a voyage, moved out to a buoy in the dock preparatory to proceeding to sea on the following morning. While the ship was at the buoy, a seaman who was engaged in cleaning out a hold for the reception of cargo met with an accident which resulted in his death. The seaman's widow took proceedings to recover compensation under the Workmen's Compensation Act, 1897.

HELD—that the employment was not one to which the Act applied, the shipowners not being "undertakers" in respect of the dock, although the dock was a "factory."

Decision of the C. A. ([1904] 1 K. B. 510 ; 73 L. J. K. B. 202 ; 68 J. P. 213 ; 52 W. R. 323 ; 90 L. T. 142 ; 20 T. L. R. 255) reversed.

Raine v. *Jobson* ([1901] A. C. 404 ; 70 L. J. K. B. 771 ; 49 W. R. 705 ; 85 L. T. 141—H. L., No. 342, *supra*) distinguished.

THE HOULDER LINE, LD., *v.* GRIFFIN, [1905] [A. C. 220 ; 74 L. J. K. B. 466 ; 53 W. R. 609 ; 92 L. T. 580 ; 21 T. L. R. 436—H. L. (E.)

353. "*Warehouse*" — *Purchaser removing Goods stored in a Warehouse—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (1) (2).]—A. purchased a large quantity of peas which formed part of a still larger quantity lying in bulk in a store belonging to a warehouseman. The store was admittedly a "warehouse." A carter in A.'s employ was killed by the fall of a bag while taking delivery (under a delivery order) of the purchased peas.

HELD—that A. was not an "occupier" of the store and was therefore not liable to pay compensation under the Act of 1897.

RAMSAY *v.* MACKIE, (1905) 7 F. 106—Ct. of [Sess.

354. "*Factory*"—*Occupied by Strangers—*"*Engineering Work*"—*Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A workman employed by boiler makers was injured while repairing a boiler in a mill belonging to a third person. His work was all being done by hand, and no mechanical power was at the time being used on the premises.

HELD—(1) that as the mill was not a factory occupied by his employers, it was not a factory in respect of which they were undertakers within the meaning of the Act ; and (2) that he was not engaged upon an "engineering work."

COOPER AND GREIG *v.* ADAM, (1905) 7 F. 681—[Ct. of Sess.

355. "*Factory*"—*Ship in Dry Dock—Repairs—Actual Use or Occupation—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-ss.* (1) (2).]—A shipwright employed in his ordinary duties on board a ship lying in a dry dock is not within the provisions of the Workmen's Compensation Act, 1897, and is not entitled to compensation under that Act for injuries received in the course of such employment, his employers not being "occupiers" of a "factory," and therefore not "undertakers" within the meaning of that Act.

Houlder Line, Ld. v. *Griffin*, ([1905] A. C. 220 ; 74 L. J. K. B. 466 ; 53 W. R. 609 ; 92 L. T. 580 ; 21 T. L. R. 436—H. L., No. 352, *supra*) discussed and explained.

Smith v. *Standard Steam Fishing Co.* (No. 356, *infra*) followed.

BURDON *v.* GREGSON & CO. ((1906) 95 L. T. 45—[C. A.

356. *Ship in Wet Dock—*"*Actual Use and Occupation*" — *Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A workman was employed by the owners of a steam trawler in effecting repairs on board of her. The trawler was at the time moored to the jetty of the fish dock at Grimsby, being fastened by her fore rope to the jetty, and by her aft rope to other trawlers which were lying alongside of her. Her bow touched the jetty, and the workman went on board of her by stepping from the jetty on to her. The crew were engaged in unloading the fish. While working on board of her the workman was injured by an accident arising out of and in the course of his employment.

HELD—that the owners of the trawler were not the occupiers of the dock, and therefore were not the "undertakers" within sect. 7 of the Workmen's Compensation Act, 1897, and that they were not liable to pay compensation under the Act.

Houlder Line v. *Griffin* ([1905] A. C. 220 ; 74 L. J. K. B. 466 ; 53 W. R. 609 ; 92 L. T.

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580; 21 T. L. R. 436—H. L., No. 352, *supra*) applied and discussed.

Smith *v.* The Standard Steam Fishing Co. [Ld., [1906] 2 K. B. 275; 75 L. J. K. B. 640; 54 W. R. 582; 95 L. T. 42; 22 T. L. R. 578—C. A.

357. *Dock—Factory—Actual Use or Occupation of Dock—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—The defendants were the tenants of a small hut in a dock, and they supplied horses, men, and gear for hauling railway wagons loaded with coal for ships using the dock from the railway sidings to the quay where the ships lay. One of the men in the employment of the defendants, while engaged in hauling a wagon to the quay with coal belonging to the plaintiffs' ship, fell, and the wagon went over his foot. He took proceedings against the plaintiffs under the Workmen's Compensation Act, 1897, and a third party notice was served on the defendants. An award of compensation having been made in his favour, the plaintiffs brought an action claiming an indemnity from the defendants under sect. 4.

Held—that the defendants had the actual use or occupation of the dock, which was a factory, for the purpose of carrying on their business there, and were therefore the occupiers thereof, and so were "undertakers," and liable to indemnify the plaintiffs under sect. 4.

Pacific Steam Navigation Co. *v.* Pugh & [Son, (1907) 23 T. L. R. 622—C. A.

See also Nos. 185, 188, 201.

(r) Workman.

358. *Independent Contractor — Claim by—Undertaker—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 4.]—An independent contractor who personally takes part in work which he has contracted to do for an "undertaker" has no claim against him under sect. 4 of the Workmen's Compensation Act, 1897, in respect of injuries sustained by him in the course of his work (Ld. Young dissenting.)

M'Gregor *v.* Dansken, (1899) 1 F. 536; 36 [S. L. R. 393—Ct. of Sess.

359. *Sub-Contractor—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 1 (1).]—The applicant for compensation contracted with the respondent to supply labour and tools for the purpose of carrying out the bricklaying work on a certain building for the sum of £160. As the work proceeded payments on account were made of about 75 per cent. of the value of the work done. The applicant while working upon the building as a foreman bricklayer was injured by accident.

Held—that there was no evidence that the applicant was anything other than a contractor, and was therefore not within the Workmen's Compensation Act, 1897, which is confined to workmen.

Simmons *v.* Faulds, (1901) 65 J. P. 371; 17 [T. L. R. 352—C. A.

360. *Contractor — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—The applicant for compensation was a quarryman who was employed by the defendants under a written agreement on the terms that he should be paid so much for every ton of material which he worked. His tools were found for him, and he used to hire the men who worked under him and discharge them. Having a misgiving as to whether he was within the Workmen's Compensation Act, 1897, he gave notice to determine his employment, and took the opportunity of stipulating that he should be entitled to compensation in the event of an accident, and then proceeded to work on those terms.

Held—that there was evidence justifying the county court judge in finding that the applicant was a workman within the Act.

Evans *v.* Penwyllt Dinas Silica Brick Co., [(1902) 18 R. P. C. 58—C. A.

361. *Contractor or Workman — Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7 (2).]—A man did work for the respondents under an agreement, by which he was to break steel and clear cinders, and be paid weekly by the ton. He had five or six men under him, whom he used to engage and discharge, and his average weekly earnings were £4.

Held—that there was evidence to justify the county court judge in finding that he was a "contractor," and not a "workman."

Vamplew *v.* Parkgate Iron and Steel Co., [Ld., [1903] 1 K. B. 851; 72 L. J. K. B. 575; 67 J. P. 417; 51 W. R. 691; 88 L. T. 756; 19 T. L. R. 421—C. A.

363. *Manager of Mine—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.] —The certificated manager of a coal mine who was paid a salary of £400 a year, payable monthly, and was provided with a house rent free, was killed by an accident while employed in the mine. He did no manual labour.

Held, affirming the decision of the county court judge, that he was not a "workman" within the Workmen's Compensation Act, 1897.

Simpson *v.* The Ebbw Vale Steel, Iron, and [Coal Co., Ld., [1905] 1 K. B. 453; 74 L. J. K. B. 347; 53 W. R. 390; 92 L. T. 282; 21 T. L. R. 209—C. A.

364. *Mining Partnership—Partner working in Mine—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *ss.* 1, 7.]—A partner in a mine, by agreement with the other partners, worked at manual labour in the mine, for which he was paid weekly wages independently of any sum he was entitled to as a partner. While so working he was killed by an accident.

Held—that he was not a "workman" within the Workmen's Compensation Act, 1897, and that his widow was not entitled to compensation.

Ellis *v.* Joseph Ellis & Co., [1905] 1 K. B. [324; 74 L. J. K. B. 229; 53 W. R. 311; 92 L. T. 718; 21 T. L. R. 182—C. A.

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365. *Man quarrying Stone for Estate Purposes—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7.]—A landowner by his factor engaged a man to quarry stone for estate purposes. He was to be paid 5*s.* per day and might employ assistants to be paid through him at the same rate. He was told how much stone to get and where to get it, but might work at any part of the quarry indicated. He supplied some of the necessary tools.

HELD—that the man was a "workman" within the meaning of the Workmen's Compensation Act, 1897, and not a "contractor."

Quære, per Ld. McLaren, whether the landowner was an "undertaker" for the purposes of the Act.

PATERSON *v.* LOCKHART, (1906) 7 F. 954—[Ct. of Sess.

366. *Skilled Person employed in Dye and Chemical Works—Workmen's Compensation Act*, 1897 (60 & 61 Vict. *c.* 37), *s.* 7, *sub-s.* 2.]—A person, who had been educated at a university in England and had taken the degree of Master of Science, entered into the employment of a firm of manufacturers of dyes and chemicals for the term of five years at a salary beginning at £200 a year and ending at £260 in the fifth year, either of the parties being at liberty to cancel the agreement upon giving six months' notice. The employee was to put at the disposal of the firm the entire results of his work, whether they led to improvements in the existing methods of manufacture or whether they concerned the production of new bodies, and the firm were to pay him a commission of 4 per cent. on the net profits of all such inventions, improvements, or discoveries as should in their opinion be of sufficient merit to justify a patent being taken out. There were clauses in the agreement requiring the employee to keep secret all affairs relating to the business. The employee was employed by the firm in sulphur colours, and he had to do certain manual labour in connection therewith. He was dressed as an ordinary workman, and had to work among the chemicals like other workmen. He was paid monthly, but his name was not in the wages book. For five-sixths of his working time he was in the works, and for one-sixth in the laboratory. While so employed he met with an accident from which he died. His widow claimed compensation under the Workmen's Compensation Act, 1897. The county court judge found that the deceased man was a "workman" within the Act, and awarded the widow compensation.

HELD, by Collins, M.R., and Cozens-Hardy, L.J. (Farwell, L.J., dissenting)—that the county court judge in so deciding had misdirected himself upon the law applicable to the facts, the terms of the agreement of employment and the evidence all pointing to the conclusion that the deceased was not a workman, and they remitted the case to him for a new trial.

Simpson v. *Ebbw Vale Steel, Iron, and Coal Co.* ([1905] 1 K. B. 453; 74 L. J. K. B. 347; 53 W. R. 390; 92 L. T. 282; 21 T. L. R. 209—C. A., No. 363, *supra*) applied.

BAGNALL *v.* LEVINSTEIN, LD., [1907] 1 K. B. [551; 76 L. J. K. B. 234; 96 L. T. 184: 23 T. L. R. 165—C. A.

367. *Motor Omnibus Driver supplied with Spanners, &c.—Employers and Workmen Act*, 1875 (38 & 39 Vict. *c.* 90), *s.* 10—*Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *s.* 8.]—The driver of a motor omnibus who is supplied with spanners and wrenches with which he is expected to put right, as far as he is able, anything that goes wrong with the omnibus upon its journey is a "workman" within the meaning of sect. 10 of the Employers and Workmen Act, 1875, and so, also, within the meaning of sect. 8 of the Employers' Liability Act, 1880.

Cook v. *North Metropolitan Tramways Co.* ((1887) 18 Q. B. D. 683; 56 L. J. Q. B. 309; 51 J. P. 630; 56 L. T. 448; 57 L. T. 476; 35 W. R. 577—Div. Ct.) distinguished.

SMITH *v.* ASSOCIATED OMNIBUS CO., LD., [1907] [1 K. B. 916; 76 L. J. K. B. 574; 71 J. P. 239; 96 L. T. 675; 23 T. L. R. 381—Div. Ct.

2. Under Employers' Liability Act, 1880.

368. *Employers' Liability Act*, 1880, *s.* 1, *sub-s.* 3—*Order of Foreman—Evidence for the Jury.*]—The plaintiff was employed by the defendant as a linoleum mixer, and his duty was to work at a machine consisting of a box used for mixing certain ingredients, at the bottom of which was a pair of revolving blades. There was a wheel by which the machine could be stopped, but it was the almost constant practice of the men, including the foreman, not to stop the machine, but to take the mixture out while the blades were revolving. On the day of the accident the foreman ordered the plaintiff to mix some stuff in the machine, and having done this the plaintiff attempted to take it out and his right hand was caught and injured by the revolving blades.

HELD—that the meaning of this order was that the foreman intended that the plaintiff should work at the machine as it had been worked for some two and a half years, and that the judge had rightly left the case to the jury.

MEDWAY *v.* GREENWICH INLAID LINOLEUM [CO., LD., (1898) 14 T. L. R. 291—C. A.

369. *Employers' Liability Act*, 1880, *s.* 1, *sub-s.* 3—*Negligence of Person in Superintendence—Evidence.*]—This was an action brought under the Employers' Liability Act, 1880. The deceased man (a ganger) was in the employment of the defendant, who was a builder, and was acting under a foreman called Crossley. On the day of the accident Crossley told the deceased to assist his men in pulling down a small house. The deceased began to take down a matchboard partition, when the joists supporting the ceiling came down with the roof and killed him.

The Court held that there was evidence of Crossley having given a negligent order, because the evidence showed that before giving the order

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to pull down the house Crossley ought to have examined the house and ascertained how the joists were fixed in the walls and supported, especially in view of the fact that the deceased was only a ganger and had had no experience in pulling down houses, and that this he had not done.

REYNOLDS *v.* HOLLOWAY, (1898) 14 T. L. R. 551 [—C. A.

370. "*Workman*"—*Coal Mine—Independent Contractor—Liability of Mine Owner—Coal Mines Regulation Act*, 1887 (50 & 51 Vict. *c.* 58) —*Employers and Workmen Act*, 1875 (38 & 39 Vict. *c.* 90), *s.* 10—*Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *s.* 8.]—The owners of a mine employed a contractor to sink a shaft in their mine. A workman employed by the contractor was accidentally killed while engaged in the sinking of the shaft. Under sect. 51 of the Coal Mines Regulation Act, 1887, special rules had been made for the regulation of the mine, under which the manager was responsible for the control, management, and direction of the mine.

In an action by the administratrix of the deceased workman against the owners of the mine :—

HELD—that the deceased was not a "workman" in the service of the mine owners within the meaning of the Employers and Workmen Act, 1875, and that the mine owners were therefore not liable under the Employers' Liability Act, 1880.

MALROW *v.* FLIMBY AND BROUGHTON MOOR [COAL AND FIRE BRICK CO., LD., [1898] 2 Q. B. 588 ; 67 L. J. Q. B. 976 ; 79 L. T. 397 ; 14 T. L. R. 583—C. A.

371. *Defect in Plant—Chartered Ship—Gang employed by Agent of Defendants—Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *s.* 1 (1), (2), (3).]—The defendants Stephenson, Clarke & Co., were coal contractors, and contracted to supply coal to the London, Brighton and South Coast Railway. They ship coal at Cardiff in vessels belonging to the London, Antwerp, and Continental Steam Navigation Company to be carried to Newhaven.

The defendants have to unload the coal there, and engage agents to employ a gang to carry out the work.

One of their agents, Weeks, had a gang unloading *The Bluebell*, amongst whom was the plaintiff Carter.

Owing to the hold of *The Bluebell* not being properly ventilated there was an accumulation of gas, and when the hatch was removed a violent explosion took place, and the plaintiff was injured.

HELD—that the injury was caused by the defective "plant" of the defendants, Stephenson, Clarke & Co.

CARTER *v.* CLARKE, (1898) 78 L. T. ; 14 T. L. R. [172—Div. Ct.

372. *Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *s.* 1, *sub-s.* 3—*Explosives Act*, 1875 (38 Vict. *c.* 17).]—Two miners, when working in a mine, were improperly told by the oversman to break up balls of compressed powder and to make them into a cartridge. They were bound to conform to orders so given. While they were carrying them out the powder exploded and both men were injured. In an action brought by them against their employer under the Employers' Liability Act, 1880, the defence set up was that the men should have refused to have carried out the order given them on the grouud that it was in contravention of the Explosives Act, 1875 ; but it was held that, even assuming that to be the case, the order being one within the scope of the oversman's authority and not obviously illegal, this defence was of no avail.

CAMPBELL *v.* CALDERBANK STEEL AND COAL [CO., (1898) 25 R. 753 ; 35 Sc. L. R. 722—Ct. of Sess.

373. *Personal Injuries to Workman—Known Danger—Lifting Heavy Articles—Duty of Workman — Duty of Superintendent — Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *s.* 1.]—It is not the duty of such a superintendent as falls within the Employers' Liability Act, 1880, to see that everything which comes out of a waggon is not too heavy for a man to remove from that waggon without assistance. In such work as moving sacks or large packages in a waggon, workmen must judge for themselves, when they come to try it, whether the sacks or packages are such that they cannot move them without excessive exertion, and, if they cannot, then they must apply for assistance. There is no negligence on the part of a superintendent simply because he requires such things to be removed without assistance.

WILSON *v.* CALEDONIAN RY. CO., (1900) 2 F. [319—Ct. of Sess.

374. *Personal Injuries to Workman—Person "who has any Superintendence entrusted to him" —Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *s.* 1 (2).]—A quay labourer was working in the employment of stevedores in the lower hatch of a steamer, and was injured by a piece of wood used to secure some pieces of iron slung in a crane sling, which, while the load was descending into the hold of the vessel, fell out, and struck him while he was in the hold. The duty of seeing that the material was properly slung before it was brought over the hold lay upon the hatch-mouth man, who besides practically superintending the whole work at the hatch had also to work himself by taking the chain of the winch ashore and attaching the hook to the goods.

HELD (*dissentiente* Ld. Young)—that the hatch-mouth man was not a person who had "superintendence entrusted to him" within the meaning of the Employers' Liability Act, 1880, s. 1 (2), but was a man ordinarily engaged in manual labour.

FALCONER *v.* M'CABE, (1901) 3 F. 210—Ct. of [Sess.

Liability of Master for Injury to Servant—*Continued.*

375. *Personal Injuries to Workman—Defect in the Condition of the "Machinery or Plant connected with or used in the Business of the Employer"—Removing Broken-down Machine—Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *s.* 1, *sub-s.* 1.]—A machine was used by workmen employed by the defendants out of hours for the making of stoppers to glass bottles. It broke down completely, and was ordered not to be used again, and a new machine ordered. In moving it away on a Sunday in a corner a lever fell on and injured the plaintiff's toe. The county court judge was of opinion that the machine, although it had finally ceased to be used in the defendants' business at the time of the accident, was "plant" within the meaning of sect. 1, sub-sect. 1, of the Employers' Liability Act, 1880.

HELD—that as the machine was in such physical contiguity to the rest of the plant that it had to be removed out of the way under the orders of the foreman, there was evidence on which the judge could find that the machine was "plant" connected with the business of the employer, and there was no evidence of an absence of intention to mend the machine; the machine therefore had not ceased to be "plant."

HELD, also, that there was plenty of evidence of negligence on the part of the foreman.

Judgment of Div. Ct. ([1901] 2 K. B. 483; 70 L. J. K. B. 817; 85 L. T. 251; 17 T. L. R. 594) reversed.

THOMPSON *v.* CITY GLASS BOTTLE CO., [1902] [1 K. B. 233; 71 L. J. K. B. 145; 85 L. T. 661; 18 T. L. R. 69—C. A.

376. *Contract of Service—"Workman"—Employed by and working under a Contractor in Coal Mine—Direct Relation of Employment between Colliery Owners and Workmen—Observance by Workman of Conditions imposed by Colliery Owners—Liability of Colliery Owners—Coal Mines Regulation Act*, 1887 (50 & 51 Vict. *c.* 58)—*Employers and Workmen Act*, 1875 (38 & 39 Vict. *c.* 90), *s.* 10—*Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *s.* 8.]—The defendants, colliery proprietors, had contracted with M., whereby M. agreed to sink the shaft of a pit in a colliery. The deceased was employed by M. as a sinker, and was paid by M. The deceased had signed the "record book" kept at the colliery of persons employed there, the only part of which directly applicable to the deceased was clause 5, which was "for drawers and persons working under contractors only," and by clause 4 M. was to require the deceased to obtain a copy of the conditions whereby the deceased was to be bound. The deceased, while at work, was so badly burned by an escape of gas, which ignited on coming into contact with the nearest lights used during sinking operations, that he died from the results of his injuries. The administrator of the deceased sued the defendants under the Employers' Liability Act, 1880, to recover damages for his death.

HELD—that M. was an independent contractor, and that the deceased workman was in his direct employ; and that the direct relation of employer and employed was not created between the colliery owners and the deceased.

Marrow v. *Flimby and Broughton Moor Coal and Fire Brick Co.* ([1898] 2 Q. B. 588; 67 L. J. Q. B. 976; 79 L. T. 397—C. A., No. 370, *supra*) followed.

Judgment of Div. Ct. ([1901] 1 Q. B. 756; 70 L. J. K. B. 353; 49 W. R. 491; 84 L. T. 233; 17 T. L. R. 253) affirmed.

FITZPATRICK *v.* EVANS & CO., [1902] 1 K. B. [505; 71 L. J. K. B. 302; 50 W. R. 290; 86 L. T. 141; 18 T. L. R. 290—C. A.

377. *Employers' Liability Act—"Workman"—Woman employed as Seamstress and Ironer—Held to be a Workman—Employers and Workmen Act*, 1875 (38 & 39 Vict. *c.* 90), *s.* 10—*Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *s.* 8.]—By sect. 10 of the Act of 1875 the word "workman" in that Act "does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour . . . has entered into and works under a contract with an employer"; by sect. 8 of the Employers' Liability Act, 1880, the expression "workman" means a railway servant and any person to whom the Act of 1875 applies.

HELD—that the above definition included a seamstress who worked at a sewing machine, and at intervals had to iron materials, or to attend to the heating of the irons at a gas stove.

MAYNARD *v.* PETER ROBINSON, (1903) 89 L. T. [186; 19 T. L. R. 492—Div. Ct.

378. *"Workman"—Seaman—Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *ss.* 1, 8—*Employers and Workmen Act*, 1875 (38 & 39 Vict. *c.* 90), *ss.* 10, 13.]—The plaintiff was employed by the defendant in a sailing barge of 38 tons to assist in navigating and in loading and unloading her, there being one other man employed on board, the plaintiff being under his orders. The barge carried cargoes from the sea reaches of the Thames higher up the river. She could, however, be used for coasting purposes. While the barge was being towed from Woolwich up the river, a rope supplied by the defendant broke and the plaintiff was injured. In an action under the Employers' Liability Act, 1880, to recover damages for personal injuries owing to the defendant having supplied a defective rope,

HELD—that the plaintiff was a seaman, and, therefore, not a "workman" within the meaning of the Act, and was not entitled to sue.

CORBETT *v.* PEARCE, [1904] 2 K. B. 422; 73 [L. J. K. B. 885; 68 J. P. 387; 90 L. T. 781; 20 T. L. R. 473—Div. Ct.

379. *Notice of Claim — What Sufficient — Claim under the Workmen's Compensation Act*, 1897—*Held not Sufficient—Employers' Liability*

Liability of Master for Injury to Servant— *Continued.*

Act, 1880 (43 & 44 Vict. *c.* 42), *s.* 7.]—A workman sent in a claim for compensation under the Act of 1897, and in it stated his name and address and the nature of his accident.

HELD—not sufficient to operate as a notice under the Employers' Liability Act, 1880.

THOMSON *v.* BAIRD, (1904) 6 F. 142—Ct. [of Sess.

380. *Notice — Sufficiency of Service — Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *ss.* 4, 7.]—A workman in the employ of a limited company, having been injured by an accident, sent a notice thereof addressed to the company, but enclosed in an envelope directed to their cashier who was in charge of their offices.

HELD—to be sufficient service.

DUNCAN *v.* FIFE COAL CO., LD., (1906) 7 F. [958—Ct. of Sess.

381. *Defect in Condition of "Ways"—Open Joists in Floor of House in course of Construction—Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *s.* 1 (1).]—The open joists of a floor of a house in course of construction, across which a labourer has to pass in carrying out an order by his foreman, do not constitute a "way" within the meaning of sect. 1, sub-sect. 1, of the Employers' Liability Act, 1880.

M'GOWAN *v.* SMITH, (1907) S. C. 548—Ct. of [Sess.

382. *Defective Plant — Stevedore unloading Ship—Plant used but not belonging to Employer —Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *s.* 1, *sub.-s.* 1.]—The defendant, who was a master stevedore, contracted with a shipowner to unload a cargo of sugar from his ship. The sugar, which was in bags, was unloaded by means of a derrick attached at one end to the mast by a shackle and pin. While some of the bags were being hoisted out by the derrick the pin came out and the bags fell on the plaintiff, who was employed on the work by the defendant, and injured him. There was evidence that the pin was worn and was not safe for use; and there was evidence that it was usual as between shipowners and stevedores that the former should provide all the appliances, except ropes, slings, and chains, and that the derrick, shackle, and pin belonged to the shipowner. In an action to recover damages under sect. 1, sub-sect. 1, of the Employers' Liability Act, 1880, for negligence in providing defective plant, the county court judge held that the stevedore was not liable for a defect in the ship's tackle, and he withdrew the case from the jury. The Divisional Court affirmed this judgment. On appeal:—

HELD—that if a stevedore used plant which did not belong to him, he had cast upon him a duty towards his workmen of taking reasonable care to see that the plant was fit for the purposes for which it was required; and that therefore the case ought to have been left to the jury.

BIDDLE *v.* HART, [1907] 1 K. B. 649; 76 L. J. [K. B. 418; 97 L. T. 66; 23 T. L. R. 262—C. A.

383. *Defect in Machinery—Dangerous Machine —Want of Instructions—Employers' Liability Act*, 1880 (43 & 44 Vict. *c.* 42), *s.* 1, *sub-s.* 1—*Compensation under Workmen's Compensation Act*, 1887—*Application to Assess—Court to which to make Application* (60 & 61 Vict. *c.* 37,) s. 1, *sub-s.* 4.]—The plaintiff, who was of the age of twenty, and was in the employment of the defendant, a farmer, was engaged in working a straw-pressing machine, when he received an injury. In an action to recover damages under sect. 1, sub-sect. 1, of the Employers' Liability Act, 1880, upon the ground that there was a defect in the condition of the machine, in that it was not properly fenced, the county court judge found that there was a defect in the machine in that, although perfectly made and not requiring a guard, it was a dangerous machine, and, that being so, it was the duty of the defendant to instruct those who used it as to its dangers, there being no foreman to do so, and that he had failed in that duty. He accordingly gave judgment for the plaintiff.

HELD—that this did not constitute a defect in the condition of the machine within sect. 1, sub-sect. 1, of the Employers' Liability Act, 1880, and the defendant was entitled to judgment. The plaintiff having applied to the Court to assess compensation under sect. 1, sub-sect. 4, of the Workmen's Compensation Act, 1887, the Court expressed the opinion that the county court judge was the proper tribunal to assess the compensation.

GREENWOOD *v.* GREENWOOD, (1907) 24 T. L. R. [24—Div. Ct.

3. Apart from Workmen's Compensation and Employers' Liability Acts.

384. *Fencing Machinery—Breach of Statutory Duty—Statutory Penalties—Right of Action for Damage—Common Employment — Factory and Workshop Act*, 1878 (41 & 42 Vict. *c.* 16), *s.* 5, *sub-s.* 4; *ss.* 81, 82, 86, 87—*Factory Act*, 1891 (54 & 55 Vict. *c.* 75.]—Where a workman employed in a factory has been injured through a breach of the duty imposed on the occupiers of the factory by sect. 5 of the Factory Act, 1878, of maintaining efficient fencing to the machinery in the factory, an action will lie to recover damages.

In such an action the defence of common employment is not available although the absence of the fencing at the time of the accident was due to the negligence of a fellow servant of the plaintiff.

GROVES *v.* WIMBORNE (LORD), [1898] 2 Q. B. [402: 67 L. J. Q. B. 862; 79 L. T. 284; 14 T. L. R. 493; 47 W. R. 87—C. A.

385. *Ship—Tallying Clerk—Unsafe Access to Ship* — Volenti non fit injuria.]—The question whether a workman, who undertook dangerous employment with knowledge of the danger, undertook the risk of danger so as to make the maxim "*Volenti non fit injuria*" apply is a question of fact for the jury.

Decision of Cave, J. affirmed.

PYNER *v.* BALLARD, KING & CO., (1898) 14 [T. L. R. 57—C. A.

Liability of Master for Injury to Servant— *Continued.*

386. *No Evidence of Negligence to go to the Jury.*]—The plaintiff was employed at the "Cheshire Cheese," in Fleet Street, and was ordered by the head waiter to clean the window, in a room on the fourth floor. This occurred on a November evening between 6 and 7 o'clock, and, owing to the room being imperfectly lighted, the plaintiff failed to see that one of the window panes was cracked, and, while cleaning it, cut his wrist and nearly severed a nerve. He brought an action against the proprietors of the tavern for damages. At the trial it was not proved that the manager of the defendant company knew that the window pane was cracked. The plaintiff was nonsuited on the ground that there was no evidence of negligence to go to the jury.

SMITHWAITE *v.* MOORE & SONS, LD., (1898) 14 [T. L. R. 461—Phillimore, J.

387. *Railway Company—Scheme of Compensation—Death from Accident in course of Duty—Disobedience—Accident while coming on Duty.*]—The Great Eastern Railway under statutory powers established an accident allowance fund. By the rules to regulate the fund it was provided "The allowances to be paid . . . . shall be as follows : . . . . in case of the death of an insurer from any accident in the discharge of duties in the company's service . . . . there thall be paid to the representative of the insurer . . . . £130."

The action was brought by the widow of a workman under the following circumstances :—

Before commencing work it was according to the rule of the company required of every workman to procure from an office at the works a ticket or check which was to be delivered back at the end of the day's work, and which operated as a voucher, and showed what wages he was to receive. This office could be approached by two footpaths, and workmen were expressly forbidden to cross the lines of rails. The deceased on his way to get the ticket before he began his work crossed the rails, and was knocked down by an engine and killed.

HELD—that the death did not result from an accident in the discharge of duties in the company's service, and that the plaintiff could not recover.

VICKERY *v.* GREAT EASTERN RY. CO., (1898) [79 L. T. 121 ; 14 T. L. R. 562—Hawkins, J.

388. *Negligence — Defect in Plant or Machinery—Workman's Knowledge of Danger—Contributory Negligence—The Fatal Accidents Act*, 1846 (9 & 10 Vict. *c.* 93.]—A workman in the employment of the defendants was killed by a fall while descending in the course of his work from an elevated tramway on the defendants' premises. In an action by his widow under the Fatal Accidents Act, 1846, the jury found that the defendants did not exercise due care to have the tramway in a safe and proper condition so as to protect their servants working upon it against unnecessary risks ; that it was dangerous to descend from the tramway without the means of a ladder ; that the deceased had the same means of knowing that it was dangerous as the defendants had ; that he did know that it was dangerous : and that he had not been guilty of contributory negligence ; and they assessed damages at £130.

HELD—that the plaintiff was entitled to judgment.

Smith v. *Baker* ([1891] A. C. 325 ; 60 L. J. Q. B. 683 ; 55 J. P. 660 ; 40 W. R. 392 ; 65 L. T. 467) discussed.

WILLIAMS *v.* BIRMINGHAM BATTERY AND [METAL CO., [1899] 2 Q. B. 338 ; 68 L. J. Q. B. 918 ; 47 W. R. 680 ; 81 L. T. 62 ; 15 T. L. R. 468—C. A.

389. *Negligence — Dangerous Employment — Special Duty — Newspaper Boy at Railway Station—Crossing Line—No Caution—Evidence for Jury.*]—The plaintiff, a boy twelve years of age, was employed by the defendants to deliver newspapers from their bookstall at a railway station to customers in the town. The bookstall was on a platform surrounded by lines of railway, there being a foot-bridge across the lines. The plaintiff was shown his duties by a boy of the same age as himself, but he was not warned not to cross by the metals. There was a notice warning the public not to cross the metals, but to use the foot-bridge. There was evidence that the newspaper boys were in the habit of crossing by the metals, and that the man in charge of the bookstall knew that the plaintiff was in the habit of so crossing. The plaintiff, in crossing by the metals, was run over by a train. In an action against the defendants for damages for negligence, the county court judge nonsuited the plaintiff.

HELD—that there was evidence of negligence to go to the jury, the employment being a dangerous one in regard to which a duty was thrown upon the defendants to order the child what to do in order to keep out of the danger.

Decision of Div. Ct. ((1901) 17 T. L. R. 235) affirmed.

ROBINSON *v.* SMITH (W. H.) & SON, (1901), [17 T. L. R. 423—C. A.

390. *Defect in Machinery — Knowledge of Master—Duty to give Instructions to Servant—Working of Lift in Premises.*]—The plaintiff, a boy sixteen years of age, whose duty it was to work a lift, met with an accident caused by his slipping on the oiled floor of the lift after setting the latter in motion, the result being that his leg, which was hanging outside the lift, was caught between the lift and the shaft, and had to be amputated. It was part of his duty to oil the floor of the lift himself, and he did so in consequence of the instructions of the defendants or their superintendent. The jury found that the lift was defective through the absence of an inner gate ; that the cleaning with oil caused the lift to be dangerous, and that instructions to clean it in that manner were given by the superintendent ; and that the accident was

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occasioned by the neglect of the defendants or their superintendent to take good care in giving the plaintiff proper instructions as to the working of the lift.

Upon these findings the judge entered judgment for the plaintiff for the amount awarded by the jury.

HELD—that there was no evidence to justify these findings of the jury, or to bring the case within any principle of law which would make the masters liable.

Decision of Bruce, J. (87 L. T. 73; 18 T. L. R. 578) reversed.

LLOYD *v.* WOOLLAND BROS., (1903) 19 T. L. R. [32—C. A.

391. *Common Law—Pauper set to Work on Scaffolding — Responsibility of Guardians — Common Employment.*]—A pauper, whilst being maintained in a workhouse, was set to work on a scaffold in connection with certain electrical work. The scaffold, for the safe erection of which the head of the electrical work assumed responsibility, gave way, and the pauper sustained serious injuries.

On an action being brought by the pauper against the guardians, to whom the workhouse belonged, for damages in respect of such injuries :—

HELD—that the guardians in employing the pauper were discharging a duty imposed upon them by the Poor Law Acts, and that the action was not maintainable.

TOZELAND *v.* WEST HAM UNION, [1907] 1 K. B. [920; 76 L. J. K. B. 514; 96 L. T. 519; 71 J. P. 194; 23 T. L. R. 325; 5 L. G. R. 507—C. A.

392. *Common Employment — Defence of — Defective Condition of Ship's Ladder.*]—A seaman was injured by a step of the ship's lazarette ladder giving way. The ladder was originally sufficient for its purpose, but some of the steps had been replaced in a somewhat makeshift manner.

HELD—that the shipowner was not responsible, for if the defect were a patent one it ought to have been remedied by some person in common employment with the seaman, the owner being justified in leaving to servants the repair of such minor defects.

GILLIES *v.* CAIRNS, (1906) 8 F. 174—Ct. of [Sess.

393. *Common Employment — Defence of — Omission by Master of Statutory Duty—Coal Mines Regulation Act*, 1887 (50 & 51 Vict. *c.* 58), *s.* 49.]—A miner was injured by a fall of shale from the roof of a roadway in a mine. Eight days previously there had been a large fall at the same place, but nothing had been done to support the roof. Sect. 49 of the Coal Mines Regulation Act, 1887, provides that "the following general rules shall be observed, so far as is reasonably practicable, in every mine . . ." rule 21. "The roof and sides of every travelling road and working place shall be made secure."

In answer to an action for damages at common law, the mine-owners contended (1) that, having appointed a competent manager, they were not in default, and (2) that the default of the manager was default of a person in "common employment" with the plaintiff.

HELD—that the owners were in default in not having complied with the statutory requirements; and that, this being so, the defence of "common employment" was not open to them.

BETT *v.* DALMENY OIL CO., LD., (1906) 7 F. [787—Ct. of Sess.

394. *Negligence of Fellow Servant—Common Employment—Theatre Proprietor and Actress—Exception of Employers' Liability Act*, 1880.]—The plaintiff was, by an agreement in writing, engaged by the defendants to take part in the chorus in a pantomime, which was to be produced at Drury Lane Theatre, at a weekly salary. By the agreement the defendants were not to be liable to the plaintiff for personal injury under the Employers' Liability Act, 1880. During one of the performances the plaintiff was injured by something falling on her head. In an action against the defendants to recover damages, alleging negligence either on the part of the scene shifters in letting fall a piece of machinery or on the part of the defendants' manager :—

HELD—that the doctrine of common employment applied, and the plaintiff could not recover.

HELD, further, that the express exception of liability under the Employers' Liability Act, 1880, did not affect the implication of non-liability for injury caused by the negligence of a fellow servant.

BURR *v.* THEATRE ROYAL, DRURY LANE, LD., [1907] 1 K. B. 544; 76 L. J. K. B. 459; 96 L. T. 447; 23 T. L. R. 299—C. A.

395. *Negligence of Fellow Servant—Common Employment—Forewoman—Neglecting to give Caution—Infant.*]—A servant, in entering his master's employment, takes upon himself the risk of negligence on the part of his fellow servants whatever position they hold. There is no exception to this rule in the case of dangerous employments, or in the case of the employment of infants, where, there being a duty to warn the servant of the danger, the master has (as he is entitled to do) delegated that duty to another person in his employment, and that other person has been guilty of negligence in not giving proper warning.

CRIBB *v.* KYNOCH, [1907] 2 K. B. 548; 76 [L. J. K. B. 948; 97 L. T. 181; 23 T. L. R. 550—Div. Ct.

396. *Negligence of Fellow Servant—Common Employment — Infant — Foreman — Failure to give Caution.*]—When a master employs a young or inexperienced servant upon dangerous work it

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is his duty to instruct and caution him. He may, however, delegate that duty to a competent person, and if that person fails to perform the duty, the master will not be liable for an injury resulting to the servant by reason of the failure; the defence of "common employment" will be open to him, and the fact that the injured servant is an infant is immaterial.

Cribb v. *Kynoch, Ld.* (*supra*) approved.

YOUNG *v.* HOFFMANN MANUFACTURING CO., [LD., [1907] 2 K. B. 646; 76 L. J. K. B. 993; 97 L. T. 230; 23 T. L. R. 671—C. A.

II. LIABILITY OF MASTER FOR INJURY BY SERVANT: SCOPE OF AUTHORITY.

And see title CRIMINAL LAW.

397. *Servant Working for Another.*]—The pursuer brought an action against the Clyde Navigation Trustees to recover damages for an accident which happened to him in Glasgow harbour. At the time of the accident he was employed by one Shaw, a stevedore, and was helping to load a steamer which was taking a cargo of steel plates. These plates were lowered by means of a steam crane which belonged to the Clyde Navigation Trustees, and which was worked by one of their servants. The evidence showed that it was the practice of the stevedore to give direction to the man in charge of the crane when to lower and raise the load and when to slew the crane round; but he had no actual control over him, nor could he dismiss him. On the occasion in question an order was given to the craneman by the stevedore to lower one of the plates, but he, instead of doing this, diverted the plate to one side and injured the pursuer.

HELD—that at the time of the accident the man in charge of the crane was the servant of the trustees and not of the stevedore.

CAIRNS *v.* CLYDE NAVIGATION TRUSTEES, [(1898) 25 R. 1021; 35 Sc. L. R. 808—Ct. of Sess.

398. *Negligence—Damage caused by Negligent Driving of Coachman—Coachman hired from Livery Stable Keeper—Liability of Owner of Horse and Carriage.*]—The defendant, who was the owner of a horse, harness, and carriage, had placed them at livery with a livery stable keeper, and as he had no coachman of his own, when he had occasion to use the carriage the livery stable keeper supplied the coachman to drive the defendant's carriage. This coachman was in the general employment of and was paid by the livery stable keeper, to whom the defendant paid a weekly sum for the driver's services. The same coachman had driven the defendant's horse and carriage for some time, and the defendant had supplied him with a suit of livery. The driver while so driving the defendant was guilty of negligence, in consequence of which the horse ran away and damaged the plaintiff's goods.

HELD—that although the driver was in the general service of the livery stable keeper, he was, as regards the management of the defendant's horse and carriage at the time of the occurrence, the servant of the defendant and under his control, and that the defendant was therefore responsible for the damage caused by his negligence.

JONES *v.* SCULLARD, [1898] 2 Q. B. 565; 67 [L. J. Q. B. 895; 79 L. T. 386; 14 T. L. R. 500—Lord Russell of Killowen, C.J.

399. *Tramway Company—Conductor—Alleged Counterfeit Coin—Giving into Custody—Liability of Company.*]—The plaintiff Knight was travelling in one of the defendant company's trams, and tendered sixpence in payment of the fare, and received fourpence change. Shortly after, the conductor alleged it was counterfeit, and, on the plaintiff refusing to give another, the conductor gave him in charge. An inspector of the company, who happened to be passing, sent the conductor down to charge the plaintiff, and went on with the tram. The next morning the magistrate dismissed the charge, the sixpence turning out to be a good one. Another inspector of the company was present in Court during the proceedings. In an action against the tramway company for malicious prosecution and false imprisonment:—

HELD—that there was no evidence to show that the conductor acted within the scope of his authority, express or implied, or that the defendant company ratified his proceedings.

KNIGHT *v.* NORTH METROPOLITAN TRAMWAYS [CO., (1898) 78 L. T. 227; 14 T. L. R. 286.—Bruce, J.

400. *Assault*—The servants of a railway company arrested a cabman for a breach of the peace committed within the precincts of a station, and took him to a neighbouring police office. In an action for damages by the cabman against the company an issue was allowed: "Whether the cabman was wrongfully and forcibly taken into custody and removed from the railway station to the police office by the servants of the railway company while acting in the course of their employment by the railway company."

WOOD *v.* NORTH BRITISH RY. CO., (1899) 1 F. [562; 36 Sc. L. R. 407—Ct. of Sess.

401. *Burden of Proof—Omnibus driven by Conductor.*]—On the trial of an action for negligence against an omnibus company, it was proved by the plaintiff's witnesses that the omnibus by which the plaintiff was run down and injured had just finished one of its journeys, and was coming down an incline at the rate of eight miles an hour, while making a slight *détour* for the purpose of coming to the starting-place facing the right way for commencing a fresh journey, and that it was being driven by the conductor, who was not the regular driver.

HELD—that the judge was right in withdrawing the case from the jury at the close of the plaintiff's case, on the ground that there was

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no evidence that the person who was driving the omnibus was acting within the scope of his authority.

BEARD *v.* LONDON GENERAL OMNIBUS CO., [1900] 2 Q. B. 530; 69 L. J. Q. B. 895; 48 W. R. 658; 83 L. T. 362; 16 T. L. R. 499 C. A.

402. *False Imprisonment—Implied Authority to give into Custody—Exigency of Particular Occasion—Public-house Manager—Liability of Master.*]—A servant has an implied authority to give a person into custody, if it is necessary to do so, in order to protect the master's property.

A servant may have such an implied authority derived from the exigency of a particular occasion.

The owner of a public-house—the defendant—did not manage it, but came there nearly every day. The manager had the general management of the house. The plaintiff was employed there as head barman and cellarman. The manager gave the plaintiff into custody on a charge of stealing whisky, when none in fact had been stolen. The plaintiff brought an action against the defendant for false imprisonment.

HELD—that it was not within the special sphere of the manager's duty to arrest people or to decide as to their arrest; that there was no evidence that any whisky had gone, or that any of it was in such a position that it could be deemed to be property which might be saved if a prompt arrest were made; and that the defendant was not liable.

HANSON *v.* WALLER, [1901] 1 Q. B. 390; 70 [L. J. Q. B. 231; 49 W. R. 445; 84 L. T. 91; 17 T. L. R. 162—Div. Ct.

403. *Negligence of Servant—Hire of Servant of another Master—Control of Servant—Liability of Hirer.*] — A company having girders and other heavy articles which had to be delivered to their customers, and not having vans and horses of their own available for the purpose, agreed with the defendant that he should supply vans each working morning during the year, "in complete working order, with good and capable men to drive and take charge of same; vans, horses, and all necessaries being the property of Mr. W. Winfield (the defendant); the men in his employ, and all charges and claims whatsoever in reference to the vans, horses, and men being paid for by Mr. W. Winfield, and he to be responsible for same; we (the company) only to be responsible for the due payment at the rate of £420 per annum for one pair and one single horse van and man, payment being made in equal monthly proportions at the rate of £35 per month." The plaintiff sued the defendant to recover damages for injuries which he sustained through the negligence of the driver of a van and horse sent by the defendant to take some girders to a customer of the company.

HELD—that the intention to be gathered from the agreement was that the hirers were to have nothing to do with the management; that the defendant was to be responsible for the management of the vans and horses by his men; that the driver of the van was not to be the servant of the hirers or under their control, but was to remain the servant of the defendant, and that the plaintiff was entitled to judgment.

WALDOCK *v.* WINFIELD, [1901] 2 K. B. 596; 70 [L. J. K. B. 925; 85 L. T. 202; 17 T. L. R. 661—C. A.

404. *Evidence of Existing Relationship—Admission—Offer to pay Money after Accident—Presumption—Burden of Proof—Course of Trial—Nonsuit.*]—The plaintiff was knocked down and injured by a runaway pony attached to a trap which had been driven by M., but was left standing by him in the street when it took fright. The pony and trap were the property of B. The plaintiff brought an action against M. & B. for damage for injuries received by the negligence of the defendants or their servants. At the trial a witness for the plaintiff gave evidence of a statement made by M. after the accident to the effect that he had been driving the pony and trap, and had left them standing in the street, when the pony was startled and ran away. He also proved that after the accident, and after the plaintiff had been brought to the hospital, M. claimed the pony and trap and took them away. The plaintiff's daughter proved that B. had called on her after the accident and said that he was very sorry that they were his pony and trap, and that if she took her father home he would pay all expenses. In cross-examination it appeared that this offer to pay the expenses was made after the plaintiff's daughter had said to B. that she believed he had lent M. the pony and trap, to which observation B. replied with the ejaculation "Humph." Neither B. nor M. were produced at the trial. Counsel for the defendant B. asked the judge for a direction in his favour, which was refused, and the judge, amongst other questions, asked the jury to find whether M. was acting as the servant of B. within the scope of his authority. The jury answered this question in the affirmative, and found £250 damages against the defendants. He moved to have the verdict set aside and the judgment entered for him in the action, on which motion the King's Bench Division made no rule, the Court being equally divided, Lord O'Brien, L.C.J., and Barton, J., being of opinion that there was no evidence to support the finding of the jury that M. was the servant of B., acting within the scope of his authority; Madden and Boyd, JJ., being of opinion that, having regard to the non-production of the defendants, and the offer to pay expenses made by B., there was evidence to support the finding.

HELD (by the C. A.) — that there was no evidence to support the finding; that no presumption of the relationship of master and servant arose from the fact of M. driving B.'s pony and trap; that the offer to pay expenses was made on the basis of B. having lent the pony and trap to M., and could not be treated as an admission of liability on another hypothesis; that the evidence offered being at least

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equally consistent with a state of facts on which B. would not be liable, he was entitled to a nonsuit or a direction in his favour, and that the verdict and judgment entered thereon against him should be set aside.

POWELL *v.* M'GLYNN AND BRADLAW, [1902] 2 [Ir. R. 154—Q. B. Div., Appeal.

405. *Passenger standing on Driver's Platform of Tramcar—Consent of Driver—Violation of Rules.*]—The plaintiff arrived at a railway station at the outskirts of the city of Londonderry about nine o'clock at night. The station was one mile from the town, with which it was connected by the defendants' tramway. It was raining heavily, and there was only one tramcar, which was crowded both inside and on the back platform. The plaintiff got on the driver's platform, and the driver made no objection to his doing so. The plaintiff stated that he had travelled on the driver's platform some six times before without objection and had always paid his fare. This evidence was controverted. The servants of the tramway company had orders not to allow any one on the front or back platform, and notices were placed inside the cars that it was forbidden for any one to stand there. During the journey the tramcar ran off the line owing to the points being set wrong, and the plaintiff was thrown off and sustained severe injury. No one else in the tramcar was hurt. The jury found that the servants of the defendant company had no authority from the company to allow the plaintiff to stand on the driver's platform; that the plaintiff stood on such platform with the permission of the defendants' servants, and that such permission was not with the consent of the company, and was in violation of their rules; that the plaintiff was travelling on the platform as a passenger intending to pay his fare; that the notice alleged to be posted in the tramcar was not brought to the plaintiff's attention or seen by him; and that reasonable notice was not given to the public of the rule of the company that passengers should not occupy the platform. They further found that the accident was caused by the defendants' negligence in the driving of the tramcar, and awarded the plaintiff £500 damages.

HELD (by the K. B. Div.)—that the inference should be drawn. from the course of the trial and the evidence that it was within the scope of authority of the defendants' servants to take persons as passengers on the front platform, and that on such inference, coupled with the findings, the plaintiff was entitled to judgment for the damages found.

HELD, by the C. A. (reversing the decision of the K. B. Div.)—that the findings of the jury negatived any authority in the driver to permit the plaintiff to stand on the front platform, whether derived from course of service or scope of employment; that such permission was not an act of agency, but was a personal indulgence outside the course of service or scope of employment; and that the defendant company were not liable.

BYRNE *v.* LONDONDERRY TRAM CO., (1902) 2 [Ir. R. 457—C. A.

406. *Pledging Master's Credit—Forage supplied by direction of Coachman — Ostensible Authority—Ratification.*]—In order to fix the principal for an order given by a person purporting to be his agent, either actual or ostensible authority to contract for the principal, or ratification, must be proved.

A coachman was employed by the defendant under an arrangement that the defendant should pay him a certain sum per week per horse, and that he should for such payment supply forage and shoeing. The coachman ordered forage for the defendant's horses from the plaintiff without mentioning the arrangement, and the plaintiff supplied forage accordingly for several months, giving credit to the defendant. The defendant duly paid the agreed weekly sums to his coachman, and did not know from whom he ordered forage.

HELD—that there was no evidence of a holding out by the defendant of his coachman as having ostensible authority to pledge his credit, or of ratification by the defendant.

Precious v. *Abel* ((1795) 1 Esp. 350) and *Rimell* v. *Sampayo* ((1824) 1 C. & P. 254) commented on.

Decision of Grantham, J. ((1901) 17 T. L. R. 434), reversed.

WRIGHT *v.* GLYN, [1902] 1 K. B. 745; 71 L. J. [K. B. 497; 50 W. R. 402; 86 L. T. 373; 18 T. L. R. 404—C. A.

407. *Society for Prevention of Cruelty to Animals — Inspector of Society giving Person into Custody—Liability of Society—Cruelty to Animals Act*, 1849 (12 & 13 Vict. *c.* 92), *s.* 13.]—The Cruelty to Animals Act, 1894, sect. 13, provides that upon a complaint being made a constable may arrest an offender. The rules of the defendant society suggested that their inspector could give a person into custody. An inspector, acting under the rules, gave the plaintiff into custody on a false charge. The inspector on duty at the police station refused to take the charge. The plaintiff sued the society for damages for false imprisonment.

HELD—that the inspector of the defendants acted within the scope of his authority, erroneously given to him by the society, and that the defendant society was liable in damages for his act.

LINE *v.* ROYAL SOCIETY FOR THE PREVENTION [OF CRUELTY TO ANIMALS, (1902) 18 T. L. R. 634—Walton, J.

408. *Public Body — Contractor to supply Horses, Harness, and Drivers — Negligence of Driver supplied—Liability arising therefrom.*]—The plaintiff sustained injury to his person and damage to his cab by reason of the vehicle colliding with an upright key left standing in a cock situate on the roadway by a driver of one

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of the water-carts of the defendant council. The defendant Latter, by an agreement dated March 28th, 1901, agreed to supply the council for a period of three years with horses, harness, and drivers on the terms and conditions set out, amongst which was one placing the drivers under the orders of the council's surveyor in respect of the particular work to be done on each day. The driver above mentioned was supplied by Latter under the agreement. On trial of an action brought against both the defendants the jury found that the driver was negligent, and that he was the servant of Latter, but that at the time of the accident he was acting under the control of the defendant borough council in the act of filling his cart.

HELD—that on the construction of the agreement made between the defendants and on the authority of *Jones* v. *Mayor, &c. of Liverpool* ((1885) 14 Q. B. D. 890; 54 L. J. Q. B. 345; 49 J. P. 311; 33 W. R. 551) judgment should be entered against both the defendants.

MILEHAM *v.* BOROUGH OF MARYLEBONE AND [LATTER, (1903) 67 J. P. 110; 1 L. G. R. 412 —Channell, J.

409. *Assault — False Imprisonment.*]—A servant has implied authority to give a person into custody, if it is necessary to do so in order to protect his master's property; such authority may also be derived from the exigencies of a particular occasion.

The plaintiff visited a public entertainment, and paid the ticket issuer for a ticket. Half an hour later the ticket issuer, finding his change 10*s.* wrong, and believing that he had given the plaintiff as change a sovereign instead of half a sovereign, went up to him and asked for half a sovereign. Upon the plaintiff declining to pay, he was given into custody. The manager was on the premises at the time, but did not sanction the arrest.

HELD—that the ticket issuer had no authority from his principals to give the plaintiff into custody, and that they were not liable therefor.

CULLIMORE *v.* SAVAGE SOUTH AFRICA CO., [1903] 1 Ir. R. 589—C. A.

410. *Contract to keep in Repair—Failure—Injury to Van Owner's Servant in consequence—Liability of Repairer.*] — The defendant contracted to keep in repair certain vans; owing to his servant's negligence a wheel came off from one of these vans, and an employee of the van owner was injured.

HELD—that the defendant was not liable to such employee.

Winterbotham v. Wright ((1842) 10 M. & W. 109) followed.

Heaven v. *Pender* ((1884) 11 Q. B. D. 503; 52 L. J. Q. B. 702; 49 L. T. 357—C. A.) discussed.

Decision of Div. Ct. (91 L. T. 73) affirmed.

EARL *v.* LUBBOCK, [1905] 1 K. B. 253; 74 [L. J. K. B. 121; 53 W. R. 145; 91 L. T. 830; 21 T. L. R. 71—C. A.

411. *Nursing Association — Association for Supplying Trained Nurses—Negligence of Nurse —Liability of Committee of Association.*]—An association was formed for the supply of trained nurses, on payment of certain fees to the association, to nurse patients during illness, the nurses being paid regular salaries by the association. The association was, according to its rules, managed by a house committee, who appointed a superintendent, part of the superintendent's duties being to receive and attend to all applications for nurses. The nurses were appointed and discharged by the house committee in consultation with the superintendent, the nurses being recommended for appointment by the superintendent. Each nurse was to be responsible to the superintendent, and was to conform to her instructions in all matters pertaining to work and conduct, and when on duty was to follow implicitly the instructions of the medical attendant. The association supplied for reward two nurses to nurse the female plaintiff, who was about to undergo a surgical operation. By the carelessness of one of the nurses in applying a hot-water bottle to the female plaintiff while under the influence of the anæsthetic the latter received a severe burn. In an action against the house committee of the association to recover damages for the injury so sustained:—

HELD—that under the rules of te hassociation the latter did not undertake to nurse the patient, but only undertook to supply a nurse competent, so far as reasonable care could ensure it, to perform the duties of a nurse, who, while she was with the patient, should be under the control and instructions of the medical man; and that, therefore, the relation of master and servant did not exist at the time between the association and the nurse so as to make the association liable for the negligence of the nurse.

HALL AND WIFE *v.* LEES AND OTHERS, [1904] 2 K. B. 602; 73 L. J. K. B. 819; 91 L. T. 20; 53 W. R. 17; 20 T. L. R. 678— C. A.

412. *Dishonesty of Servant — Contract to supply Carriage and Coachman to Commercial Traveller — Duty of Coachman to safeguard Articles in Carriage—Larceny by Coachman.*] —The defendant agreed to let on hire to the plaintiff by the week a brougham, horse, and coachman for the use of the plaintiff's commercial traveller in taking round samples of goods to customers. The defendant was not told the character of the samples to be carried. While the carriage was being so used, the traveller went to lunch, leaving the carriage and its contents in charge of the coachman, and while he was away the contents of the carriage were stolen with the connivance of the coachman. The coachman had been in the defendant's employment for some time and had borne a good character.

HELD—that the defendant had undertaken by his servant to use due care in safeguarding the samples in the temporary absence of the traveller, and would therefore have been liable for the negligence of his servant acting within the scope of his employment; but that as the

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felony of the servant, which caused the loss of the samples, was an act done outside the scope of his employment, the defendant was not liable.

Abraham v. *Bullock* (86 T. L. R. 796; 18 T. L. R. 701—Collins, J., *see* NEGLIGENCE, No. 39) explained.

Decision of Walton, J. (52 W. R. 631; 20 T. L. R. 561) reversed.

CHESHIRE *v.* BAILEY, [1905] 1 K. B. 237; 74 [L. J. K. B. 176; 53 W. R. 322; 92 L. T. 142; 21 T. L. R. 130—C. A.

413. *Fraud of Servant—Stockbroker's Clerk Stealing Client's Cheque and Certificates.*]—The plaintiff bought stocks and shares through a firm of brokers whose confidential clerk was his brother-in-law. It was recognised by all parties that this clerk was the person in the office who attended to the plaintiff's business. The plaintiff allowed the certificates of the stocks and shares bought by him to remain in the broker's office for more than a year, when it was discovered that the clerk in question had stolen and sold them.

HELD—that the plaintiff had no cause of action against the brokers, for knowing that he could have obtained the certificates, he left them in the office under the control of the clerk as his agent, or, if the clerk was not his agent, the clerk got possession of the certificates by fraud, and such fraud was not committed in the course of his service or for his principal's benefit.

The plaintiff in payment for stock purchased either posted to the brokers, or handed to the clerk in question, a cheque payable to the brokers or bearer, which was stolen by the clerk.

HELD—that such a cheque was not a remittance in the ordinary course of business, and that the brokers might show that they had never received payment, although the clerk had initialled on behalf of the firm and sent to the plaintiff an account showing the cheque credited to him.

ROBB *v.* GOW BROS. AND ANOTHER, (1906) 8 F. [90—Ct. of Sess.

414. *Authority of Servant — Driver of Car Delegating Duty—Negligence—Agent of Necessity.*]—A motor-car, after having been repaired by the defendants, was sent back to the owner under the charge of a driver who was in the employment of the defendants. The driver received instructions from the defendants not to give up the driving to anyone. At one stage of the journey a man not in the employment of the defendants accompanied the driver, who, hearing a noise at the back of the car, entrusted the driving to his companion while he himself went to see the cause of the noise. While his companion was driving he negligently drove the car against the plaintiff's van.

In the county court the plaintiff obtained a verdict and judgment. The Divisional Court held that as there was no necessity for keeping the car going while the driver examined the machinery, and therefore for entrusting the driving to the driver's companion, the defendants were not liable for the negligence of the latter.

HELD (by the C. A.)—that as the question of such necessity was not raised in the county court or in the notice of appeal to the Div. Ct., the judgment in the county court must stand.

Decision of Div. Ct. (22 T. L. R. 556) reversed.

HARRIS *v.* FIAT MOTORS, LD., (1907) 23 T. L. R. [504—C. A.

415. *Driver — Private Electric Brougham — Owner Contracts with Company to Garage Brougham and Supply Driver—Injury to Third Party Caused by Negligence of Chauffeur — Liability of Company.*]—The owner of an electric brougham contracted with the defendants to garage the brougham, supply electric energy, and supply a chauffeur at so much a week inclusive. By the negligence of the chauffeur, the chauffeur while driving the brougham for his own purposes, and contrary to the orders given him by its owner, injured the plaintiff. In an action to recover damages from the defendants:

HELD—that there was evidence on which a jury could find that the defendants were liable, on the ground that the chauffeur was their servant.

MORRIS *v.* WOLSELEY TOOL AND MOTOR CAB [CO., (1907) 52 Sol. Jo. 116—Ridley, J.

416. *Purchase of Motor Car — Driver—Car being driven for delivery to Purchaser.*]—The defendant purchased and paid for a motor car in London, and the vendor agreed to provide a driver to drive the car to a certain place outside London and deliver it there, as the defendant's driver did not know the locality and had no experience of the class of car purchased. While the car was being driven by the driver supplied by the vendor from London to the place named for delivery it collided with and damaged a motor bicycle owing to the negligence of the driver. At the time the defendant, his driver, and his son were in the car. In an action in the county court by the owner of the bicycle against the defendant to recover for the damage to the bicycle, the judge held that the driver of the car, though he was the general servant of the vendor, was at the time under the control of the defendant, who had the property in and possession of the car, and that therefore the defendant was liable to the plaintiff for the negligence of the driver.

HELD—that the decision was right.

Jones v. *Scullard* ([1898] 2 Q. B. 565; 67 L. J. Q. B. 895; 79 L. T. 386; 14 T. L. R. 580—Ld. Russell, C.J., No. 398, *supra*) followed.

PERKINS *v.* STEAD, (1907) 23 T. L. R. 433— [Div. Ct.

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417. *Servant lent to Another — Control over Servant — Hire of Engine and Driver.*]—The defendants hired out an engine to another person, and they supplied a driver for the engine. They paid the driver, supplied the oil for the engine, and kept it in repair. The evidence showed that the person to whom the engine was hired could direct where the engine should go and what loads it should haul, and that the defendants never knew where the engine was sent to or what it carried. While so hired, the engine, by the negligence of the driver, injured the plaintiff.

Held—that, on the facts, the defendants, who appointed and paid and who could dismiss the driver, had control over him at the time of the injury, and were therefore liable to the plaintiff.

Decision of the Div. Ct. (22 T. L. R. 303) reversed.

Dewar *v.* Tasker & Sons, Ld., (1907) 23 [T. L. R. 259—C. A.

III. CONTRACTS BETWEEN MASTER AND SERVANT NOT RELATING TO PERSONAL INJURIES.

And see title Contracts.

418. *Apprentice—Employed not with Master—Master's Consent—"Duly and truly serve."*—An apprentice "duly and truly" serves his master if, with that master's consent, he is employed otherwise than actually by that master during the term of apprenticeship.

Richardson *v.* Colne Fishery Co. (1897) 77 [L. T. 501—Barnes, J.

419. *Continuance of Employment—Proceedings for Damages—Waiver—Employers and Workmen Act*, 1875 (38 & 39 Vict. *c.* 90).]—On the hearing of a complaint under the Employers and Workmen Act, 1875, for damages for breach of contract by the appellants against the respondent, a miner, and it was admitted that the appellants had continued since the date of such breach to employ the respondent upon the terms of such contract:

Held, that that amounted to no waiver or release with regard to the claim for damages.

Wynnstay Collieries *v.* Edwards, (1898) 79 [L. T. 378; 62 J. P. 823—Div. Ct.

420. *Agreement to refer Disputes to Arbitration—Dismissal—Condition precedent.*]—The plaintiff sued the defendants, who were colliery owners, to recover damages for wrongful dismissal. A sliding scale agreement had been made between certain persons on behalf of the members of the Monmouthshire and South Wales Coal Owners' Association, and certain persons on behalf of the workmen employed at the collieries of the members of the association—the parties thereto being called by clause 1 of the agreement "the joint committee." The defendants were members of the above association.

It was provided (*inter alia*) by clause 17 of this agreement that in cases of disputes or unavoidable differences no notice to terminate contracts should be given by either the employers or their workmen before the particular question in dispute should have been considered by the joint committee.

In October, 1895, the defendants' colliery was being worked at a considerable loss and, it had been under the consideration of the defendants to close the pit, but they were willing to continue working if the men on their part were willing to forego or make certain reductions in the allowances they then claimed and were receiving. This the men refused to do, and they contended that the matter should be referred to the joint committee. On January 1st, 1896, the defendants' manager, without referring the matter to the joint committee, gave the men a month's notice of dismissal.

Held, that under the provisions of clause 17, it was not a condition precedent to the giving of this notice that the matter should have been considered by the joint committee.

Roberts *v.* Hill's Plymouth Co., Ld., (1898) [14 T. L. R. 21—C. A.

421. *Fixed Salary and Travelling Expenses—Employer ceasing to send Travelling—Liability for Travelling Expenses.*]—The defendants employed the plaintiff as one of their foreign travellers at £500 a year and travelling expenses at 35*s.* a day. By reason of circumstances over which the defendants had no control (bad trade and falling prices) it became impossible to obtain orders for the defendants' goods in the countries in which the plaintiff travelled at prices which would leave a profit. They notified to him that he would not be required to travel until trade revived. However, they continued to pay the plaintiff his full salary. The plaintiff claimed damages because the defendants did not send him travelling, but kept him idle, thereby inflicting injury on the goodwill of his travelling connection, and he was not able to save anything out of the amount allowed him for travelling expenses.

Held—that the defendants' obligation to the plaintiff was limited to paying him the £500 a year, and that there was no obligation to keep him travelling, and that the action was unfounded.

Lagerwall *v.* Wilkinson, (1899) 80 L. T. 55 —Bigham, J.

422. *Agreement to Engage and Employ—Refusal to provide Work—Payment of Salary—Breach of Contract.*]—By an agreement in writing the defendants agreed to engage and employ the plaintiff as their servant and representative salesman for a period of four years, and to pay him a salary, and the plaintiff agreed to devote the whole of his time to the business of the defendants. The defendants wrote to the plaintiff saying that, although he would still be in the employ of the defendants, and at their disposal, he would not, after a certain day, be required to perform any duties. The defendants

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were always ready and willing to pay all that was due under the agreement. The question arose as to the obligation on the defendants during the period over which the contract was to extend to find continuous, or at least some, employment for the plaintiff.

HELD—that it was within the province of the defendants to say that they would go on paying the salary, but that they were under no obligation to provide work.

Judgment of Kennedy, J. ((1901) 17 T. L. R. 427) reversed.

TURNER *v.* SAWDON & Co., [1901] 2 K. B. 653 ; [70 L. J. K. B. 897 ; 49 W. R. 712 ; 85 L. T. 222 ; 17 T. L. R. 645—C. A.

423. *Implied Contract for Remuneration — Some of such Improvements patented at Master's Expense in Joint Names—Claim by Servant for Remuneration—Agreement.*]—The plaintiff, who had risen within a year from a toolmaker at 36*s.* per week to foreman of the toolroom at £3, was then employed by his masters to devote his whole time to improving a certain machine. He made several improvements, in respect of some of which patents were taken out by the masters at their expense, but in the joint names of themselves and the plaintiff. The plaintiff, having been dismissed, brought an action alleging an agreement to pay him a reasonable remuneration in respect of all improvements whether patented or not. The jury awarded him £310 in respect of the improvemen's which had been patented.

PASHLEY *v.* LINOTYPE CO., LD., (1903) 20 [R. P. C. 633—Walton, J.

424. *Jockey — Temporary Incapacity from Accident—"Failure to procure Licence."*]—The plaintiff agreed to give the defendant the first call upon his services as a jockey during the flat racing seasons of 1900, 1901, and 1902, in consideration of a retaining fee of £2,000 a year. The defendant could terminate the agreement by paying a penalty of £1,000 and the retaining fee for the current year, and the agreement was to come to an end if the plaintiff should "fail to procure a licence."

The season for 1901 began on March 17th, at which date the plaintiff was incapacitated by an accident: he had previously applied for his licence, and had been told by the stewards to apply again when he was able to ride. He applied again on April 14th, received his licence before he was fit to ride, and in fact rode a race on May 14th.

HELD—that the letters written by the defendant did not amount to a termination of the contract, and that the £1,000 was not payable ; but that the plaintiff had not "failed to procure a licence," and that he was entitled to the £2,000 retaining fee for 1902.

LOATES *v.* MAPLE, (1903) 88 L. T. 288 — [Wright, J.

425. *Implied Contract from Confidential Relationship—Right of Servant to take out Patents in his own Name.*]—The mere existence of a contract of service does not *per se* disqualify a servant from taking out a patent for an invention made by him during his term of service, even though the subject-matter of his invention is germane to his employers' business, and even though he has made use of his employers' time and servants and materials in perfecting his invention, and has allowed his employers to use the invention, while he remained in their employment. But some forms of confidential employment are inconsistent with such a right on the part of the employé.

The plaintiff had for a number of years been the manager of the English branch of an engineering company, dealing in a special pattern of pumps. He was paid a very high salary, and the relationship between him and his employers in America was of the most confidential character. Upon the facts the judge held that the degree of good faith due from him to his employers was inconsistent with any right to keep back ideas for improvements, &c., with a view to his personal profit at the expense of his employers ; and that he must be declared to be a trustee for his employers of the patents taken out by him during his service.

WORTHINGTON PUMPING ENGINE CO. *v.* [MOORE, (1903) 19 T. L. R. 84 ; 20 R. P. C. 1 —Byrne, J.

426. *Accident—Compensation—Scheme of Compensation—Contract—Workmen's Compensation Act,* 1897 (60 & 61 Vict. *c.* 37), *s.* 3.]—A scheme of compensation was certified in November, 1898, by the Registrar of Friendly Societies under sect. 3 of the Workmen's Compensation Act, 1897, as applicable to the defendants' workmen, and the plaintiff, who was a workman in the defendants' employment, agreed to come in under the scheme. The scheme expired at the end of 1903, and in December, 1903, a renewal scheme was certified by the Registrar, and the defendants posted up a notice that workmen might enrol under the scheme. The course adopted at the defendants' works was that a month's notice should be given if a workman wished to withdraw from the scheme. The workman had not given notice of withdrawal, but he did not enrol under the renewal scheme. The defendants deducted a certain sum from his wages as his contribution under the renewal scheme.

HELD—that there was no contract by the workman to accept the renewal scheme, and that the defendants were not entitled to make the deduction.

Decision of Div. Ct. (21 T. L. R. 195) affirmed.

WILSON *v.* THE OCEAN COAL CO., LD., (1905) [21 T. L. R. 621—C. A.

427. *Contract to find Work for Servant—Implied Term—Custom.*]—The plaintiff was regularly employed at the defendants' tin-plate works as a roller man, being paid by piecework. The terms of the plaintiff's employment were embodied in certain rules, one of which provided that "no person regularly employed shall quit or be discharged from these works without giving or receiving twenty-eight days' notice in writing,

Contracts between Master and Servant not Relating to Personal Injuries—*Continued.*

such notice to be given on the first Monday of any calendar month before twelve o'clock at noon"; and other rules provided for fines for a workman refusing to work, and that every workman would, when required by the manager, perform such duties as might be deemed necessary in case of emergency other than the special work he might be engaged in. On July 20th, 1903, and subsequently, the defendants were unable to get orders at remunerative prices, and accordingly they closed their works on that date, and the works remained closed for some months. After July 20th the defendants ceased to provide any work for the plaintiff and their other workmen, and on Monday, August 3rd, they gave twenty-eight days' notice that the contracts of employment would cease. The plaintiff claimed damages for breach of contract to find him employment up to August 31st.

Held—that there was an implied term in the contract of employment to find the plaintiff a reasonable amount of work until the termination of the contract by twenty-eight days' notice; that upon the facts the defendants had not proved the existence of a custom to close the works without notice for want of remunerative orders.

Decision of Jelf, J. (93 L. T. 274; 21 T. L. R. 595) affirmed.

Devonald *v.* Rosser & Sons, [1906] 2 K. B. [728; 75 L. J. K. B. 688; 95 L. T. 232; 22 T. L. R. 682—C. A.

428. *Agreement not to Divulge Trusts or Secrets of Master's Business—List of Customers and Terms of Business—Damages.*]—The first defendant entered the service of the plaintiffs as a traveller under an agreement by which he agreed that he would not at any time thereafter "divulge or make known any of the trusts, secrets, accounts, or dealings of or relating to" the plaintiffs' business. Upon leaving the plaintiffs' service, he entered the service of the second defendants, who knew the terms of the above agreement, and he kept a list of the plaintiffs' customers in the district in which he travelled and divulged to a considerable extent to the second defendants the terms upon which the plaintiffs did business.

Held—that the plaintiffs were entitled to an injunction against both defendants, an order for delivery up of papers and books, and damages.

Summers & Co., Ld. *v.* Boyce and Kinmond [& Co., Ld., (1907) 97 L. T. 505; 23 T. L. R. 724—Eady, J.

See also Nos. 429, 435, 437.

IV. DISMISSAL.

And see title Bankruptcy, No. 245.

429. *Domestic Servant — Contract — Custom—Notice during first fortnight to determine at end of first month—Proof—Reasonableness—Consistent with custom judicially noticed.*]—A custom enabling either a mistress or a domestic servant to determine the contract of service at the end of the first month by notice given to the other during the first fortnight of that month, is not a custom judicially noticed, and therefore must be proved. Its existence being a question of fact to be proved by evidence, there is no appeal from a county court judge's decision upon it.

Per the Court: Such a custom is not unreasonable nor is it bad as being inconsistent with the custom judicially noticed by which a month's notice or wages in lieu of notice is required in such engagements.

Per Channell, J.: A custom judicially noticed is not a rule of law, but a judicial recognition of a fact—the fact being that the practice so recognised as customary, once generally prevailed. It can therefore be displaced by proving as a matter of fact that a new practice now generally prevails.

Moult *v.* Halliday, [1898] 1 Q. B. 125; 62 [J. P. 8; 67 L. J. Q. B. 451; 77 L. T. 794; 14 T. L. R. 109; 46 W. R. 318—Div. Ct.

430. *Misconduct—Single Act of Forgetfulness — Considerable Damage caused thereby.*]—The question whether a single act of forgetfulness on the part of a servant will justify his dismissal without notice depends upon the character of the act.

A workman having the charge of a valuable machine, worth £800, through forgetfulness caused damage to the machine to the extent of £30.

Held—that his employer was justified in dismissing him without notice. Such a question is one of fact and degree.

Baster *v.* London and County Printing [Works, [1899] 1 Q. B. 901; 68 L. J. Q. B. 622; 63 J. P. 439; 47 W. R. 639; 80 L. T. 757; 15 T. L. R. 331—Div. Ct.

431. *Notice — Reasonableness — Journalist.*]—A summons was taken out in a voluntary liquidation to determine whether a claim by Mrs. A., the Scotch representative of the *Gentlewoman*, for 26 weeks' salary was well founded. By the final arrangement with Mrs. A. the company was to pay her 21*s.* per column for all matter they inserted, and two guineas for all services and all petty cash, stationary and postage stamps being supplied. When from home by the editor's instructions, actual railway fares to be paid, and a daily allowance of 10*s.* to cover all expenses, with a *minimum* payment of three guineas a week. A settlement was come to monthly.

Held—that a month's notice was a reasonable notice, as the payment was reckoned by the week, and made monthly. There was no ground for saying that there was a contract for a yearly service. At the very outside a month's notice was sufficient.

In re Illustrated Newspaper Corporation, [(1900) 16 T. L. R. 157—Cozens-Hardy, J.

432. *"Retiring with Consent" — Clerk required to Retire — Right to Pension.*] — A bank pension scheme entitled clerks "retiring

Dismissal—*Continued.*

with the consent of the directors" to a retiring allowance, but provided that no allowance should be granted to any one "dismissed." The plaintiff, a clerk, was "required to resign," because he had endorsed a promissory note, an act of which the directors disapproved on the ground of general policy.

HELD—that he had not "retired with the consent of the directors," but had been "dismissed," and could not claim a pension.

Decision of Wright, J. ((1903) 19 T. L. R. 138) affirmed.

STEPHENSON *v.* LONDON JOINT STOCK BANK, [LD., (1904) 20 T. L. R. 9; 52 W. R. 183—C. A.

433. *Power to Dismiss on Two Months' Notice, or Payment of Two Months' Salary—Dismissal Without Notice and Without Reason—Claim for General Damages.*]—Where a servant is engaged upon the terms that his master may terminate the engagement at any time by two months' notice, or two months' salary in lieu of notice, and the servant is wrongfully dismissed without notice and without salary, he can only claim as damages two months' salary, and is not entitled to general damages in addition.

Maw v. *Jones* ((1890) 25 Q. B. D. 107) distinguished.

BAKER *v.* DENKERA ASHANTI MINING COR-[PORATION, LD., (1904) 20 T. L. R. 37—Grantham, J.

434. *Wrongful Dismissal—Charge of Drunkenness and Disorderly Conduct—Justification—Question for Jury.*]—The plaintiff, who was employed by the defendants as the manager of their business as dealers in grain and farm produce, was dismissed from their employment upon the ground that he had on a certain occasion been arrested and fined for drunkenness and the use of bad language in public. In an action for wrongful dismissal:—

HELD—that the question whether the dismissal was justifiable was for the jury, unless in the opinion of the judge there was no evidence of justification.

Duty of the judge in directing the jury in such a case considered.

The jury having found a verdict for the plaintiff, a new trial was ordered, upon the ground that the verdict was so unsatisfactory that it ought not to stand.

CLOUSTON & CO., LD. *v.* CORRY, [1906] A. C. [122; 75 L. J. P. C. 20; 54 W. R. 382; 93 L. T. 706; 22 T. L. R. 107—P. C.

435. *Terms of Employment—Shipping Agent—Engagement for "one year certain"—Engagement tacitly continued—Notice to determine.*]—The defendant company on December 29th, 1891, appointed the plaintiff as their shipping agent at B., at a salary of £450 "for one year certain." In the following December the appointment was renewed "for another year." It was never again formally renewed, but plaintiff continued to act as such agent until 1900. He always received his salary in one sum for each year ending October 31st.

HELD—that after a year had once begun the company could not terminate the employment by three months' notice.

STEVENSON *v.* NORTH BRITISH RY. CO., (1906) [7 F. 1106—Ct. of Sess.

436. *Secret Commission received by Servant—Not devoting whole time to Business.*]—The plaintiff under an agreement entered the defendants' service as manager, undertaking to give all his time and attention to their business. Part of his duty was to advise them as to insurances on their premises. Without their knowledge he accepted an agency from an insurance company, and received commissions in respect of insurances on the defendants' premises.

HELD—that these facts entitled the defendants to dismiss him without notice.

SWALE *v.* IPSWICH TANNERY, LD., (1906) 11 [Com. Cas. 88—Kennedy, J.

437. *Agreement for Five Years—Illness of Servant—Right of Employer to terminate Agreement—Substantial Period of Agreement unexpired.*]—By an agreement, made in August, 1903, the defendants agreed to employ the plaintiff for a period of five years as their works manager. The agreement contained no provision enabling the defendants to terminate the agreement before the end of the five years. Towards the end of 1905 the plaintiff became ill and was absent from work from time to time. In January, 1906, his illness became more serious, and shortly afterwards he was medically examined and was told that he must have complete rest for a considerable time and undergo special treatment. It did not appear from the certificate of the doctor given at the time that the plaintiff would never be able to resume his work. As, by reason of his ill-health, the plaintiff continued to be absent from work, the defendants gave him notice in April, 1906, terminating the agreement, and they appointed one of their staff to act as works manager. By the middle of May, 1906, the plaintiff recovered and was fit for work. In an action by him for damages for breach of contract:—

HELD—that he was entitled to recover, inasmuch as the circumstances were not such as to justify the defendants in thinking that the plaintiff would never be able to perform a substantial part of the unexpired period of the agreement.

Decision of Channell, J. ((1907) 23 T. L. R. 306) affirmed.

STOREY *v.* FULHAM STEEL WORKS CO., (1907) [24 T. L. R. 89—C. A.

See also Nos. 120, 423, 441, 443.

V. WAGES: TRUCK ACTS.

438. *Employers and Workmen—Contract—Deductions—Penalty—Summary Jurisdiction—Employers and Workmen Act*, 1875 (38 & 39

Wages: Truck Acts—*Continued.*

Vict. *c.* 90), *s.* 4—*Truck Act*, 1896 (59 & 60 Vict. *c.* 44), *s.* 1.]—By a contract of service in writing the appellant company were to be entitled to deduct 2*s.* 6*d.* from the wages of the workman for each day he was absent without leave. The respondent having so absented himself for two days:—

HELD—that, whether the contract was good or bad under the Truck Act, 1896, the justices should have proceeded to hear and determine on its merits a summons taken out by the appellants under the Employers and Workmen Act, 1875, to recover from the respondent 5*s.* as "a fine or penalty, or alternatively, by way of damages for such abstention," and that the justices were in error in holding that the appellants had lost their right to sue under the Act of 1875 by reason that the Truck Act of 1896 ousted the jurisdiction of the justices to determine disputes under the Act of 1875 in all cases where the contract in question fell within its provisions.

BUXTON LIME FIRMS CO. *v.* HOWE, [1900] 2 [Q. B. 232; 69 L. J. Q. B. 498; 64 J. P. 503: 48 W. R. 472; 82 L. T. 422; 16 T. L. R. 315—Div. Ct.

439. *Factory Hands—Contract—Deduction of Fines—"Good Order and Decorum"—Specified Acts or Omissions in respect of Fines—Truck Act*, 1896 (59 & 60 Vict. *c.* 44), *s.* 1.]—The respondents, who were corset manufacturers, and were the occupiers of a factory within the meaning of the Factory Acts, 1878 to 1895, entered into a contract with a girl, H. R., and employed her as a machinist in their factory upon the terms (*inter alia*) that "All workers shall observe good order and decorum while in the factory, and shall not do anything which may interfere with the proper and orderly conduct of the business. A fine of sixpence (or less at the discretion of the manager) shall be paid by each worker who shall be guilty of any infringement of this rule." During the dinner hour in the work-room of the factory some of the girls employed were dancing to the tune H. R. was playing on a harp, causing dust injurious to the machines and materials in the room. The rules were in force in the factory during the dinner hour, and the disorder was reported by the clerk then in charge. The girls were fined twopence each.

HELD—that the expression "good order and decorum" must be interpreted with reference to the requirements of the particular business, and that it was a sufficiently specific and a sufficient compliance with the requirements of the Truck Act, 1896, to say that a fine may be inflicted if the employee does not observe "good order and decorum" while in the factory: and that considering the fact that the employees were allowed to have their meals in the work-room, where there was valuable machinery and materials, it could not be said that there was no evidence of a breach of good order and decorum to justify the infliction of a fine.

SQUIRE *v.* BAYER & CO., [1901] 2 K. B. 299; [70 L. J. K. B. 705; 65 J. P. 629; 49 W. R. 557; 85 L. T. 247; 17 T. L. R. 492—Div. Ct.

440. *Payment otherwise than in Current Coin of the Realm—Agreement by Workman to accept Payment of Portion of his Wages in Scrip of the Company by whom he was employed—Agreement signed by those in Common Employment with the Plaintiff—Truck Amendment Act*, 1887 (50 & 51 Vict. *c.* 46.).]—On a case stated upon the hearing of a civil bill appeal it appeared that the plaintiff was employed by the defendants as a journeyman machinist at 22*s.* per week. The case stated erroneously that in October, 1894, the plaintiff signed an agreement, along with his fellow-workmen, to accept "a reduction of 10 per cent. on his wages—20*s.* a week in cash, and 2*s.* to be applied to purchase shares of the defendant company." The plaintiff was paid 20*s.* down to the 24th April, 1897, when he served notice on the defendants that he would not accept the reduced wages, and from that date until February, 1899, he was paid 22*s.* a week in cash. In February, 1899, he left the defendants' employment, and brought an action for £12, the difference between the 20*s.* and 22*s.* a week from the date of the agreement in October, 1894, to April 24th, 1897.

HELD (by Q. B. Div.), who acted on the statement in the case, without seeing the agreement, which was supposed to be lost)—that the contract entered into by the plaintiff was for a wage of 20*s.* and an addition of the purchase-money of scrip of the company at the rate of 2*s.* a week, and that the case was not within the Truck Acts.

HELD, also (by Q. B. Div.), that, even if the agreement were within the Truck Acts, the plaintiff by its tripartite character, and the acquiescence of his fellow-workmen (some of whom were outside the Acts), and himself, was precluded from recovering.

In the C. A. the original agreement was produced, from which it appeared that the contract was made on the basis that the plaintiff's wages continued at 22*s.*, of which 2*s.* per week was to be satisfied by shares.

HELD (by C. A.)—that the agreement was void under the Truck Acts, and the defendants were liable to pay so much of the plaintiff's wages as had not been paid in current coin of the realm; also that there was nothing either in the concurrence of the other workmen, or in the plaintiff's own conduct, to prevent him from recovering.

GLASGOW *v.* INDEPENDENT PRINTING CO., [1901] 2 Ir. R. 278—C. A.

441. *Minimum Weekly Wage—Deductions—No Claim at end of each Week—Waiver.*]—The appellant entered into an agreement with the respondents to serve as their workman, the wages to be at the rate of 24*s.* a week, and so in proportion for any less period than a week. The wages during the employment to be at the rate 24*s.* a week at the least. During the term of employment the appellant was not paid any wages during the various periods he might be employed. The wages were settled up at the end of each week, and deductions made for all the periods when the appellant was unemployed.

Wages: Truck Acts—*Continued.*

The appellant was dismissed by the respondents, and he then brought an action against the respondents to recover the amount of the deductions from his wages, or £10 damages.

HELD—that the workman had waived his claim to be paid 24*s.* weekly by accepting his wages each week subject to the deductions without objection; and that there was no ascertained liquidated sum due in respect of which he took the smaller sum and all that he could do was to bring a claim for damages for not employing.

STODDART *v.* MITCHELL, (1902) 66 J. P. 103; [85 L. T. 686—Div. Ct.

442. *Payment otherwise than in Current Coin of the Realm—Oral Arrangement to be supplied with Cider — Evidence — Truck Act*, 1831 (1 & 2 Will. 4, *c.* 37), *ss.* 1, 25.]—A workman was engaged under an agreement in writing at a fixed rate of wages per week. There was also an oral arrangement entered into at the same time, under which, as the justices found, the workman was to be supplied with a certain quantity of cider each day in part payment of wages. On an information for an offence under the Truck Act, 1831:—

HELD—that the justices were entitled to receive evidence of the oral arrangement, and to find that an offence had been committed; but that a real gift, however, made by an employer out of kindness to his servants was not to be treated as a payment of wages.

JONES *v.* WASLEY, (1902) 18 T. L. R. 418— [Div. Ct.

443. *Suspension from Duty—Dismissal—Right of Employers under their Rule to withhold Wages during Suspension.*]—By a rule of a railway company, the company reserved the right to punish any servant by immediate dismissal, fine, or suspension from duty, for certain offences, and they also reserved the right to deduct from the pay of their servants, and retain the sums which might be imposed as fines, and to withhold their wages during the time of their suspension or absence from duty from any cause. The company suspended one of their servants for two weeks under the rule, and at the expiration of the two weeks they dismissed him.

HELD—that no question arose as to whether the rule was reasonable or unreasonable; that the servant was in the company's service during suspension; and that when he was dismissed there was no rule empowering them to withhold his wages during the period of suspension.

WARBURTON *v.* TAFF VALE RY. CO., (1902) 18 [T. L. R. 420—Div. Ct.

444. *Temporary Illness no Bar to Action for Wages.*]—The plaintiff entered the defendant's service for a period of five years, at a yearly salary, the plaintiff undertaking to devote the whole of his time to the defendant's business. During the period the plaintiff became temporarily ill, and was in consequence prevented from performing his work: otherwise he was ready and willing to perform his work.

HELD—that the plaintiff was entitled to salary during the time of his illness.

Cuckson v. *Stones* ((1858) 1 E. & E. 248; 28 L. J. Q. B. 25; 5 Jur. (N.S.) 337; 7 W. R. 134) followed.

WARREN *v.* WHITTINGHAM, (1902) 18 T. L. R. [508—Bruce, J.

445. *Payment otherwise than in Current Coin —Deduction of Sum for Insurance of Master against Liability for Injury to Workmen—Truck Act*, 1831 (1 & 2 Will. 4, *c.* 37), *s.* 3.]—A master, when paying his workmen their wages, handed to each a slip of paper on which was written a sum of money equal to 2*d.* in the pound on the amount of the wages. The workmen thereupon handed this sum to the master. This sum was to provide for insurance premiums paid by the master to cover his own liability under the Workmen's Compensation Act, 1897. The amount so paid by the workmen exceeded the premiums paid by the master, who thus made a small profit.

HELD—that whether or no the master had infringed sect. 3 of the Truck Act, 1896, he had clearly not made a payment of wages otherwise than in current coin of the realm, contrary to sect. 3 of the Truck Act, 1831.

OWNER *v.* HOOPER, (1903) 67 J. P. 406; 89 L. T. [130; 19 T. L. R. 601; 20 Cox, C. C. 518— Div. Ct.

446. *Deduction—Miner not in Pit at Stipulated Time—Delay through Cage being full—Reasonable Facilities for Miners to descend.*]—The rule of a colliery required men to be in the pit, or in the cage, by 7 a.m., and the cage was kept running from 6 a.m. to 7 a.m. to take them down. The plaintiff arrived about 6.40 a.m., got his lamp and took his place without loitering at the end of the queue of men; but owing to the number of men waiting he was late, and a deduction was made from his wages. He brought an action to recover the sum lost, but the county court judge decided against him on the ground that the employers had provided sufficient facilities for the man to descend in time.

HELD, on appeal, that the judge was right, as the defendant's unpunctuality was not occasioned by anything for which his employers were responsible.

WILLIAMS *v.* PENRIKYBER NAVIGATION [COLLIERY CO., (1903) 19 T. L. R. 490— Div. Ct.

447. *Deductions*—"*Workman*"—*Employers and Workmen Act*, 1875 (38 & 39 Vict. *c.* 90), *s.* 10—*Truck Acts*, 1887 (50 & 51 Vict. *c.* 46), *s.* 2; *and* 1896 (59 & 60 Vict. *c.* 44, *s.* 2.]—The respondents were the occupiers of a lace factory. After the lace was removed from the machines it had to go through the process of having the superfluous threads and materials removed, called "clipping." This was done by women clippers, who undertook to get laces clipped, and who applied to the manufacturers for, and took home, lace to be clipped. They were not employed exclusively by any one firm, but might

Wages: Truck Acts—*Continued.*

take lace from different firms; they might refuse to take any work, and having taken it they might employ other persons to assist them, or do it themselves, or give it to others to execute, the firms having no control over them, and not being obliged to give them any work. The clippers were responsible in case of non-return of the lace, and were paid weekly, and if any damage was done to the lace a reasonable deduction was made in respect thereof. There was no notice or contract in writing signed by the clippers with respect to the deductions within sect. 2, sub-sect. 1, of the Truck Act, 1896.

HELD—that the clippers did not come within the term "workmen" as defined by sect. 10 of the Employers and Workmen Act, 1875, and were therefore not within the Truck Act, 1896.

Ingram v. *Barnes* ((1857) 7 C. & B. 115, 132) followed.

SQUIRE *v.* THE MIDLAND LACE CO., LD., [1905] [2 K. B. 448; 74 L. J. K. B. 611; 69 J. P. 257; 53 W. R. 653; 93 L. T. 29; 21 T. L. R. 466—Div. Ct.

448. *Judgment Debt—Set-off—Truck Act*, 1831 (1 & 2 Will. 4, *c.* 37), *s.* 3.]—The Truck Act, 1831, makes it illegal for an employer to deduct from a workman's wages a sum of money which the workman has been ordered by a petty sessional court to pay to the employer in respect of a breach of contract to work.

Decision of C. A. ([1904] 2 K. B. 44; 73 L. J. K. B. 575; 68 J. P. 371; 52 W. R. 564; 91 L. T. 3; 20 T. L. R. 448) reversed.

WILLIAMS *v.* NORTH'S NAVIGATION COLLIERIES, LD., [1906] A. C. 136; 75 L. J. K. B. 334; 70 J. P. 217; 54 W. R. 485; 94 L. T. 447; 22 T. L. R. 372—H. L. (E.).

449. *Weekly Wage for Specified Hours—Bonus for Full-time Work—Failure to put in Full Time—Deduction of Bonus.*]—A workwoman was employed at 8*s.* per week of 55½ hours, with a bonus of 2*s.* per week for full attendance. Printed rules posted in the factory, admittedly read by the workwoman, provided, *inter alia*, that "any person absent without reason, and not assigning satisfactory reason, shall lose bonus." The woman being absent for a quarter of a day without sufficient reason, 2*s.* 4*d.* was deducted from the weekly sum of 10*s.* which would otherwise have been payable to her, viz., 1*d.* in respect of a quarter of a day's wages, and 2*s.* bonus.

HELD—that the deduction of the 2*s.* bonus was not an offence under the Truck Acts.

DEANE *v.* WILSON, [1906] 2 Ir. R. 401—K. B. D.

450. *Wages becoming due daily—Payable each Fortnight—Forfeiture—Breach of Contract.*]—The plaintiff was a putter in the service of a colliery company, his duty being to draw coal in tubs underground. His wages depended on the number of tubs drawn, and were payable fortnightly on the Friday following the end of each fortnight, a statement of the wages due, called a pay note, being handed to each workman on the preceding day. The total amount of work done each day was ascertained daily. On Thursday, July 12th, 1906, pay notes were handed to the putters showing the wages due for the fortnight ending on July 7th. A dispute arose as to the amount due to one of the putters, and in consequence on Friday, the 13th, the putters declined to work, thus laying the pit idle. The putters were then informed that they had broken their contracts and forfeited all wages since the conclusion of the previous fortnight, *i.e.*, for July 9th, 10th, 11th, and 12th. On the following Monday the putters presented themselves for work, but were refused unless they signed on afresh. By arrangement, however, they resumed work on the next day. The plaintiff claimed for four days' wages, from July 9th to 12th inclusive, and damages for breach of contract in not allowing him to work on the Monday, contending upon the latter point that laying the pit idle for a day or two was, to the knowledge of the defendants, common practice, and did not amount to a repudiation of the contract for service.

HELD—that the plaintiff was not entitled to recover for breach of contract, the refusal of the men to work justifying their dismissal; but that as each day's wages became due daily, though not payable until the end of the fortnight, he was entitled to recover the four days' wages.

Decision of Div. Ct. ((1907) 97 L. T. 98; 23 T. L. R. 408) affirmed.

PARKIN *v.* SOUTH HETTON COAL CO., (1907) [24 T. L. R. 193—C. A.

451. *Railway Servant—Sick Pay—Right to Wages during Time of Illness.*]—The plaintiff who was in the service of a railway company signed an undertaking to obey the rules of the company. By one of the rules he was required to (and did) join the railway company's friendly society, which was independent of the company, but to the funds of which the company contributed. Under the rules of the friendly society a member was entitled to sick pay during sickness, but he was not entitled to sick pay whilst receiving wages from the company. In August, 1904, the plaintiff became ill, and received sick pay for a fortnight, during which time he did not ask for or receive wages. In February, 1905, he became ill again, and received sick pay until the following September, when the company gave him notice to terminate his employment. He claimed wages from February, 1905, until his discharge.

HELD—that he was not entitled to wages during that period.

NIBLETT *v.* THE MIDLAND RY. CO., (1907) 96 [L. T. 462; 23 T. L. R. 240—Div. Ct.

See also No. 426.

VI. SEDUCTION OF SERVANT.

452. *Father's Loss of Service of Daughter—Evidence—Visits to Father's House—Assisting in Household Work.*]—The plaintiff's daughter was

Seduction of Servant—*Continued.*

engaged by the defendant, who was a publican, to assist in the public-house, and to live there with board and lodging at 8*s.* a week. On one day of the week, though not as part of the contract of service, the girl was accustomed to go to her home and see her father and mother, and while there she was in the habit of doing some of the household work, and she assisted her mother by taking care of the other children. She was seduced by the defendant while she was in his service.

HELD—that the girl was in the actual service of the defendant, and whilst she was in that service the father had no legal right or interest in the services of his daughter, and that there was no evidence of loss of service to support an action for seduction.

WHITBOURNE *v.* WILLIAMS, [1901] 2 K. B. [722; 70 L. J. K. B. 933; 85 L. T. 271; 17 T. L. R. 707—C. A.

453.—*Seduction while living with Parents—Child born after Death of Girl's Father—Action by Mother.*]—A widow brought an action for the seduction of her daughter. The daughter was seduced in the lifetime of her father, and while she was living with her parents. The father died, and after his death the daughter, who had continued to reside with the plaintiff, rendering her the ordinary household services, was delivered of a child, the result of the seduction.

HELD—that the action was not maintainable.

HAMILTON *v.* LONG, [1905] 2 Ir. R. 552—C. A.

454. *Evidence of Service—Sister living with Brother.*]—After the death of a farmer, his widow and three children resided on the farm without proving his will, the farm being managed by the widow until her death eight years later. Thenceforward her daughter, who was at that time the only adult member of the family, became manager, paid the rent, and got receipts in the names of her father's representatives. She also did the housework, and had charge of the domestic arrangements. Seven years later the elder of her two brothers attained twenty-one, and from that time he worked on the farm, and was rated as the occupier. His sister continued her domestic work. In an action by the brother for the seduction of his sister:—

HELD—that there was evidence to support a verdict in his favour.

MURRAY *v.* FITZGERALD, [1906] 2 Ir. R. 254—[C. A.

455. *Measure of Damages—Master suing in respect of Seduction of Servant—Loss of Service.*] Where a master sues for damages in respect of the seduction of a servant, to whom he is neither related nor *in loco parentis*, he can only recover out-of-pocket expenses for the loss of her services.

MCKENZIE *v.* HARDINGE, (1906) 23 T. L. R. 15 [—Sutton, J.

MAYOR.

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MEDICINE AND PHARMACY.

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I. MEDICAL PRACTITIONERS.

See title PUBLIC AUTHORITIES, No. 13.

1. *Breach of Confidence — Disclosures — Whether Actionable.*]—Information obtained by a medical man by examining or questioning a patient is confidential, and ought not to be disclosed to others: but it must depend upon all the circumstances of the case whether any disclosure made to others is an actionable wrong.

A. B. *v.* C. D., (1905) 7 F. 72—Ct. of Sess.

2. *Covenant in restraint of Trade—Sale of Medical Practice — Covenant not to "set up" in Practice—Not to "Practise"—Breach.*]—A doctor who sells his practice, and covenants not to "set up in practice" within the district, does not break it by attending two or three of his former patients at their express request—at any rate, where he does not lay himself out to procure such request to be made.

Such a covenant may be broken without having any residence or place of business within the district.

A covenant not "to practise" is wider, and would probably be broken by the mere attendance on a patient at his request.

ROBERTSON *v.* BUCHANAN, (1904) 73 L. J. Ch. [408; 90 L. T. 390—C. A.

3. "*Physician*"—"*Wilfully and falsely*" *pretending to be*—*Medical Act*, 1858 (21 & 22 Vict. *c.* 90), *s.* 40—*Medical Act*, 1886 (49 & 50 Vict. *c.* 48), *s.* 6.]—A licentiate of the Society of Apothecaries of London registered since the coming into operation of the Medical Act, 1886, and therefore, by sect. 6 of that Act, entitled to practise medicine, surgery, and midwifery, is not entitled to describe himself as a physician.

If the licentiate incorrectly describes himself as a physician, but does not do so "wilfully and

Medical Practitioners —*Continued.*

falsely," he cannot be convicted under sect. 40 of the Medical Act, 1858.

HUNTER *v.* CLARE, [1899] 1 Q. B. 635; 68 L. J. [Q. B. 278; 63 J. P. 308; 17 W. R. 394; 80 L. T. 197; 15 T. L. R. 161 - Div. Ct.

II. DENTISTS.

(a) Unregistered Persons.

4. *Supply of False Teeth—Right to Recover—Dentists Act*, 1878 (41 & 42 Vict. *c.* 33), *s.* 5.]—A person who was not registered under the Dentists Act, 1878, as a legally qualified medical practitioner, made and supplied a set of false teeth.

HELD—that there was nothing in the Act to prevent him recovering the price of the teeth (as distinct from charges for fitting them and for fillings).

HENNAN & CO., LD. *v.* DUCKWORTH, (1904) [90 L. T. 546; 20 T. L. R. 436—Div. Ct.

5. *Right to sue for Fees—Right to sue in respect of materials—Cheque given—Dishonour—Dentists Act*, 1878 (41 & 42 Vict. *c.* 33), *ss.* 3, 5.]—Although under sect. 5 of the Dentists Act, 1878, an unregistered person cannot recover a fee for the performance of a dental operation, he can sue for the price of material, *e.g.*, false teeth and gold fittings, supplied by him.

Hennan & Co. v. *Duckworth* ((1904) 90 L. T. 546; 20 T. L. R. 436—Div. Ct., *supra*) followed.

Quære, whether, if a cheque be given in respect of fees, and then dishonoured, an action can be maintained on the cheque notwithstanding sect. 5.

SEYMOUR *v.* PICKETT, [1905] 1 K. B. 715; 74 [L. J. K. B. 413; 92 L. T. 579; 21 T. L. R. 302—C. A.

6. *Using Description implying Registration—Unregistered Person buying Practice of a Registered Dentist—Keeping up Latter's Name-plate with Qualifications—Question of Fact—Dentist Act*, 1878 (41 & 42 Vict. *c.* 33), *s.* 3.]—It is a question of fact whether a person has or has not taken and used an addition or description implying that he is registered under the Dentists Act.

The respondent, not being a registered dentist, bought a practice from the executors of a deceased dentist. He put up his own name on a slab without any description or qualification, but retained two plates with his predecessor's name and qualifications on them. The magistrate held that he had not "taken or used an addition, description, &c.," and dismissed the summons.

HELD—that the Court could not interfere, though, *semble*, they might have come to a different conclusion themselves.

BROWN *v.* WHITELOCK, (1903) 19 T. L. R. 524; [67 J. P. 451—Div. Ct.

(b) Dental Companies.

7. *Information by Attorney-General—Injunction.*]—Certain persons formed a company under the Companies Act, with the title of "Mr. Appleton, Surgeon-Dentist, Limited," for the following objects (*inter alia*): to carry on, through competent persons, the business of dentists or dental surgeons in the United Kingdom, and for that purpose to employ suitable persons, and to purchase, hire, or procure suitable instruments, furniture, and fittings; and they carried on and advertised such business. None of the directors or other persons forming the company were qualified dentists. The Attorney-General brought an information alleging that the company was formed for the fraudulent purpose of deceiving the public, by falsely representing that the business was carried on by persons registered under the Dentists Act, 1878, and for the purpose of injuring and defrauding persons duly so registered. The company, the signatories to the memorandum of association, and certain directors named as special defendants, not delivering any defence, and it being admitted that the company was in liquidation.

HELD—that the Attorney-General suing in the public interest to prevent an admitted fraudulent attempt to evade statutory provisions, was entitled to an injunction, and that the costs of the proceedings should be paid by the special defendants.

ATTORNEY-GENERAL *v.* APPLETON, (1907) 1 [Ir. R. 252—M.R.

8. *Name of Proposed Company involving False Representation—Refusal to Register—Companies Act*, 1862 (25 & 26 Vict. *c.* 89), *s.* 6.]—It was proposed to register a company to carry on the business of extracting teeth and making artificial teeth under the name of "S. G. Rowell, Dentist, Ld." Neither S. G. Rowell, nor any of the other six signatories to the memorandum was registered as a dentist.

HELD—that the registrar had rightly refused to register the company, as its name involved a false representation liable to mislead the public.

REX *v.* REGISTRAR OF JOINT STOCK COMPANIES [FOR IRELAND, (1904) 2 Ir. R. 634—K. B. D.

9. *Taking or Using the Name—Company—Dentists Act*, 1878 (41 & 42 Vict. *c.* 33), *s.* 3.]—The word "person" in the Dentists Act, 1878, relates only to an individual, and does not embrace a corporation or company.

A company by assuming a name which includes the words "surgeon-dentists" does not become liable to a prosecution under the Act for using a name, title, addition, or description implying that it is registered under the Act.

O'DUFFY *v.* JAFFE, [1901] 2 Ir. R. 27—K. B. D.

10. *Use of Word "Dentist"—Registration under Companies Acts—Injunction—Dentists Act*, 1878 (41 & 42 Vict. *c.* 33), *s.* 3.]—Although it has been held that the word "person" in sect. 3 of the Dentists Act, 1878, does not include artificial persons, yet at the suit of the

Dentists—*Continued.*

Attorney-General a limited company may be restrained from using the word dentist (or its synonyms) in such a way as to amount to a false representation to the public that the individuals forming or employed by the company are qualified dentists.

Attorney-General *v.* Myddletons, Ld., [(1907) 1 Ir. R. 471—Barton, J.

11. *Using Title—One Man Company—The Dentists Act*, 1878 (41 & 42 Vict. *c.* 33), *s.* 3.]—The appellant, not being a registered person under the Dentists Act, 1878, or a legally qualified medical practitioner, was summoned for using an additional title, "German Dental Institute, West Central Dental Institute, Limited,' implying that he was registered under the said Act or was specially qualified to practice dentistry.

Held—that he was rightly convicted.

Panhaus *v.* Brown, (1904) 68 J. P. 435—[Div. Ct.

(c) In General.

12. "*Professional Misconduct*"—*Partnership—Erasing Name from Dentists' Register—Evidence—Dentists Act*, 1878 (41 & 42 Vict. *c.* 33), *s.* 13.]—Articles of partnership between the plaintiff and the defendant, who were dentists, provided that if either partner should at any time during the continuance of the partnership be guilty of professional misconduct, or of any act which was calculated to bring discredit upon or injure the other partner or the business, or should become incapable by reason of lunacy or otherwise to take his part in the profession or business of a dentist, the other partner should be at liberty to give notice in writing of his intention to determine the partnership. The defendant gave the plaintiff notice to determine the partnership upon the ground that he had been guilty of professional misconduct. It was proved that the plaintiff was a shareholder and director of a company which carried on a dental business, and which employed unregistered persons to attend patients, and which advertised by means of pamphlets. The General Medical Council, acting under the Dentists Act, 1878, made an order upon the report of a committee, directing the registrar to erase from the Dentists' Register the name of the plaintiff, upon the ground that it had been proved that he had been guilty of conduct which was "infamous or disgraceful in a professional respect" within sect. 13 of the Act. The defendant tendered in evidence the order of the Medical Council and the report of their committee to show that the plaintiff had been guilty of professional misconduct within the meaning of the partnership articles. Warrington, J. held that the evidence was not admissible, and that upon the facts proved the plaintiff was not guilty of professional misconduct within the meaning of the articles. Upon appeal.

Held—that upon the facts proved at the trial the defendant was entitled to give notice to determine the partnership. By the whole Court:—The removal of the defendant's name from the register rendered him incapable of taking his part in the profession or business of a dentist within the meaning of the partnership deed.

Further, no distinction could be drawn between "professional misconduct" in the articles and "conduct infamous or disgraceful in a professional respect" in the Act of Parliament.

By Cozens-Hardy, M.R., and Buckley, L.J.: The order of the General Medical Council was *primâ facie* evidence that the plaintiff was guilty of statutory misconduct, though evidence to rebut it was admissible.

Decision of Warrington, J. ([1907] 1 Ch. 420; 76 L. J. Ch. 265; 96 L. T. 255; 23 T. L. R. 274) reversed.

Hill *v.* Clifford; Clifford *v.* Timms; Clif-[ford *v.* Phillips, [1907] 2 Ch. 236; 76 L. J. Ch. 627; 97 L. T. 266; 23 T. L. R. 601—C. A.

Affirmed on the ground that the advertisements clearly amounted to professional misconduct. 24 T. L. R. 112—H. L.

III. VETERINARY SURGEON.

13. "*Licensed Medical Practitioner.*"]—A duly qualified veterinary surgeon is a "licensed medical practitioner" within the meaning of those words in the exemption schedule of the Irish Juries Act, 1876.

Rex *v.* Clare County Council, [1904] 2 Ir. R. [569—K. B. D.

IV. SALE OF POISONS.

14. *Agent—Canvasser for Orders—Authority to receive Money—*"*Seller*"*—Pharmacy Act*, 1868 (31 & 32 Vict. *c.* 121), *s.* 15.]—In an action in a county court to recover a penalty under sect. 15 of the Pharmacy Act, 1868, from the defendant, a shopkeeper, for having sold a poison without being a duly registered chemist, the judge found as a fact that the defendant acted as agent only for a chemical company, and was in the position merely of a canvasser for orders with authority to receive money on account of the company; and that the defendant was not the "seller" of the poison within the Act.

Held—that as the county court judge had found as a fact that there was no contract of sale as between the defendant and the purchaser, and as there was evidence to support the finding, the Court could not interfere.

Judgment of Div. Ct. ([1900] 1 Q. B. 454; 69 L. J. Q. B. 289; 61 J. P. 168; 48 W. R. 335; 81 L. T. 821; 16 T. L. R. 139) affirmed.

Pharmaceutical Society *v.* White, [1901] [1 K. B. 601; 70 L. J. K. B. 386; 65 J. P. 340; 49 W. R. 407; 84 L. T. 188; 17 T. L. R. 262—C. A.

15. *Vermin-killer containing* "*Poisonous Vegetable Alkaloid*"*—Sale to Persons unknown to Seller—Resolution of Council of Pharmaceutical*

Sale of Poisons—*Continued.*

Society—Order of Privy Council—Pharmacy Act, 1868 (31 & 32 Vict *c.* 121), *ss.* 2, 17, *Sched.* A.] —A chemist sold to a person unknown to him, and not introduced by any person known to him, a vermin-killer which was labelled "Poison" and contained 1 per cent. of "veratrine," which is a poisonous vegetable alkaloid, and therefore within Part I. of Sched. (A.) of the Pharmacy Act, 1868. Sect. 2 of that Act provides that the Pharmaceutical Society may by resolution declare that any article ought to be deemed a poison within the Act, and that upon the resolution being approved by the Privy Council such article shall, after advertisement, be deemed a poison. Sect. 17 of the Act prohibits the sale of any poison included in the first part of Sched. (A.), or added thereto under sect. 2, to any person unknown to the seller unless introduced by some person known to the seller. A resolution of the Pharmaceutical Society in 1869, duly approved and advertised, declared that, *inter alia*, "every compound containing poison within the meaning of the Pharmacy Act, 1869, when prepared or sold for the destruction of vermin," ought to be deemed a poison within the meaning of the Act; and at the same time declared that certain other articles ought to be deemed poisons in the first part of Sched. (A.) to the Act.

The chemist was charged with unlawfully selling a poison to some person unknown to him, and not introduced to him by some person known to him, contrary to the Pharmacy Act, 1868.

HELD—that the resolution of the Pharmaceutical Society in 1869 placed the article in Part I. and not Part II. of Sched. (A.) of the Act, and that therefore the appellant was not guilty of the offence charged against him.

BROWN *v.* LEGGETT, [1906] 1 K. B. 330; 75 [L. J. K. B. 193; 70 J. P. 109; 54 W. R. 362; 94 L. T. 200; 22 T. L. R. 180; 21 Cox, C. C. 114—Div. Ct.

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MERCANTILE AGENT.

See AGENCY.

MERCHANDISE MARKS.

See TRADE MARKS AND DESIGNS.

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I. BUILDINGS.

(a) In General.

1. *Construction of Statutes—Dock Company authorised by Special Statute—Inconsistency with General Statute—Surrey Commercial Dock Act*, 1894 (57 & 58 Vict. *c.* lxvii.), *s.* 4—*Metropolis Management Act*, 1855 (19 & 20 Vict. *c.* 120), *s.* 76.]—The appellants were a dock company incorporated by Act of Parliament. In 1894 they obtained an Act authorising them to extend and alter their works. In carrying out such alterations and extensions the appellants were obliged to pull down certain premises, including a workshop for fitters, and rebuild them on another site within the ambit of the dock premises.

HELD—that there was no duty on the dock company to give notice of the intended erection of such building under sect. 76 of the Metropolis Management Act, 1855, as the control of the local authority under that Act was inconsistent with the powers conferred upon the appellants under their statutory authority.

Charing Cross and Strand Electricity Supply Corporation v. *Woodthorpe* ((1903) 67 J. P. 286; 88 L. T. 772—Div. Ct., No. 22, *infra*) distinguished.

SURREY COMMERCIAL DOCK CO. *v.* BERMONDSEY [BOROUGH COUNCIL, [1904] 1 K. B. 474; 73 L. J. K. B. 293; 68 J. P. 155; 52 W. R. 446; 90 L. T. 123; 20 T. L. R. 208; 2 L. G. R. 356 Div. Ct.

2. *District Surveyors—Fees—School Board Land — Metropolitan Building Act*, 1855 (18 & 19 Vict. *c.* 122) — *London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 21, 154.]—Under sect. 21 of the London Building Act, 1894, the district surveyor can only claim the fees allowed by the Metropolitan Building Act, 1855, for his services in respect of buildings erected subsequently to the coming into operation of the London Building Act, 1894, upon lands which belonged to the School Board for London at the time of the coming into operation of that Act.

MARSLAND *v.* WALLIS & SONS, (1901) 65 J. P. [166—Div. Ct.

3. *District Surveyor—Fees—Builder's Liability—Owner's Liability—Period of Limitation —London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 154, 157—*Summary Jurisdiction Act*, 1848 (11 & 12 Vict. *c.* 43). *s.* 11.]—Summonses were issued to recover fees due to the respondent as district surveyor under sect. 157 of the London Building Act, 1894. The roofing of the houses, of which the appellant was owner, was completed in December, 1899, and it was agreed by both parties that at the expiration of fourteen days from December, 1899, *i.e.*, not later than January 14th, 1900, the surveyor became entitled to the fees claimed. Between January 17th, 1900, and September 10th, he delivered bills to the builder, specifying the amount of the fees. On July 2nd, 1900, the builder became bankrupt, and on October 20th, 1900, the respondent delivered to the appellant proper bills specifying the amount of the fees, and demanded payment thereof.

HELD—that the six months—the period of limitation fixed for taking proceedings by sect. 11 of the Summary Jurisdiction Act—did not begin to run until a bill had been delivered to the builder; and that the six months did not begin to run as against the owner until he had received a bill under sub-sect. 2 of sect. 157 of the London Building Act, 1894.

CORBETT *v.* BADGER, [1901] 2 K. B. 278; 70 [L. J. K. B. 640; 65 J. P. 552; 49 W. R. 539; 48 L. T. 602; 17 T. L. R. 474—Div. Ct.

4. *District Surveyors—Fees—Wooden Structures — Stands to view Public Procession — Inspection — Transfer of Duties of District Surveyor—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 84, 145—*London Government Act*, 1899 (62 & 63 Vict. *c.* 14), *Sched. II., Part I.*]—The duties of district surveyors as to inspection of wooden structures in the Metropolis under the London Building Act, 1894, have not been transferred by the London Government Act to the borough councils and their officers, and notice under sect. 145 of the London Building Act, 1894, must still be served upon them. The district surveyors are entitled to fees where the case is a proper one for their inspection.

WESTMINSTER CORPORATION *v.* WATSON AND [OTHERS, [1902] 2 K. B. 717; 71 L. J. K. B. 603; 87 L. T. 326; 18 T. L. R. 621; 51 W. R. 300—Div. Ct.

5. *New Building—Consent of London County Council—Crystal Palace Act*, 1881—*Exemption —London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *s.* 22.]—By sect. 21 of the Crystal Palace Act, 1881, it is provided that "the main building, conservatories, and waterworks of the company, and the conveniences and other works immediately connected therewith, shall be exempted from the operation of Part I. of the Metropolitan Building Act. 1855, and of any other Act amending the same, but this exemption shall not extend to any dwelling-house or building except as aforesaid upon any part of the property of the company." The Crystal Palace Company built polo pony stables a quarter of a mile away from the main buildings, without having obtained the approval of the council required by the London Building

Buildings—*Continued.*

Acts, 1894, and the London Building Act, 1894, Amendment Act, 1898.

HELD—that the words in sect. 21, "works immediately connected therewith," meant works connected with the main building—that is to say, the physical structure, not the objects of the company, and that the polo pony stables were accordingly not exempted from the provisions of the London Building Acts.

CRYSTAL PALACE CO. *v.* LONDON COUNTY [COUNCIL, (1900) 16 T. L. R. 184—Div. Ct.

6. *New Buildings — Forecourt or Space — Distance from Centre of Roadway — London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 13, 14, 200 (2).] — The respondents were summoned by the appellants, under sects. 13, 14 and 200 (2) of the London Building Act, 1894, for having neglected to comply with a notice served on them under those sections, requiring them to cause the space between the external wall of a certain new building and the roadway to be at a distance not less than the prescribed distance from the centre of such roadway.

The respondents had erected a new building, whose external wall was not less than the prescribed distance from the centre of the roadway. At the time of the erection of this building, and for probably thirty years prior thereto, there existed a boundary wall of a garden between the building and the street, and this was left standing, and this portion of old wall was inclosed by railings, but of these railings no complaint was made. The wall itself was within the prescribed distance from the centre of the roadway.

HELD—that the appellants had no right to give the notice, there being no offence under the Act.

LONDON COUNTY COUNCIL *v.* AYLESBURY DAIRY [CO., LD., [1898] 1 Q. B. 106; 61 J. P. 759; 67 L. J. Q. B. 24; 77 L. T. 440—Div. Ct.

7. *New Building—Old Site—Occupation of same Amount of Space—Re-erected Building — London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *s.* 13 (1), (5).]—The respondents were erecting two new buildings to be used as factories on a site recently occupied by six small dwelling-houses, and the yards and outbuildings thereof. The height of the said dwelling-houses was 28 feet, and the proposed factories about 52 feet. The factories were to be erected so that their external walls were in the same line as the external walls of the old dwellings, but were 9 feet or 10 feet less than the prescribed distance from the centre of the roadway, but no more land was occupied by the factories than by the old dwelling-houses.

HELD—that the respondents were entitled to erect the factories as coming within the proviso to sect. 13 (5) of the London Building Act, 1894.

LONDON COUNTY COUNCIL *v.* PATMAN AND [FOTHERINGHAM, (1903) 67 J. P. 285; 1 L. G. R. 519—Div. Ct.

8. *Plans—Failure to give Notice of Objection —Allowing Work to Proceed—Notice of Irregularity—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 75, 150, 151, 153 (1).]—A summons was taken out against the respondent by the appellant, a district surveyor, for default in complying with a notice of irregularity given by the appellant under sect. 151 of the London Building Act, 1894, requiring the respondent to divide a building by party walls as provided by sect. 75 of the Act. The magistrate found as a fact that the appellant, after receiving the plans, allowed the work to proceed without serving notice of objection under sect. 150 of the Act, and he dismissed the summons on the ground that the appellant, by omitting to give such notice of objection, had deprived the respondent of the right of appeal conferred by sect. 150, and was, therefore, too late to take the proceedings.

HELD — that the failure to give notice of objection under sect. 150 was no bar to the proceedings, and that the case must go back to the magistrate to be considered on the merits.

COGGIN *v.* DUFF, (1907) 71 J. P. 304; 96 L. T. [670; 5 L. G. R. 615—Div. Ct.

And see under (g) PARTY WALLS, col. 875.

9. *Plans—Re-building on old Site—Plans of old Building—Plans of Building to be Erected—Objections—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *s.* 43.]—The plans which must be certified under sect. 43 of the London Building Act, 1894, as a condition of the right of re-building on the site of domestic buildings existing at the commencement of the Act, are not confined to the basement or ground plan, but must include plans showing the sections, elevations and areas of the several floors of the building.

PAYNTER *v.* WATSON, [1898] 2 Q. B. 31; 62 [J. P. 467; 67 L. J. Q. B. 640; 14 T. L. R. 397; 46 W. R. 655—Div. Ct.

10. *London Building Act—Dangerous Structure—Service of Summons—Owner—Summary Jurisdiction Act*, 1848 (11 & 12 Vict. *c.* 43), *s.* 1—*London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *s.* 188 (1).]—The procedure for the service of a summons under sect. 188 (1) of the London Building Act, 1894, is only available where, after ordinary inquiry the person cannot be found or identified. When by such inquiry the person on whom the summons is to be served can be found or identified, then the summons must be served according to sect. 1 of the Summary Jurisdiction Act, 1848.

REG. *v.* MEAD, [1898] 1 Q. B. 110; 18 Cox, C. C. [670; 61 J. P. 759; 67 L. J. Q. B. 874; 77 L. T. 462; 14 T. L. R. 14; 46 W. R. 61—Div. Ct.

(b) Building Line.

(1) *In General.*

11. *Appeal—General Line of Buildings defined by Superintending Architect — Railway Company's Premises — Right of Tribunal of Appeal to set aside Line as Defined.*] — By

Buildings —*Continued.*

sect. 31 of the London Building Act, 1894: "Nothing in this part" (Part III., sects. 22 to 31) "of this Act shall affect the exercise of any powers conferred upon any railway company by any special Act of Parliament for railway purposes."

The superintending architect defined, under sect. 22 of the Act, a general line of buildings for part of a street in London, the buildings of which were owned by a railway company including a coal order office in course of erection, to be used in connection with coal to be brought over the company's lines; this office was let on a tenancy that might be determined on a week's notice. The company appealed under sect. 25 of the Act to the tribunal of appeal, who allowed the appeal on the ground that the line affected the exercise by the company of powers conferred upon them by their special Acts of Parliament.

HELD—that the appeal from the architect's decision was misconceived; a building line was rightly fixed, but was inoperative so far as any exercise of the company's statutory powers was concerned.

SOUTH EASTERN & CHATHAM RY. CO.'S [MANAGING COMMITTEE *v.* LONDON COUNTY COUNCIL, [1907] 2 K. B. 91; 76 L. J. K. B. 528; 71 J. P. 260; 96 L. T. 676; 5 L. G. R. 626—Div. Ct.

12. *Appeal — Certificate of Superintending Architect Defining General Line of Buildings—Appeal from, to Tribunal of Appeal—London County Council Appearing to Support Certificate —Liability of Council to Pay Successful Appellants' Costs—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *ss.* 181, 183.]—Where "persons deeming themselves aggrieved" appeal to the tribunal of appeal under sect. 25 of the London Building Act, 1894, against the certificate of the superintending architect, defining a general line of buildings in part of a street, and the London County Council appear by counsel on such appeal, and call evidence in support of the certificate of the superintending architect, the tribunal of appeal may, on allowing the appeal and varying the certificate of the superintending architect, order the London County Council to pay the costs of the appellants.

LONDON COUNTY COUNCIL *v.* METROPOLITAN [RY. CO., (1907) 71 J. P. 372; 97 L. T. 136; 5 L. G. R. 814—Div. Ct.

13. *Certificate of Superintending Architect— General Line of Buildings Defined in Part of a Street—Buildings not Attached—New Line Defined Including Said Part—Whether New Line Good.*]—In 1898 the superintending architect of metropolitan buildings defined the general line of buildings in part of a street in London, and no appeal was brought against his decision. In 1906 the tribunal of appeal under the London Building Act, 1894, reversing a certificate of the superintending architect made in 1906, defined another general line of buildings in a portion of the said street, including the part for which a general line was defined in 1898, but extending further on one side of the said part. There was no evidence that buildings had been erected in the said part since 1898, which might alter the general line.

HELD—that the general line of buildings defined in 1898 was still good, and that therefore the general line defined in 1906 must be set aside.

RE LILLEY *v.* LILLEY & SKINNER, LD., (1907) [71 J. P. 437; 97 L. T. 306; 5 L. G. R. 1070 —Div. Ct.

14. *Erection of Structure beyond — "Land lawfully occupied by Building or Structure"— London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *s.* 22.]—Land occupied by buildings or structures originally erected thereon in accordance with sect. 75 of the Metropolis Management (Amendment) Act, 1862, but subject to a condition that the height of such buildings or structures should not exceed one storey, is not lawfully occupied by such buildings or structures within the meaning of sect. 22 (2) of the London Building Act, 1894, so as to justify the substitution without the consent of the London County Council of three-storied buildings or structures on the same sites, in advance of the general line of buildings in the same part of the same street, as fixed under the Act of 1891.

Decision of Div. Ct. (63 J. P. 772; 81 L. T 454) affirmed.

SCOTT *v.* CARRITT, (1900) 82 L. T. 67; 16 T. L. R. [134—C. A.

15. *Principle for Determining—Costs—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *ss.* 22, 26, 27.]—The owner of certain houses fronting Fulham Road, London, applied to the superintending architect of metropolitan buildings under sect. 22 of the London Building Act, 1894, to define the general line of buildings upon a building site partly occupied by the said houses. The superintending architect defined a general line of buildings for a part of Fulham Road, in which the said houses were, but extending further than the said houses on one side of them. The owner appealed to the tribunal of appeal under the Act. The tribunal of appeal issued an order defining another general line of buildings in advance of the line defined by the superintending architect, but stated a case at the request of the London County Council, who contended that the tribunal had no power to make that order, as (1) they had defined a line for a portion of Fulham Road for which the superintending architect had defined no line; as (2) the tribunal's line was not a general line of buildings within the meaning of the London Building Act, 1894, for in forming their line they had considered buildings not in the length of street taken by the superintending architect for his line, and further (as the London County Council alleged) they had considered buildings brought forward by the consent of the London County Council under sect. 26 of the Act, which, by sect. 27, as the council contended, they had no right to do; and (3) as they had awarded a lump sum for costs.

Buildings—*Continued.*

HELD—that the duty of the superintending architect under sect. 22 was (1) to choose a length of street for the definition of a general line of buildings and (2) to define such a line for that length. Under sect. 183 the tribunal of appeal could confirm, reverse, or vary the superintending architect's decision on both matters—the length of street taken and the line for that length. They might take a greater or less length of street than the superintending architect. The tribunal had decided a question of fact, and the Court would not interfere with their decision, as there was evidence to support it. It was not necessary to construe sect. 27, but assuming the appellants' construction to be correct, there was evidence upon which the tribunal could have defined the line they had made apart from the buildings brought forward by consent. The tribunal had power to award a lump sum for costs.

IN RE LONDON BUILDING ACT AND LONDON [COUNTY COUNCIL, (1904) 68 J. P. 490; 91 L. T. 501—Div. Ct.

(2) *Projecting Structures.*

16. *Electric Advertising Sign—Completion of Offence—Limitation of Time for taking proceedings—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *s.* 73, *sub-s.* 8—*Summary Jurisdiction Act*, 1848 (11 & 12 Vict. *c.* 43), *s.* 11.]—The appellant, by an agreement in writing, let to a tenant a position on the outside of his house for the erection of an electric advertising sign. The sign consisted of a wooden case with a glass front, which was attached to the external wall of the house by iron brackets. More than six months after the sign was completely affixed the respondents laid an information against the appellant for an offence under sect. 73, sub-sect. 8 of the London Building Act, 1894, in extending a projection beyond the general line of buildings without the respondents' permission.

HELD—that (1) the sign was not a "projection" from any buildings within the meaning of sect. 73, sub-sect. 8, the section only extending to architectural projections which were part of the structure of the building; (2) as the offence was complete when the sign was completely affixed, the proceedings, not having been taken within the six months, were too late; and (3) the tenancy would have been no answer to the charge.

HULL *v.* LONDON COUNTY COUNCIL, [1901] 1 [Q. B. 580; 70 L. J. Q. B. 364; 65 J. P. 309; 49 W. R. 396; 84 L. T. 160; 17 T. L. R. 270; 19 Cox, C. C. 635—Div. Ct.

17. *Illuminated Advertisements affixed to Buildings—Projection beyond the Building Line—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *ss.* 22, 200 (3).]—The respondents, without the consent of the appellants, had affixed upon the front walls of a building twelve advertisement cases, constructed of sheet iron, supported by wrought iron supports pinned through the front wall of the building. The outer side was covered with a wooden frame carrying canvas lined with advertisements, and provision was made for illuminating the interior of the case with electric light. The cases varied in width and height, but projected ten inches in front of the front wall of the building beyond the building line, but less than the existing cornice over the shop, which was two feet beyond the building line.

HELD—(Wills, J., *dissentiente*), that the cases were not structures within the meaning of sect. 22 of the London Building Act, 1894.

LONDON COUNTY COUNCIL *v.* ILLUMINATED [ADVERTISEMENT CO., [1904] 2 K. B. 886; 73 L. J. K. B. 1034; 68 J. P. 415; 91 L. T. 352; 20 T. L. R. 527; 53 W. R. 220—Div. Ct.

18. *Show-case Erected upon Steps and Landing—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *ss.* 22 (1) *and* 200 (3).]—By sect. 22 (1) of the London Building Act, 1894, "No building or structure shall, without the consent in writing of the council, be erected beyond the general line of buildings in any street. . . ."

The respondents, who carried on business as court milliners, erected without the consent of the appellants on the steps and landing leading to the front door in the front main wall of their premises a show-case which took the place of a shop front and which projected beyond the general line of buildings. The houses in this part of the street had bay windows in front of the general line of buildings, and the show-case was slightly in front of the bays. It stood entirely on the respondents' property.

HELD—that the show-case was not a "building or structure" within the meaning of the section.

London County Council v. *Illuminated Advertisement Co.*, ([1904] 2 K. B. 886; 73 L. J. K. B. 1034; 68 J. P. 445; 91 L. T. 352; 20 T. L. R. 527—Div. Ct.), *supra*, followed.

LONDON COUNTY COUNCIL *v.* HANCOCK AND [JAMES, [1907] 2 K. B. 45; 76 L. J. K. B. 526; 71 J. P. 268; 96 L. T. 618; 23 T. L. R. 417; 5 L. G. R. 572—Div. Ct.

19. *Shelter hung by Stay-rods, and secured by Bolts to Wall, beyond General Line of Buildings—"Structure"—"Projection"—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *ss.* 22, 73 (8), 161.]—A shelter was hung from the front wall of a building in London by two stay-rods, and secured to the wall at the bottom by six bolts. The shelter consisted of an iron framework filled in on the front and sides with leaded glass, and covered over on the top with zinc. There were letters on the glass, made visible at night by lights arranged within the shelter. The shelter extended beyond the general line of buildings in the street, and had been erected without the consent of the London County Council.

HELD—that the shelter was not a "structure" within the meaning of sect. 22, and not a "projection" within the meaning of sect. 73 (8) of the London Building Act, 1894.

Buildings—*Continued.*

London County Council v. *Illuminated Advertisements Co.* ([1904] 2 K. B. 886 ; 73 L. J. K. B. 1034 ; 68 J. P. 445 ; 91 L. T. 352 ; 20 T. L. R. 527—Div. Ct., No. 17, *supra*) followed.

Hull v. *London County Council* ([1901] 1 K. B. 580 ; 70 L. J. K. B. 364 ; 65 J. P. 309 ; 49 W. R. 396 ; 84 L. T. 160—Div. Ct.), No. 16, *supra*, observed upon, but followed.

London County Council *r.* Schewzik, [1905] [2 K. B. 695 ; 74 L. J. K. B. 959 ; 69 J. P. 409; 93 L. T. 550 ; 21 T. L. R. 731 ; 3 L. G. R. 1159; 54 W. R. 168—Div. Ct.

20. *Structure Beyond General Line—Question of Fact—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *s.* 22.]—The Palace Theatre Company, Limited, were summoned for erecting a structure beyond the general line of buildings without the written consent of the London County Council, in contravention of Part III. of the London Building Act, 1894. The construction in question was admitted to be beyond the general line of buildings, but the Palace Theatre Company contended that it was not a "structure" within sect. 22 of the Act, and that, therefore, no written consent was required. It consisted of a framework of wood which acted as a foundation for plaster work intended to imitate stone work. It was over thirteen feet high and seven feet wide, and extended two feet beyond the building line. It was fastened by iron holdfasts to the wall of the theatre, but could have been removed without serious injury to the wall, and it stood on the pavement lights without being fastened to the pavement. The centre was hollow and contained lights for the purpose of illuminating advertisements printed on the centre of the front, which was of transparent material. The magistrate found as a fact that it was a "structure" within sect. 22, and imposed a penalty and made an order of removal, and, on the ground that the question was one of fact, he declined to state a case.

Held—that as the question was one of fact, and as there was evidence on which the magistrate could come to the conclusion he arrived at, the Court would not order him to state a case.

Rex *r.* Denman, (1907) 71 J. P. 279 ; 96 L. T. [672 ; 5 L. G. R. 649—Div. Ct.

(c) "Building or Structure."

21. *Boxes in Street for Electric Lighting—Notice to District Surveyor—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.) *s.* 145.]—The appellants, being a local authority within the meaning of the Electric Lighting Acts, 1882 and 1888, had in pursuance of those Acts obtained a provisional order confirmed by a statute. Under the provisions of that order they constructed boxes in the street in connection with the supply of electric light.

Held—that such boxes were buildings, structures or works within the meaning of the London Building Act, 1894, s. 145, and notice under that section must be served on the district surveyor before the erection of such boxes.

Whitechapel District Board of Works *r.* [Crow, (1901) 65 J. P. 463 ; 84 L. T. 595 ; 17 T. L. R. 463 ; 19 Cox, C. C. 700—Div. Ct.

22. A street box of an electric lighting company, built of brick underneath a pavement, and large enough to hold a man, is a "building, structure, or work" within the meaning of sect. 145 of the London Building Act, 1854.

The fact that the company's provisional order requires them to give notice to the Postmaster-General and to the street authority of their intention to construct the box, does not exclude the operation of the Building Act ; and they must therefore give notice also to the district surveyor.

Whitechapel Board of Works v. *Crow* ((1901) 65 J. P. 549 ; 84 L. T. 595 *supra*) followed.

Charing Cross and Strand Electricity [Supply Corporation *r.* Woodthorpe, (1903) 67 J. P. 286 ; 88 L. T. 772 ; 1 L. G. R. 551 ; 67 J. P. 437 ; 52 W. R. 158—Div. Ct.

23. *Glass and Iron Portico supported only by Porch — Projection over Pavement beyond Building Line — Consent of London County Council—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 22, 200 (3).]—The appellants, with the consent of the respondents, had erected a porch, but without their consent had dovetailed into the porch an iron and glass shelter, projecting some 4 feet over the pavement beyond the general building line.

Held—that such erection was a structure or building within sect. 22 of the London Building Act, 1894, and could not be erected without the consent of the London County Council.

Coburg Hotel *r.* London County Council, [(1899) 63 J. P. 805 ; 81 L. T. 450 ; 16 T. L. R. 9—Div. Ct.

24. *Hoarding for Advertisement—"Free and uninterrupted Use"—Boundary Wall—Hoarding erected thereon—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *s.* 22 ; *London Building Act*, 1894, *Amendment Act*, 1898 (61 & 62 Vict. *c.* cxxxvii.), *s.* 7.]—T., owner of a house and garden in London, by an agreement, which was expressed not to be a lease, allowed P., in return for monthly payments, to display for a term advertisements upon her boundary wall. P. was to have "free and uninterrupted use" of the wall for this purpose. P. accordingly erected a hoarding upon the wall. The London County Council afterwards served on P. a notice alleging that the hoarding projected beyond the general line of buildings ; in consequence of which notice P. removed the hoarding. T. sued to recover the sums stipulated for in the agreement.

Held—that the words quoted amounted only to a personal covenant that T. and persons holding under her would not interfere with P.'s enjoyment, and that T. was therefore entitled to recover.

Quære, whether a hoarding for advertisements erected on the top of a boundary wall is a

Buildings—*Continued.*

"structure" within the meaning of the London Building Act, 1894.

TUNMER *v.* PARTINGTON ADVERTISING CO. [(1904) 68 J. P. 318—Channell, J,

(d) Nature of Buildings.

(1) *In General.*

25. *Building used in Part for Trade and in Part for Dwelling-house — Fire-resisting Materials—Public-house—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *s.* 74, *sub-s.* 2.]—A building intended to be used as a fully-licensed public-house, where the licensee and his family would reside, is not a building "used in part for purposes of trade or manufacture and in part as a dwelling-house." Within sect. 74, sub-sect. 2, of the London Building Act, 1894, a licensed victualler carries on his trade upon the whole of the licensed premises. Nor need the approach to the part which is used as a dwelling-house be constructed of fire-resisting materials.

CARRITT *v.* GODSON & SON, [1899] 2 Q. B. 193; [68 L. J. Q. B. 799; 63 J. P. 644; 80 L. T. 771; 15 T. L. R. 400; 19 Cox, C. C. 355—Div. Ct.

26. "*Building used in Part for Purposes of Trade or Manufacture and in Part as a Dwelling-house*"—*Separation by Fire-resisting Materials—Structural Severance—Ordinary Beer-house—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *s.* 74, *sub-s.* 2.]—Sect. 74, sub-sect. 2 of the London Building Act, 1894, provides that "In every building exceeding ten squares in area used in part for purposes of trade or manufacture and in part as a dwelling-house, the part used for the purposes of trade or manufacture shall be separated from the part used as a dwelling-house by walls and floors constructed of fire-resisting materials."

HELD—that the sub-section applies to a case in which the part of the building used for purposes of residence is structurally severed from the part used for the purposes of trade and approached by a separate entrance, so that the two parts, although under the same roof, constitute in fact two separate tenements; and that it does not apply to the case of an ordinary beer-house, in which the portions used for residence and trade respectively form part and parcel of the same tenement.

DICKSEE *v.* HOSKINS, [1901] 2 K. B. 122; 70 [L. J. K. B. 577; 65 J. P. 469; 49 W. R. 523; 84 L. T. 625; 17 T. L. R. 446—Div. Ct.

On appeal the above judgment was reversed on the ground that the magistrate had found, in fact, that, "the basement and ground-floor of the building are intended to be used for the purpose of the trade of a beer-house, and the part above the ground-floor is intended to be used as a dwelling-house for the licensed occupier," and that the Court had no jurisdiction to go beyond the findings of fact in the special case, notwithstanding the magistrate had held that the case was governed by *Carritt* v. *Godson*, [1899] 2 Q. B. 193; 68 L. J. Q. B. 799; 63 J. P. 644; 80 L. T. 771; 15 T. L. R. 400—Div. Ct., No. 25, *supra*.

DICKSEE *v.* HOSKINS, [1901] 2 K. B. 660; 70 [L. J. K. B. 851; 65 J. P. 612; 49 W. R. 693; 85 L. T. 205; 17 T. L. R. 660—C. A.

27. *Erection of Gas Works under Private Act*—"*As they think fit*"—*Compliance with London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *ss.* 9, 13, 205.]—A gas company erecting a building upon lands specified in a schedule to their private Act, which entitled them to erect such gasworks "as they think fit" upon such land, are nevertheless subject to the provisions of the London Building Act, 1894, relating to the position of new buildings in a street.

LONDON COUNTY COUNCIL *v.* WANDSWORTH [AND PUTNEY GAS CO., (1900) 64 J. P. 500—Div. Ct.

28. "*Public Building*"—"*Hospital*"—*Homes for Children of defective Intellect—Building used for any other Public Purpose—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *s.* 5 (27).]—In order to provide effectually for the education of children of defective intellect within their district, the Metropolitan Asylums Board established homes close to board schools, specially equipped and adapted for the education of children of that class, in which it was intended the children should live while attending the schools.

HELD—that a building acquired by the board for this purpose, not having a cubical capacity of more than 250,000 feet, or sleeping accommodation for more than 100 persons, was not a "public building" within the London Building Act, 1894, not being a "hospital" or a building "used or constructed, or adapted to be used, for any other public purpose" within sect. 5 (27).

Josolyne v. *Meeson* ((1885) 49 J. P. 805; 53 L. T. 319—Div. Ct.) followed.

MOSES *v.* MARSLAND, [1901] 1 Q. B. 668; 70 [L. J. Q. B. 261; 65 J. P. 183; 49 W. R. 217; 83 L. T. 710; 17 T. L. R. 190—Div. Ct.

29. *Swimming Bath—Construction of Floor within Bath—Notice to District Surveyor under sect.* 145 *of the London Building Act*, 1894—*London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *s.* 78.]—The appellants were employed as contractors by a borough council to fit together and place in public baths which were vested in the council by virtue of the London Government Act, 1899, temporary wooden floorings in order that the baths might be used as halls during the winter months. The appellants began the construction of the floorings before serving a building notice under sect. 145 of the London Building Act, 1894, on the respondent, the district surveyor of the said council. The respondent laid an information under the Act against the appellants for neglecting to serve such a notice. The magistrate convicted the appellants, but found that the floorings did not affect and were not likely to affect the baths.

HELD—that the floorings did not form a 'structure, or building or work," before the

Buildings—*Continued.*

commencement of which a building notice must be served upon a district surveyor under sect. 145 of the London Building Act, 1894, as according to the finding of the magistrate, they did not affect and were not likely to affect the building in which they were placed and so did not come within sect. 78 of the Act.

Venner v. *M'Donnell* ([1897] 1 Q. B. 421 ; 66 L. J. Q. B. 273 ; 61 J. P. 181 ; 45 W. R. 267 ; 76 L. T. 152—Div. Ct.) followed.

Handover *v.* Meeson, (1903) 67 J. P. 313—[Div. Ct.

30. *Uniting of Buildings—Erection of Blocks of Flats—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *s.* 77 (1).]—The respondent was a builder. On February 6th, 1902, an amended notice was served by the respondent upon the appellant, a district surveyor, that he proposed to erect in a street called West Hill a domestic building, 500 feet in depth, to be used as private residences. In April, 1902, the appellant served a notice of objection on the ground (*inter alia*) that the respondent proposed to unite the buildings in contravention of sect. 77 (1) of the London Building Act, 1894. In October, 1900, the builder was proposing to erect six separate blocks of eight flats each, named on a plan A., B., C., D., E., and F. Blocks A. and B. were to front on West Hill, and blocks C. and D. and blocks E. and F. were to have separate entrances from West Hill. Objection was then taken by the surveyor that the erection of blocks C., D., E., and F. would be laying out a street. Various proposals were made by the respondent and objected to by the appellant. At the time of the notice, in February, 1902, block A. was completed and block B. partly completed. By the notice of February, 1902, it was proposed to erect each of the four other blocks, C., D., E., and F., to contain its own staircase leading from the basement to the top, and to be provided with an entrance leading from the space outside to such staircase. Each pair of adjacent blocks was to be connected by a door leading from the bath-rooms of one to the bath-rooms of the adjacent block, and there was a passage way under the roofs from one end of the four blocks to the other end. Each block was capable of being let separately, and none of the blocks were constructed, adapted, or intended to be occupied with any other block.

Held—that the proposition of the respondent was to erect a separate building in itself, and not a union under one roof of separate buildings, and that sect. 77 (1) applied only to the union of buildings which had in the first instance been completely erected as separate structures, and did not apply to the union of several buildings in the course of erection for the purpose of transforming them and finishing them as a separate structure.

Goodchild *v.* Matthews, (1903) 67 J. P. 296 ; [89 L. T. 369 ; 19 T. L. R. 492 ; 1 L. G. R. 523—Div. Ct.

31. *Uniting of Buildings wholly in One Occupation or constructed or adapted to be so—London Buildings Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *s.* 77, *sub-s.* 1.]—Where buildings not wholly in one occupation are in fact united by an opening, although the said opening may have been made without the necessary consents under the Metropolitan Building Act, 1855, or under the London Building Act, 1894, it is no offence against sect. 77 (1) of the latter Act to make another opening between the same buildings.

Per Channell, J.—that the words "or are constructed or adapted to be so" in the same subsection have reference to the state of thing at the time of the uniting and not at the time of the original construction.

Woodthorp *v.* Spencer, (1899) 63 J. P. 246—[Div. Ct.

(2) *Dwellings for Working Classes.*

32. "*To be inhabited or adapted to be inhabited by persons of the working class*"—"*Dwelling House*"—*London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *ss.* 5 (25) (26) and (27) and 13 (5).]—By sect. 13 (5) of the London Building Act, 1894, a building may, without the consent of the London County Council, be re-erected on the site of the buildings existing at the passing of the Act, though such site is within the prescribed distance of the centre of the roadway, subject to the proviso that, if such new building be a "dwelling-house to be inhabited or adapted to be inhabited by persons of the working class," it shall not exceed in height the distance of its front wall from the opposite side of the street.

Held—that "to be inhabited" here means intended when erected to be so inhabited, and "adapted to be inhabited" means structurally adapted to be so inhabited.

Held further—that a public building in the nature of a hotel for poor men is not a dwelling-house within the proviso.

Held further—that though a building is a "public building" within the definition in sect. 5 (27), it may also be a "dwelling-house" within sect. 13 (5).

Per Channell, J.—By "working class" in this section is meant that class of persons who ordinarily live in such a condition of life that overcrowding is likely to take place.

Per Channell, J.—Query, whether in sect. 13 (5), where height of dwelling-houses is regulated by distance of their front wall from the opposite side of the street, "street" does not mean a roadway on the opposite side of which buildings are or may possibly be erected.

London County Council *v.* Davis, (1898) [62 J. P. 68 ; 77 L. T. 693 ; 14 T. L. R. 113—Div. Ct.

33. "*Adapted to be inhabited by Persons of the Working Class*"—*Houses Suitable for Occupation by other Classes—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *s.* 13 (5).]—If houses are constructed in such a way that they are practically certain to be inhabited only by persons of the working class, the fact that the builder intended to let them to any one

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willing to take them will not be sufficient to take them out of the scope of sect. 13 (5) of the London Building Act, 1894.

In considering whether a building falls within sect. 13 (5), one must look at its structural plan, and see whether it is adapted for inhabitation by the class of persons who would take two or three rooms in a house for the purpose of doing for themselves in those rooms.

Semble, a building, to be within the section need not be "specially" adapted for inhabitation by the working classes "only."

CROW *v.* DAVIS, (1903) 67 J. P. 319; 89 L. T. [407; 19 T. L. R. 505—Div. Ct.

34. "*To be Inhabited or intended to be Inhabited by Persons of the Working Class*"—*London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *s.* 13 (5)—*London Building Act*, 1894, *Amendment Act*, 1898 (61 & 62 Vict. *c.* cxxxvii.), s. 4.]—Where a person proposes to erect houses in a locality almost entirely inhabited by persons of the working class, which are constructed in such a way that it is practically certain that when constructed they would be inhabited by persons of the working class, such buildings are deemed to be "dwelling-houses inhabited or adapted to be inhabited by persons of the working class" within the meaning of London Building Act, 1894, Amendment Act, 1898.

L. C. C. v. *Davis* ((1898) 62 J. P. 68; 77 L. T. 693—Div. Ct.), No. 32, *supra*, explained.

CROW *v.* DAVIS, (1904) 68 J. P. 417; 91 L. T. [88; 2 L. G. R. 1034—Div. Ct.

(e) Height of Buildings.

35. *Buildings vested in and in the occupation of any Department of Her Majesty's Government*—*London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 47, 202.]—Buildings of which Her Majesty's Commissioners of Works have entered into an agreement to take a lease at their option when the buildings are completed, the said buildings being built under the supervision of an architect, subject to the approval of the surveyor of the Commissioners of Her Majesty's Board of Works, do not come under the exemption in sect. 202 of the London Building Act, 1894.

DRURY *v.* RICKARD, (1899) 63 J. P. 374; 15 [T. L. R. 188—Div. Ct.

36. *Distance of Front or nearest External Wall from opposite side of Street—Distance of each part of Building—Building with a Recess—Old Street—Substantial Alteration—New Street formed or laid out since* 1862—*London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *s.* 49.]—Sect. 49 of the London Building Act, 1894, provides that no existing building . . . on the side of a street formed or laid out after August 7th, 1862, and of a less width than fifty feet shall . . . be raised, and no new building shall . . . be erected on the side of any such street so that the height of such building shall exceed the distance of the front or nearest external wall of such building from the opposite side of the street.

Kekewich, J., having held that the words "so that the height shall exceed" mean "shall in any part exceed," so that the height of each part of a building must be governed by the distance of its own front or external wall from the opposite side of the street:—

HELD, by the C.A.—that where a building is one building and not several buildings, the fact that there is a recess in the building going back from the general line of frontage does not vary the meaning of front or nearest external wall as used in the section, for the purpose of ascertaining if the building exceeds the proper height.

An old street formed before August 7th, 18 2, which has been substantially altered since that date, although retaining its old name, becomes by such alteration a new street, to which the restrictions of the Act are applicable.

Decision of Kekewich, J. ([1907] 2 Ch. 23; 76 L. J. Ch. 259; 71 J. P. 182; 96 L. T. 351; 23 T. L. R. 263) reversed.

ATTORNEY-GENERAL *v.* METCALFE AND [ANOTHER, [1908] 1 Ch. 327; 77 L. J. Ch. 261; 97 L. T. 737; 72 J. P. 97; 24 T. L. R. 53—C. A.

(f) Dangerous, Defective, Temporary, and Wooden Structures.

36a. "*Criminal Cause or Matter*"—*Order for Demolition of Building—General Line of Buildings—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *s.* 22—*Judicature Act*, 1873 (36 & 37 Vict. *c.* 66), *s.* 47.]—A magistrate, upon a summons charging a person with having erected a new building beyond the general line of buildings in a street contrary to the London Building Act, 1894, having made an order for the demolition of the building, the Divisional Court refused to grant a rule *nisi* calling upon him to state a case for the opinion of the Court.

HELD—that the decision of the Div. Ct. was in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, and no appeal lay.

REX *v.* D'EYNCOURT, (1901) 85 L. T. 501; 18 [T. L. R. 53—C. A.

37. *Dangerous Structures—Erection of Hoarding—Removal and reinstatement of Pavement—Liability of London County Council—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 109, 120, 122, 215—*London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *Part IX.*, *ss.* 106, 107.]—The London County Council are not bound, under sects. 109 or 122 of the Metropolis Management Act, 1855 to give a vestry notice of their intention to remove the pavement and erect a hoarding when they are about to remove a dangerous structure, under Part IX. of the London Building Act, 1894; and if, in the course of the removal of a dangerous structure, they remove the pavement for the purpose of erecting a hoarding, they are not bound to reinstate the pavement on the removal of the hoarding, and are consequently not liable for

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injuries caused to a person by its non-reinstatement. The duty of replacing the pavement lies upon the owner of the premises.

CRISP *v.* LONDON COUNTY COUNCIL, [1899] [1 Q. B. 720; 68 L. J. Q. B. 499; 63 J. P. 484; 80 L. T. 654—Wills, J.

38. *Dangerous Structure—Party Wall—One Dangerous Structure or Two—Surveyor's Fees—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *s.* 113, *and Part II. of Sched. III.*]—A district surveyor is entitled to one and not two sets of fees under Part II. of Sched. III. of the London Building Act, 1894, in respect of his services (surveys, inspections and reports) under Part IX. of the Act, in relation to a party-wall in respect of which proceedings have been taken against adjoining owners and occupiers, and which necessitate inspection on both sides, for such a party-wall is one dangerous structure and not two.

LONDON COUNTY COUNCIL *v.* SHEINMAN, (1905) [69 J. P. 395; 93 L. T. 505; 3 L. G. R. 977—Div. Ct.

39. *Defective Structure—Theatres and Music-halls—Special Danger from Fire—Notice to Remedy—Compliance with Notice—Power to give subsequent similar Notices—Metropolis Management and Building Act*, 1878 (41 & 42 Vict. *c.* 32), *s.* 11.]—Where, under sect. 11 of the Metropolis Management and Building Act, 1878, the London County Council has required the owner of a theatre or a music-hall, licensed before the Act of 1878, to remedy structural defects, so as to avoid danger from fire, and the notice is complied with, the County Council cannot subsequently serve a second notice under the section requiring further works to be executed. The powers of the section must be exercised once for all.

ST. JAMES'S HALL CO. *v.* LONDON COUNTY [COUNCIL, [1901] 2 K. B. 250; 70 L. J. K. B. 610; 49 W. R. 572; 84 L. T. 568; 17 T. L. R. 483—Channell, J.

40. *Temporary Structure—Erected without Licence—Metropolis Management and Building Act*, 1882 (45 Vict. *c.* 14), *s.* 13—*London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *s.* 215.]—Sect. 215 of the London Building Act, 1894, saves only rights and liabilities actually acquired, accrued, or incurred under the Acts repealed by it at the time the London Building Act, 1894, came into operation.

Sect. 13 of the Metropolis Management and Building Act, 1882 (45 Vict. *c.* 14), forbids the erection of temporary structures without the written licence of the London County Council. Sect. 215 of the London Building Act, 1894 (57 & 58 Vict. *c.* cexiii.), which came into operation on January 1st, 1895, repeals the Metropolis Management and Building Act, 1882, but enacts that the repeal shall not affect any right or liability "acquired, accrued, or incurred under or in accordance with any enactment hereby repealed," or any legal proceeding or penalty in respect of any such liability "as aforesaid."

A. before January 1st, 1895, erected a temporary structure without the licence of the London County Council, and thereby made himself liable under the Metropolis Management and Building Act, 1882, to a penalty for erecting it, and also to a penalty for each day he continued it. A. continued this structure until less than six months immediately preceding May 17th, 1897, on which day the London County Council applied for a summons against him for an offence under sect. 13 of the Metropolis Management and Building Act, 1882.

The magistrate refused the summons on the ground that the only liabilities saved by sect. 215 of the London Building Act, 1894, were liabilities actually incurred on or before January 1st, 1895, and that proceedings for these were barred by sect. 11 of the Summary Jurisdiction Act, 1848. On appeal:—

HELD—that the magistrate's decision was right.

REG. *v.* CLUER; EX PARTE LONDON COUNTY [COUNCIL, [(1897) 67 L. J. Q. B. 36; 77 L. T. 439—Div. Ct.

41. "*Wooden Structures*"—*Stands to view Public Procession—Authority to license Erection of—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *s.* 84—*London Government Act*, 1899 (62 & 63 Vict. *c.* 14), *s.* 5; *Sched. II., Part* 1.]—Sect. 84 of the London Building Act, 1894, applied to wooden structures, permanent or otherwise, and the London Government Act, 1899, by sect. 5, Sched. II., Part 1, transferred the powers of sect. 84, as to licensing the erection of wooden structures and as to taking proceedings for default in obtaining or observing the conditions of the licence, to the borough councils.

The city of Westminster is the proper authority to license the construction and lay down the conditions of construction of structures made wholly of wood, except so far as nails are used in the construction, which it is proposed or may be proposed to erect for the purpose of viewing public processions in the streets within the area of the borough of Westminster.

WESTMINSTER CORPORATION *v.* LONDON [COUNTY COUNCIL, [1902] 1 K. B. 326; 71 L. J. K. B. 244; 66 J. P. 199; 50 W. R. 429; 86 L. T. 53; 18 T. L. R. 187—Div. Ct.

42. *Wooden Structures used in connection with the Traffic of Railway Companies—Licence of London County Council—Exemption—London Building Act*, 1894 (57 & 58 Vict. *c.* cexiii.), *ss.* 84, 86.]—Where the appellants, coal merchants, had, in close proximity to the point where a railway company delivered the coal, a wooden structure in the nature of an office, wherein they could dispose of their clerical business in connection with (*a*) the delivery of coal to them by the railway company, and (*b*) the speedy clearing of coal from the wharf near the sidings of the railway company, which was a matter of importance and convenience to the coal merchants and the railway company:—

HELD—that the coal office was used in connection with the traffic of the railway company

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and was exempt from Part VII. of the London Building Act, 1894, and that a licence in respect thereof from the London County Council was unnecessary under sect. 84 of the said Act.

Elliott *v.* London County Council, [1899] [2 Q. B. 277; 68 L. J. Q. B. 837; 63 J. P. 645; 81 L. T. 155; 15 T. L. R. 412—Div. Ct.

(g) Party Walls.

And see under (a) In General.

43. "*Adjoining Owner*"—*Various Interests in Adjoining Premises—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 5, 90, 173.]—A building owner must serve a "party wall" notice under sect. 90 of the London Building Act, 1894, upon every person holding an interest on the adjoining premises, other than tenants at will or from year to year, subject to the proviso that service upon one member of a class (*e.g.* joint tenants) is sufficient.

Lis v. *Tharp*, [1897] 1 Ch. 260; 66 L. J. Ch. 175; 61 J. P. 248; 76 L. T. 45; 45 W. R. 243—Chitty, J.) discussed.

Crosby *v.* Alhambra Co., Ld., [1907] 1 Ch. [295; 76 L. J. Ch. 176—Neville, J.

44. *Building Owner's Notice — Work to be commenced within Six Months — Dispute as to Notice—Arbitration—Delay of Six Months caused thereby—Validity of Notice — London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 90, 91.]—An owner served a party wall notice on an adjoining owner under the provisions of the London Building Act. Differences arose as to the proposed work, which were referred to arbitration under sect. 91: the award was not made until six months had elapsed from the service of the notice.

Held—that the notice was still "available," notwithstanding the provision of sect. 90 (4) that such a notice should not be available for the exercise of any right unless the work to which it relates was commenced within six months. Under the circumstances such provision had no application.

Leadbitter and Others *v.* Marylebone [Corporation, [1905] 1 K. B. 661; 74 L. J. K. B. 507; 69 J. P. 201; 53 W. R. 470; 92 L. T. 819; 21 T. L. R. 377—C. A.

45. *Demolition of Adjoining Premises — Railway Company — Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. *c.* 20), *ss.* 16, 45—*Charing Cross, Euston and Hampstead Railway Act*, 1893 (56 & 57 Vict. *c.* ccxiv.), *s.* 31—*London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *s.* 5 (31).]—A railway company was authorised by its special Act, which incorporated the Lands Clauses Acts, the Companies Clauses Acts, and the Railways Clauses Consolidation Act, 1845, to make and maintain the railway and other works described in the Act. By sect. 31 of its special Act the company was empowered to take by agreement for the extraordinary purposes mentioned in the Railways Clauses Consolidation Act, 1845, any quantity of land not exceeding five acres, and it was provided that any buildings erected or land acquired under this section should be subject to the provisions of the Metropolitan Building Acts.

The company acquired by agreement under sect. 31 a house situate outside the limits of deviation in their deposited plans, and proceeded to pull it down, thereby, as alleged by the owners of the adjoining premises, "affecting" the party wall between that house and their premises, without having given them the party structure notice required by the London Building Act, 1894. On a claim for an injunction to restrain the company from continuing the demolition of these premises:—

Held—that the company were not exempt under their special Act from the provisions of the London Building Act, 1884, and were bound to give the adjoining owners the usual party structure notice, in default of which the adjoining owners were entitled to an injunction.

But Held also, upon the facts, that the company, not having done anything which amounted to a substantial interference with the party structure, were not "building owners" within the meaning of sect. 5 (31) of the London Building Act, 1894.

Lewis and Salome *v.* Charing Cross, &c. [Ry. Co., [1906] 1 Ch. 508; 75 L. J. Ch. 282; 70 J. P. 221; 54 W. R. 435; 94 L. T. 732; 22 T. L. R. 282; 4 L. G. R. 432—Warrington, J.

46. *Difference between Adjoining Owners—Arbitration—Jurisdiction of Arbitrators—Subsequent raising of Party Wall by Adjoining Owner —London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 87–91.]—In 1902 the plaintiff, who was the owner of a house in London, proceeded to pull it down with the intention of erecting a new building on the site: it was necessary to pull down and rebuild the party wall between the house and the adjoining house. He accordingly served a building owner's notice on the defendants, who were the adjoining owners, as required by sect. 87 of the London Building Act, 1894. The defendants, who were contemplating erecting workmen's dwellings upon their site, served on the plaintiff a notice of certain requisitions to be complied with by him in the rebuilding of the party wall. A difference having arisen with regard to these requisitions, the matter was referred to surveyors in accordance with sect. 91 of the Act, who awarded that the party wall should be of thicker dimensions than would be necessary in ordinary circumstances, and, further, that the defendants should be entitled to raise the wall at any time as they thought fit. The plaintiff completed the building. Subsequently the defendants proposed to increase the height of the party wall without serving a building owner's notice under the Act. The plaintiff thereupon brought an action for an injunction to restrain them from building on the party wall without first serving such notice.

Held—that the award of the surveyors giving the defendants leave to raise the party wall at any time as they thought fit was *ultra vires*, and

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that the defendants ought to have served a building owner's notice.

LEADBITTER AND OTHERS *v.* MAYOR, &C., OF [ST. MARYLEBONE, [1904] 2 K. B. 893; 73 L. J. K. B. 1013; 20 T. L. R. 778; 68 J. P. 566; 53 W. R. 118; 91 L. T. 639—C. A.

47. *Difference between Building Owner and Adjoining Owner — Reference to Surveyors— Compensation for Damage to Trade—Jurisdiction to Award—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 88–91.]—Where surveyors are appointed under sect. 91 of the London Building Act, 1894, to settle a difference between a building owner and an adjoining owner under sect. 90 of that Act, with respect to the raising of a party wall, they have no jurisdiction to award compensation to the adjoining owner for anything but structural damage. They cannot consider, *e.g.*, loss of trade arising from the execution of the work.

Decision of Div. Ct. ([1906] 2 K. B. 767; 75 L. J. K. B. 995; 70 J. P. 545; 95 L. T. 540; 22 T. L. R. 820) affirmed.

ADAMS *v.* MARYLEBONE BOROUGH COUNCIL, [1907] 2 K. B. 822; 71 J. P. 465; 23 T. L. R. 702—C. A.

48. *Notice to Adjoining Owner—Sufficiency—Counter-Notice — London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 89, 90 (1).]—A notice, purporting to be a party wall notice, under sect. 90 (1) of the London Building Act, 1894, ought to be so clear and intelligible that the adjoining owner may be able to see what counter-notice he should give to the building owner under sect. 89.

HOBBS, HART & CO. *v.* GROVER, [1899] 1 Ch. 11; [68 L. J. Ch. 84; 79 L. T. 454; 15 T. L. R. 40—C. A.

49. *"Owner" — Tenant at Will — London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 5 (29), 87.]—By sect. 5 (29) of the London Building Act, 1894, the expression "owner" does not include a tenant at will.

The plaintiff agreed to take a lease of certain land for building purposes from the London County Council subject to certain conditions, one of which was that until the granting of the lease the plaintiffs should be deemed tenant at will to the council, but he was to pay the rent and observe and perform the covenants and conditions to be reserved and contained in such lease when granted, and he was to be at liberty to take away sufficient earth to enable him to build. Before he became entitled to have the lease granted he built a party wall between his land and that of the adjoining owner, and claimed to be entitled to all the rights of a building owner conferred by sect. 87 of the London Building Act, 1894.

HELD—that, as the plaintiff had agreed to be a tenant at will until the granting of the lease, though with certain rights superadded, he was not an "owner" within the definition in sect. 5 (29) of the Act, and therefore had not the rights of a building owner under sect. 87.

ORF *v.* PAYTON, (1905) 69 J. P. 103; 21 T. L. R. [90; 3 L. G. R. 126—Eady, J.

50. *Wall raised by Owner of House at his own Expense—Lease of House for a Term of Years— Subsequent User by Adjoining Owner of Party Wall so raised—Contribution towards Expense of raising Wall—Right of Lessee—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 88–95.]—The owner of a house in London, under the powers of the London Building Act, 1894, raised at his own expense the party wall separating his house from the adjoining house. Subsequently the owner granted a lease of the house for twenty-one years to the appellant. After the lease to the appellant, the respondent, who had become the owner of the adjoining house, proposed to carry out certain building works upon his premises, and for that purpose to make use of the raised party wall beyond the use thereof made by him before the alteration. The appellant claimed (*inter alia*), under sect. 95, sub-sect. 2, of the Act, a proportion of the original expense of raising the party wall in respect of the increased user of it by the respondent. The arbitrators appointed in accordance with the provisions of the Act awarded to the appellant a sum of money in respect of the claim.

HELD—that the arbitrators had no jurisdiction to entertain the claim, as the Act only contemplated the payment of a proportion of the expense of raising the party wall to the person who had originally incurred the expense.

In re STONE AND HASTIE, [1903] 2 K. B. 463; [72 L. J. K. B. 846; 89 L. T. 343; 19 T. L. R. 654; 63 J. P. 44; 52 W. R. 130—C. A.

H. BYE-LAWS.

See also Sect. III. DRAINAGE (b)—IN GENERAL.

(a) Betting in Streets.

51. *Inconsistency between Bye-law and Statute —Metropolitan Streets Act*, 1867 (30 & 31 Vict. *c.* 134), *s.* 23—*Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 16.]—A bye-law made by the London County Council prohibiting under a penalty any person from frequenting and using any street or other public place for the purpose of bookmaking, betting, or wagering is a reasonable bye-law, and one that can properly be made under sect. 23 of the Municipal Corporations Act, 1882, for the good rule and government of the district; and there is no inconsistency or repugnancy between the bye-law and the statutory provision contained in sect. 23 of the Metropolitan Streets Act, 1867, which says that "any three or more persons assembled together in any part of a street within the metropolis for the purpose of betting shall be liable to a penalty."

WHITE *v.* MORLEY, [1899] 2 Q. B. 31; 68 L. J. [Q. B. 702; 63 J. P. 550; 47 W. R. 583; 80 L. T. 761; 15 T. L. R. 360; 19 Cox, C. C. 345 —Div. Ct.

Bye-laws—*Continued.*

52. *Inconsistency between Bye-law and Statute —Metropolitan Streets Act*, 1867 (30 & 31 Vict. *c.* 134), *s.* 23—*Municipal Corporations Act*, 1882 (45 & 46 Vict. *c.* 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 16.]—A bye-law that "No person shall frequent or use any street or other public place, on behalf either of himself or any other person, for the purpose of book-making, or betting, or wagering, or agreeing to bet or wager with any person, or paying, or receiving, or settling bets," is a bye-law for the good government of the district, and is valid under a statutory power for the local authority to make bye-laws for the good government of the district. Nor is such a bye-law repugnant to sect. 23 of the Metropolitan Streets Act, 1867, which prohibits three or more persons assembling together in a street for the purpose of betting.

White v. *Morley* ([1899] 2 Q. B. 34; 68 L. J. Q. B. 702; 63 J. P. 550; 47 W. R. 583; 80 L. T. 761; 15 T. L. R. 360—Div. Ct., *supra*) and *Burnett* v. *Berry* ([1896] 1 Q. B. 641; 65 L. J. M. C. 118; 60 J. P. 375; 44 W. R. 512; 74 L. T. 494—Div. Ct.) approved.

Calder and Hebble Navigation Co. v. *Pilling* ((1845) 3 Rail. Cas. 735; 14 M. & W. 76; 14 L. J. Ex. 223; 9 Jur. 377) and *Strickland* v. *Hayes* ([1896] 1 Q. B. 290; 65 L. J. M. C. 55; 60 J. P. 164; 44 W. R. 398; 74 L. T. 137; 18 Cox, C. C. 244—Div. Ct.) distinguished.

THOMAS *v.* SUTTERS, [1900] 1 Ch. 10; 69 [L. J. Ch. 27; 48 W. R. 133; 81 L. T. 469; 16 T. L. R. 7—C. A.

(b) Lavatories and Waterclosets.

See also VIII. SANITARY CONVENIENCES, &c.

53. *"Constructing" any Watercloset—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 202—*London County Council Bye-laws* (1900), 17, 21.]—The appellants were the owners of industrial dwellings erected before the bye-laws made by the London County Council in 1900. In 1902 the appellants resolved to substitute iron pipes for the ordinary tile drain pipes communicating from the waterclosets in such buildings with the drains, and in carrying out such alterations several pans and pipes connected therewith which had been broken were replaced. The respondents contended that in carrying out such alterations the appellants were constructing a "watercloset" within the meaning of bye-laws 17 and 21 of the bye-laws of the London County Council made in 1900. Bye-law 17 provided "any person who shall construct any watercloset, the soil pipe of which shall communicate with any sewer, and shall be in connection with any other watercloset," shall cause certain things to be done. Bye-law 21 provided that "these bye-laws shall so far as is practicable apply to any person who shall construct or reconstruct any pipe or drain or other means of communicating with sewers or any trap or apparatus connected therewith so far as he shall effect any such works in any building erected before the confirmation of these bye-laws, as if the same were being constructed in a building newly erected."

HELD—that the appellants had not "constructed a watercloset" within the meaning of bye-law 17, and that what was done was not within the purview of bye-law 21.

METROPOLITAN INDUSTRIAL DWELLINGS CO. [*r.* LONG, (1904) 68 J. P. 113; 20 T. L. R. 103; 2 L. G. R. 233—Div. Ct.

54. *"Fit or fix in connection with any w.c. any apparatus or any trap or soil pipe"—Repairing existing Watercloset — Notice to Sanitary Authority—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 39 (1).]—By a bye-law, No. 5, made by the London County Council under sect. 39 (1) of the Public Health (London) Act, 1891, it is provided that "a person who shall newly fit or fix any apparatus in connection with any existing w.c. shall as regards such apparatus and its connection with any soil pipe or drain comply with such of the requirements of the foregoing bye-laws as would be applicable to the apparatus so fitted or fixed as if the w.c. were being newly constructed."

Bye-law 14 provided that "every person who shall intend to construct any w.c. earthcloset or privy or to fit or fix in or in connection with any w.c. earthcloset or privy any apparatus or any trap or soil pipe shall before executing any such works give notice in writing to the clerk of the sanitary authority."

The appellants, a railway company, finding that the pans and traps of two existing waterclosets at one of their stations required renewal owing to ordinary wear and tear, removed the same and refitted or fixed two new pans or traps in connection with the said waterclosets. In carrying out the works the appellants complied with all the requirements of the bye-laws as referred to in bye-law 5, but gave no notice to the clerk of the sanitary authority as provided by bye-law 14.

HELD—that bye-law 14 did not apply only to new waterclosets, but also to the fixing of an apparatus, trap, or soil pipe in connection with any existing watercloset.

LONDON AND SOUTH WESTERN RY. CO. *v.* [HILLS, [1906] 1 K. B. 512; 75 L. J. K. B. 340; 70 J. P. 212; 94 L. T. 517; 4 L. G. R. 399—Div. Ct.

55. *Pipe from every Lavatory to be trapped—Row of Basins in Board School—Applicability —Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 102.]—The appellants were summoned for contravention of a bye-law of the respondents, which provided that "a person who shall erect a new building shall cause every pipe in such building for carrying off waste water from every lavatory or sink . . . to a sewer to be constructed of lead iron or stoneware and to be trapped immediately beneath such lavatory or sink by an efficient syphon trap which shall be constructed of lead iron or stoneware with adequate means for inspection and cleansing and which shall be ventilated into the external air wherever such ventilation shall be necessary

Bye-laws—*Continued.*

to preserve the seal of such trap." The appellants had constructed rows of basins in a new building for the London School Board. The waste water from each basin ran through a pipe into an open drain, which was trapped before it reached the sewer.

HELD—that each basin was not a lavatory and need not comply with the bye-law, and that the case was not within the bye-law.

TREASURE & Co. *v.* BERMONDSEY BOROUGH [COUNCIL, (1904) 68 J. P. 206; 2 L. G. R. 488—Div. Ct.

(c) Lights on Vehicles.

56. *Lights on Vehicles—Tramcars—Validity.*]—The London County Council has power to make a bye-law for the good government of their district, and to make bye-laws enforcing the use of lights on vehicles, *e.g.*, tramcars using highways during the hours of darkness, and to say that such lights should be white lights.

ADAMSON *v.* MILLER, (1900) 16 T. L. R. 184—Div. Ct.

(d) Lodging Houses.

57. *Cleansing at stated times—Liability of "Landlord"—No Notice—Unreasonableness—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 94.]—A bye-law made by a metropolitan borough council under sect. 94 of the Public Health (London) Act, 1891, provided "that the landlord in the first week in April in every year, and at such other times as the condition thereof may render it necessary, shall cause every part of the premises of a house let in lodgings or inhabited by members of more than one family to be cleansed." "Landlord" in relation to such a house was defined as "the person, whatever may be the nature or extent of his interest in the premises, and whether he resides on the premises or not, who receives or is entitled to receive the rack-rent of such premises."

HELD—that the bye-law was unreasonable, and therefore invalid, because it did not provide for notice being given to the landlord, who was the person made responsible, and who might have no knowledge of any offence being committed.

And, per Wills, J., "That the bye-law was also unreasonable on the ground that it required the work to be done in the first week of the month of April, which frequently included the Easter holidays, the work being of such a nature as might occupy several days."

STILES *v.* GALINSKI; NOKES AND NOKES *v.* [ISLINGTON BOROUGH COUNCIL (No. 2). [1904] 1 K. B. 615; 73 L. J. K. B. 485; 68 J. P. 183; 52 W. R. 462; 90 L. T. 437; 20 T. L. R. 219; 2 L. G. R. 341—Div. Ct.

58. *Houses "let in Lodgings"—Bye-laws—Artisans' Dwellings—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 94.]—A building—artisans' dwellings—was divided into a number of separate double-roomed tenements and single-roomed tenements. It had no front door in the ordinary sense, and the passages and staircase were common to all the tenements that it contained, and on them the front doors of the separate tenements opened. Each tenement was let to a separate family.

HELD—that the tenements were separately occupied, and that each of them was a "house" within sect. 94, sub-sect. 1 (a), of the Public Health (London) Act, 1891, and that the whole building was not a house which was "let in lodgings or occupied by the members of more than one family" within the meaning of the section or of bye-laws made thereunder.

WEATHERITT *v.* CANTLAY, [1901] 2 K. B. 285; [70 L. J. K. B. 799; 65 J. P. 644; 49 W. R. 568; 84 L. T. 768—Div. Ct.

59. *Ordinary House—Each Floor occupied by Different Family—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 94.]—The appellant was the landlord of an ordinary six-roomed house not specially constructed to be let in separate tenements. It had a common staircase and one common front door which was always kept open. On each floor there were two rooms which were let to and occupied by a separate family. The appellant did not reside on the premises, nor have any representative residing there.

HELD—that this was a "house occupied by members of more than one family" and that the sanitary authority could make bye-laws for its regulation under sect. 94 of the Public Health (London) Act, 1891.

KYFFIN *v.* SIMMONS, (1903) 67 J. P. 228; 1 [L. G. R. 381—Div. Ct.

60. *Proportion of Closets to Inmates—Notice to Owner—Unreasonableness—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 39 (1).]—A bye-law of the London County Council, made under the Public Health (London) Act, 1891, *s.* 39 (1), provided that "the landlord or owner of any lodging-house shall provide and maintain in connection with such house water-closet, earth-closet, or privy accommodation in the proportion of not less than one water-closet, earth closet or privy for every twelve persons." Upon a complaint being lodged against rent collectors, who are "owners" within the definition clause, for contravention of the bye-law:—

HELD—that the bye-law was not reasonable, on the ground that it did not provide for notice to be given to the person complained against (who might be quite unaware that the bye-law was being infringed) before proceedings were commenced.

NOKES AND NOKES *v.* ISLINGTON BOROUGH [COUNCIL (No. 1), [1904] 1 K. B. 610; 73 L. J. K. B. 100; 68 J. P. 95; 52 W. R. 399; 90 L. T. 22; 20 T. L. R. 95; 2 L. G. R. 334—Div. Ct.

III. DRAINAGE.

(a) Drain or Sewer.

And see title SEWERS AND DRAINS.

61. *Combined Operation—Plans sanctioned by Vestry—Subsequent deviation from Plan*—

Drainage—*Continued.*

Metropolis Management Act, 1855 (18 & 19 Vict. *c.* 120), *ss.* 74, 250.]—A plan for draining a group of houses by a combined operation, under sect. 74 of the Metropolis Management Act, 1855, was sanctioned by the vestry. The course of one of the pipes indicated in the plan, which drained more than one of the houses, was in the laying of it altered so as to run within a few feet of the course indicated in the plan.

HELD—that the pipe was a drain and not a sewer within the meaning of sect. 250 of the Metropolis Management Act, 1855, the number of houses draining into it not being added to or interfered with by the deviation from the plan sanctioned.

GREATER LONDON PROPERTY CO. *v.* FOOTE, [1899] 1 Q. B. 972; 68 L. J. Q. B. 628; 63 J. P. 420; 47 W. R. 541; 80 L. T. 390—Div. Ct.

62. *Combined Operation — Departure from Plan authorised—Owner not liable to abate Nuisance — Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 112.]—In 1855 an order of the Metropolitan Commissioners of Sewers was obtained for draining four houses in the metropolis by a combined operation. The work was carried out before January 1st, 1856, but not in accordance with the plan authorised by the Commissioners. From the group of four houses one was left out, and two others were added. A nuisance having arisen in regard to the pipe draining the group, and the owner of the houses having been required to abate the nuisance:—

HELD—that the departure from the plan authorised was material, and, there being no evidence that such departure was sanctioned by the Commissioners, the pipe was not a drain but a sewer, and that therefore the owner was not liable to abate the nuisance.

BULLOCK *v.* REEVE, (1900) 49 W. R. 93; 70 [L. J. Q. B. 42; 65 J. P. 161; 81 L. T. 55—Div. Ct.

63. *Combined Operation — Order of Local Authority —Subsequent alteration of Scheme — No fresh Order—Drain or Sewer—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 250.]—By order of the local authority in 1853 certain houses had been drained by a combined scheme. In 1899 one of the houses, No. 85, was disconnected from No. 83, and connected with the adjoining house on the other side, No. 87. No order was made by the local authority as to this alteration, but it was superintended by their officers. In 1900 the owner of No. 85 erected a workshop in the garden at the rear, and the drainage from that, including an additional watercloset, was connected with the drain of No. 87. A plan of this had been approved by the local authority, and though the work was not carried out in accordance with such plan it was done under the superintendence of the officers of the local authority.

HELD—that the drain of No. 87 had not become a sewer.

GORRINGE *v.* SHOREDITCH BOROUGH, (1902) 66 [J. P. 565; 86 L. T. 592—Div. Ct.

64. *Combined Operation — Order of Local Authority — Subsequent deviation — Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 74.]—On September 29th, 1876, an order was made by the Hackney District Board of Works for the drainage of twenty-six houses (numbered 35 to 85, odd numbers only) in Rectory Road, by a combined operation in accordance with a plan by which the houses were to be put in various groups, one of which, consisting of Nos. 45, 47, 49, and 51, was to be drained by a drain passing under No. 49.

In October, 1906, a nuisance was found to exist owing to a defect in a line of pipes passing beneath No. 51, and on examination it was found that the grouping had been altered, and that Nos. 47, 49, 51, 53, and 55 were drained together by means of a drain passing under No. 51 (instead of No. 49, as shown on the above-mentioned plan).

HELD—that as the alteration in the system of drainage was a material one, and as there was no evidence that it had been sanctioned by the local authority, the line of pipes passing under No. 51 was a sewer repairable by the borough council.

Greater London Property Co. v. *Foote* ([1899] 1 Q. B. 972; 68 L. J. Q. B. 628; 63 J. P. 420; 80 L. T. 390; 47 W. R. 541—Div. Ct.), No. 61, *supra*, applied.

HARVEY *v.* JAYE, (1907) 71 J. P. 473; 97 L. T. [543; 5 L. G. R. 967—Div. Ct.

65. *Combined Operation — Transfer of Title otherwise than by Purchase—Estoppel— Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 76, 83, 101, 250.]—A metropolitan vestry had approved a plan for the drainage of a number of houses which did not show the particular drainage of each house, but authorised the drainage of the houses in pairs by a series of combined operations. In a pair of such houses the drainage was carried off by two pipes, laid one under each house; these pipes joined into one pipe before they reached the sewer. The pipe under house A took the whole of the drainage of A, together with that from a sink in the back part of house B; the pipe under B took the rest of the drainage of B. The connection between the sink in B and the pipe under A had been made at the time when the houses and the drains were constructed. The trustees of a settlement were owners of both houses: they derived their title, without any purchase for value, from the original owner, by whom the houses and drains were constructed. The Court inferred as a fact that the connection of the sink in house B with the pipe under A was made by the authority of the surveyor to the vestry.

HELD—that that connection did not make the pipe under house A a sewer within the meaning of sects. 101 and 250 of the Metropolis Management Act, 1855.

Drainage—*Continued.*

HELD, further, that even if the connection had been made without authority the present plaintiffs, not being purchasers for value, could get no higher rights than the original owner had as against the public; and the pipe would still remain a drain.

A notice under sect. 83 of the Metropolis Management Act, 1855, had been served upon the plaintiffs by the defendants.

HELD—that it had been wrongly served (assuming that the connection had been wrongfully made), because the plaintiffs were not the persons who had made the connection originally.

Silles v. *Fulham Borough Council* ([1903] 1 K. B. 829; 72 L. J. K. B. 397; 67 J. P. 273; 51 W. R. 598; 88 L. T. 753; 19 T. L. R. 398, No. 72, *infra*—C. A.) discussed.

HEAVER AND OTHERS *v.* FULHAM CORPORATION, [1904] 2 K. B. 383; 73 L. J. K. B. 715; 68 J. P. 278; 91 L. T. 31; 20 T. L. R. 383; 2 L. G. R. 672—Channell, J.

66. *Drain or Sewer—Combined Scheme—House included in Scheme not Sanctioned by Board—Variation of Line of Pipes—Metropolis Management Act.* 1855 (18 & 19 Vict. *c.* 120), *ss.* 74, 250.]—On July 12th, 1878, a plan was approved by the H. Board of Works by which three houses, Nos. 21, 23 and 25, R. Road, were to be drained by a combined operation into E. Road. On March 19th, 1879, a plan was approved by the same local authority sanctioning a combined system of drainage by which Nos. 27, 29, 31 and 33, R. Road, were to be drained into E. Road. A nuisance having arisen in August, 1905, it was found that Nos. 21, 23, 25 and 27 were drained together by means of a line of pipes passing along the back of such houses and under No. 25 to the public sewer in R. Road, and that Nos. 29, 31 and 33 were drained together by means of a line of pipes passing at the rear of such houses into the public sewer in E. Road.

HELD—that the line of pipes draining Nos. 21, 23, 25 and 27 R. Road was a sewer repairable by the local authority and not a combined drain repairable by the owners of the houses.

Kershaw v. *Taylor* ([1895] 2 Q. B. 471; 64 L. J. M. C. 245; 59 J. P. 726; 44 W. R. 28; 73 L. T. 274—C. A.) followed.

HARVEY *v.* BUSBY, (1906) 70 J. P. 301; 95 L. T. [91; 4 L. G. R. 693—Div. Ct.

67. *Combined System of Drainage—Delegation of Authority to Surveyor by Board of Works—Order of Board of Works—Evidence—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 74, 76, 250.]—Six houses were drained by one line of pipes, and the owner of one of the houses was summoned for a nuisance caused by defect in such pipe under his premises. By a resolution dated March 24th, 1859, the district board of works authorised their surveyor to grant applications for house drainage when they were regular, involving no special point for the consideration of the board, the number of such applications to be reported quarterly. On April 9th, 1868, an application by the then owner of the said six houses for permission to drain the said six houses by a combined drain was sent to the district board of works. Such application was filed in a book kept for the purpose to contain such applications made to the district board, and signed as "approved" by the then surveyor to the board of works. There was no record or any other evidence of approval by the board or any of its committees of the said application.

HELD—that there was no evidence that the board of works had ever authorised or approved of such application, and that therefore the line of pipes draining the said six houses was a sewer and not a drain, and that the local authority were liable for its repair.

HIGH *v.* BILLINGS, (1903) 67 J. P. 388; 89 [L. T. 550; 1 L. G. R. 723—Div. Ct.

68. *Drains made without Consent of Local Authority — Liability to Repair — Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 68, 69, 74, *and* 250—*Metropolis Management Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 47.]—After the passing of the Metropolis Management Acts, 1855 and 1862, the owner of a row of houses in London drained them by laying down a line of pipes which was connected with a sewer belonging to the vestry in an adjoining street. There was no evidence that this was done by the order or with the sanction of the local authority.

HELD—that the pipes so laid down were a "sewer" within sect. 250 of the Metropolis Management Act, 1855, and that the vestry were liable to repair it.

ST. MATTHEW, BETHNAL GREEN (VESTRY OF) [*v.* LONDON SCHOOL BOARD, [1898] A. C. 190; 62 J. P. 532; 67 L. J. Q. B. 234; 77 L. T. 635; 46 W. R. 353—H. L. (E.).

69. *Nuisance—Notice to Owner to Abate—Defective Sewer—Right of Owner to Recover Amount Expended — Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *ss.* 4, 11.]—An action was brought to recover from the defendants £24, money expended by the plaintiff in carrying out work relating to the drainage of two houses, Nos. 5 and 6, Vine Street, Southwark, of which he was the owner.

Notices were served by the defendants on him under sect. 4 of the Public Health (London) Act, 1891, stating that the board were satisfied that a nuisance arose from a defective drain and requiring the abatement and reconstruction of the drain.

The plaintiff searched the records and found, as he thought, an order for a combined system of drainage, and therefore, when he found the two houses drained into one pipe, continued and finished the work. It transpired, however, that the order for the combined system of drainage applied to other houses, and therefore the defective pipe was a sewer, for the repair of which the defendants were legally liable. The plaintiff then sued the defendants for the £24, expended,

Drainage—*Continued.*

but the county court judge gave judgment for the defendants.

HELD (reversing the county court judge)—that the plaintiff could recover, as he had been legally compelled to do work which the defendants were liable to do, and, as he was liable to a penalty for not obeying the notice, he could recover the money as paid at the defendants' request.

HELD, further, that he could in any case recover the money under sect. 11, as the words "expenses of carrying the order into effect" include work done in pursuance of an abatement notice, as the defendants were the persons by whose default the nuisance arose.

ANDREW *v.* ST. OLAVE'S BOARD OF WORKS, [1898] 1 Q. B. 775; 62 J. P. 329; 67 L. J. Q. B. 592; 78 L. T. 504; 46 W. R. 424—Div. Ct.

70. *Nuisance—Intimation Notice threatening Proceedings—"Sewer" described therein as a "Drain"—Recipient executing Repairs to Sewer—Right to Recover Cost of Work from Sanitary Authority—Whether Work done Voluntary or under Compulsion—Builder fraudulently laying a Sewer instead of authorised Drain—Effect of—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *ss.* 3, 4.]—An owner, who is served with an intimation of a nuisance under sect. 3 of the Public Health (London) Act, 1891, requiring him to repair a "drain," and who thereupon complies, must be held to have done the work voluntary, and not under compulsion, although the notice contains a threat that the authority will commence proceedings against him by the service of a statutory notice, if the repairs are not done within a week. Therefore, if the so-called "drain" proves to be a "sewer," he cannot recover from the authority the cost of the repairs.

Quære, what may be the respective rights and duties of an owner and an authority where a builder, authorised to lay a "drain" from a house, has, in fraud of the authority, joined it to the drain from another house, so as to constitute it a sewer.

Thomson and Norris Manufacturing Co. v. *Hawes* ((1895), 59 J. P. 580; 73 L. T. 369—C. A.) followed.

North v. *Walthamstow Urban District Council* ((1898) 67 L. J. Q. B. 972; 62 J. P. 836—Channell, J., *see* PUBLIC HEALTH, 35) discussed.

OLIVER *v.* CAMBERWELL BOROUGH COUNCIL, [(1901) 68 J. P. 165; 52 W. R. 511; 90 L. T. 285; 2 L. G. R. 617—Div. Ct.

71. *Owner called on to Remedy Defect in "Drain"—In fact a "Sewer"—Right to Recover Cost of Work from Local Authority—Work carried out under Compulsion—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 3.]—A local authority called upon the plaintiff, a householder, to abate a nuisance arising from a defective and unventilated "drain," adding that, if it was not abated, "the borough council, as the sanitary authority, may commence proceedings against you by the service of a statutory notice": at the end of the document was printed the following notice: "If it becomes necessary through your default to serve a statutory notice, the costs incurred will be recoverable in manner provided by sect. 11 of the Public Health (London) Act, 1891."

The plaintiff did the work required, some of which was really work to a "sewer," and claimed to recover from the authority £54, the cost of that part of the work.

Wright, J. (18 T. L. R. 505) held that the plaintiff could not recover, as the work was not carried out under compulsion, or at such time as the defendants were themselves bound to carry it out.

On appeal, the C. A., without giving any decision on the merits of the case (*see* 67 J. P. 164 (n.)), suggested that the parties should consent to their assessing the amount to be paid, and judgment was entered for the plaintiff for £40.

PROCTOR *v.* BOROUGH OF ISLINGTON, (1903) [67 J. P. 164; 1 L. G. R. 652 (n.)—C. A.

72. *Rain Water Pipe from one House joining Soil Pipe from next—Notice from Authority that "Drain" is defective—Proceedings threatened—Really a "Sewer"—Owner recovering Expenses from Authority—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 250.]—A pipe carrying away sewage and rain water from one house, and rain water only from another, and not constructed as a combined operation under the order of a local authority, is a "sewer" and not a "drain."

Where the authority insisted that such a pipe was a drain, and the house owner, under threat of legal proceedings, repaired it:—

HELD—that he could recover the cost of so doing from the authority.

Holland v. *Lazarus* ((1897) 66 L. J. Q. B. 285; 61 J. P. 262—Bruce, J.) approved.

SILLES *v.* FULHAM BOROUGH COUNCIL, [1903] [1 K. B. 829; 72 L. J. K. B. 397; 67 J. P. 273; 51 W. R. 598; 88 L. T. 753; 19 T. L. R. 398; 1 L. G. R. 613—C. A.

74. *Unauthorised Connection between Drains—Houses drained by combined Operation—Consent of Vestry—Evidence—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 71, 250.]—A plan of a drain receiving the sewage of four houses was found in the plan book of a local authority, initialled by their surveyor. The drain was in fact constructed in accordance with the plan under the superintendence of the servants of the local authority, but there was no entry relating to it in their minute book. Subsequently, without the knowledge of the local authority or of the owner of the four houses, a drain from another building was constructed and connected with the first drain.

HELD, first, that there was evidence that the first drain was constructed "by order of the

Drainage — *Continued.*

local authority," within the meaning of sects. 74 and 250 of the Metropolis Management Act, 1855.

HELD, further, that when the connection with the second drain was made, the first drain became a "sewer" within the meaning of sect. 250, and was repairable by the local authority.

GEEN *v.* NEWINGTON VESTRY. [1898] 2 Q. B. [1; 62 J. P. 565; 67 L. J. Q. B. 557; 16 W. R. 624—Div. Ct.

(b) In General.

74. *Adjoining Occupiers — Right of One to send Sewage through Drain of Other — Drain Defective — Nuisance abated by Occupier of Premises with Drain — Right of Contribution — Act or Default of other Occupier — Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 120 (3).] —The plaintiff and the defendants occupied adjoining houses, and the defendants had the right of sending sewage from their house through a pipe under the plaintiff's house into the main sewer. Twelve feet of this pipe was used solely to convey sewage from the defendants' premises. Proceedings under sects. 4 and 5 of the Public Health (London) Act, 1891, having been taken against the plaintiff for a nuisance arising from the said pipe being defective, and a magistrate's order obtained, the plaintiff did the required repairs to the pipe, including the said portion of twelve feet, and brought an action in the county court to recover contribution from the defendants under sect. 120 (3) of the Public Health (London) Act, 1891. The county court judge found that there was no evidence to show that the defendants were liable to repair or make good the drain, and therefore he held that the nuisance was not caused by any act or default of the defendants, and gave judgment for the defendants.

HELD—that, as there was no evidence of any obligation on the defendants to repair any portion of the pipe on the premises occupied by the plaintiff, the decision of the county court judge was right.

Sect. 120 of the Public Health (London) Act, 1891, considered; *semble*, that section only applies where an order is obtained against one of several persons who might all have been proceeded against as responsible for causing the nuisance.

NATHAN *v.* ROUSE AND ANOTHER, [1905] [1 K. B. 527; 74 L. J. K. B. 285; 69 J. P. 135; 92 L. T. 321; 21 T. L. R. 222; 3 L. G. R. 354—Div. Ct.

75. *Agreement to receive Sewage of Outside District* — Ultra vires — *Estoppel* — *Injunction resulting in Public Nuisance — Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 135, 138, 140, 250—*Metropolis Management Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 61—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55.]—There is no provision in the Metropolis Management Act, 1855, or the Public Health Act, 1875, which authorises a parish outside the metropolitan area to send its sewage into any sewer of any parish within that area, without the consent of such latter parish.

Metropolitan Board of Works v. *London and North Western Ry. Co.* ([1880] 14 Ch. D. 521; 49 L. J. Ch. 355; 42 L. T. 830—Hall. V.-C.), approved.

The vestry of a parish inside the metropolitan area has no higher power to grant its consent to a district outside the metropolitan area to send its sewage into the drains of such vestry than the Metropolitan Board of Works had to grant a similar consent under the provision of sect. 61 of the Metropolis Management Act, 1862, as read in connection with sects. 135, 138, 140, and 250 of the Metropolis Management Act, 1855. The Metropolitan Board of Works had power under the above sections to grant such consent as above mentioned only in the form of a revocable leave and licence, but no power to grant an irrevocable licence of the kind in perpetuity, or even for a definite period.

A public body, with limited powers, which has purported to permit the doing of a certain act, the permission of which is *ultra vires* its powers, is not subsequently estopped by such permission from asserting its right to prevent what it has hitherto purported to permit, and even encouraged and agreed to allow.

The fact that, if an injunction be granted, a public nuisance will be a necessary consequence unless the persons against whom the injunction is granted take steps to prevent it, affords the latter no defence to an action for such an injunction, even if it be true that they cannot take steps to prevent the nuisance without obtaining statutory powers.

At the same time, the difficulty in which such an injunction would place the defendants will in many cases induce the Court to use its discretion, and not to exert its jurisdiction to the utmost when it is not absolutely essential to do so.

Decision of Kekewich, J. (80 L. T. 746), reversed.

ST. MARY, ISLINGTON, VESTRY *v.* HORNSEY [URBAN DISTRICT COUNCIL, [1900] 1 Ch. 695; 69 L. J. Ch. 324; 18 W. R. 401; 82 L. T. 580; 16 T. L. R. 286—C. A.

76. *Bye-law as to Drains "in" every Building — Drains through Back Yard of Building — Applicability — Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 202.]—A bye-law (No. 5) made under sect. 202 of the Metropolis Management Act, 1855, by the London County Council, and approved by the Local Government Board, provided: "Every person who shall erect a new building shall provide in every main drain or other drain in such building which shall communicate with any sewer a suitable and efficient intercepting trap"; and bye-law 21 of the same bye-laws provided: "These bye-laws shall, so far as practicable, apply to any person who shall construct or reconstruct any pipe or other means of communication with sewers, or any trap or apparatus connected therewith so

Drainage —*Continued.*

far as he shall effect any such work in any building erected before the confirmation of these bye-laws, as if the same were being constructed in a building newly erected."

HELD—that such bye-laws were not confined to drains within the walls of such building, but that the words "in such building" meant "in connection with" or "in reference to."

KINGSLAND *v.* HABEN, (1901) 68 J. P. 159 : 90 [L. T. 449 ; 2 L. G. R. 470—Div. Ct.

77. *Defective Drain—Works specified in Detail—Notice of Order — Non-compliance — Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 82, 85—*Metropolis Management (Amendment) Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 64.]—S., being the owner of certain premises, the respondents, on February 5th, served a notice on him, under the Public Health (London) Act, 1891, requiring him to abate a certain nuisance, being a defective drain.

On February 19th another notice was served, requiring him to abate the nuisance, and re-lay the drain.

On March 20th the public health committee of the respondents caused a notice to be served on him under the Metropolis Management Acts, 1855 and 1862, that the drain was defective, and requiring him to amend the same and to execute the works that the notice set out in detail. In April, S. executed certain repairs to the drain, but not those in the notice of March 20th.

On June 18th the committee reported to the respondents that they had had the report of the inspector before them, and had given directions for the statutory notices to be served on S., and they recommended that a notice be served on the appellant under the Act of 1855 requiring him to execute such works as were necessary to amend the drain which was in bad order, and that in the event of non-compliance proceedings should be taken.

On June 18th the respondents, by resolution, adopted this recommendation, and on July 14th a notice was served on S., requiring him to amend the drain, and for that purpose to execute the works that this notice set out in detail.

HELD—that the notice of July 14th was not a notice of an order within the meaning of sect. 85, and that S. could not be convicted for non-compliance.

Whether under sect. 85 the necessary works can be specified in detail, *quære*.

SWINBOURN *v.* HAMMERSMITH CORPORATION, [(1903) 67 J. P. 259 ; 88 L. T. 596 ; 2 L. G. R. 280—Div. Ct.

78. *Direction of Local Authority — New Drainage System—Direction as to removal of old disused Drains—Non-compliance with Direction—Validity of Direction—Ss.* 83 *and* 76 *of the Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120).]—The appellants, in making certain drains and connected works at Everington Street Board School, Fulham, in the metropolis, were directed by the respondents that all "old brick and other disused drains at Everington Street Board School be broken up and destroyed, and the materials forming them and all foul and sewage-charged earth and other substances carefully removed from the premises, dry earth or ballast or brick rubbish being brought in if necessary in the place of them." When the drains and connected works were laid, the appellants' agents undertook to comply with the respondents' regulations and bye-laws, of which the above-mentioned direction was one purporting to have been made under the Metropolis Management Act, 1855. The drains and connected works were thereupon connected with the sewer by order of the respondents. The appellants did not comply with the above-mentioned direction, and they were fined by a metropolitan magistrate on the ground that the drains and connected works were found on inspection not to have been made or provided according to the directions and regulations of the respondents within the terms of sect. 83 of the Metropolis Management Act, 1855.

HELD—that, having regard to sects. 83 and 76 of the Metropolis Management Act, 1855, the decision of the magistrate was right.

LONDON SCHOOL BOARD *v.* FULHAM BOROUGH [COUNCIL, (1904) 68 J. P. 117 ; 90 L. T. 116 ; 2 L. G. R. 409—Div. Ct.

79. *Drainage by Gravitation — Dwellings on Land below Trinity High Water Mark — So situate as not to admit of being drained by Gravitation into an existing Sewer of the Council —Sewer unable to be used in Cases of Flood or heavy Rainfall—Time for commencing Proceedings — Six Months from "Erection" — London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 122, 200 (9).]—The appellant began to erect in July, 1902, certain houses on land the surface of which was below the level of Trinity high water mark. The houses were drained into a sewer, the property of the Greenwich Borough Council, called the Ransom Road sewer. This sewer led into the main outfall sewer of the respondents. In times of flood or moderate rainfall the outfall sewer became full and surcharged, and the effect upon the Ransom Road sewer was that no sewage or drainage could pass away from it, and it necessarily became more or less full. The houses were covered in in November, 1902. The information was laid on January 28th, 1903.

HELD—that the houses erected by the appellant did admit of being drained by gravitation into an existing sewer of the council, and that the appellant had committed no offence under sect. 122 of the London Building Act, 1894, but that the informations were not out of time though laid more than six months after the commencement of the erection of the dwelling-houses.

ELLIS *v.* LONDON COUNTY COUNCIL, [1904] 1 [K. B. 283 ; 73 L. J. K. B. 151 ; 68 J. P. 99 ; 52 W. R. 381 ; 90 L. T. 206 ; 2 L. G. R. 147—Div. Ct.

80. *Draining into the Thames—Notice to discontinue such Drainage—Cost of constructing*

Drainage—*Continued.*

Sewer—Thames Conservancy Act, 1894 (57 & 58 Vict. *c.* clxxxvii.), *s.* 94—*Metropolis Management Acts*, 1855 (18 & 19 Vict. *c.* 120), *s.* 135, *and* 1858 (21 & 22 Vict. *c.* 104), *s.* 1.]—Before the passing of the Metropolis Management Act, 1855, a drain was laid, with the consent of the Metropolitan Commissioners of Sewers, by which certain houses were drained into the Thames. In 1903 the Thames Conservators gave notice to the plaintiffs, who were the successors of the vestry, under sect. 94 of the Thames Conservancy Act, 1894, requiring them to discontinue the passage of sewage into the Thames from the said houses; and the plaintiffs constructed a sewer to take such sewage into an existing sewer by which it was carried into the main drainage sewer.

In an action brought for a declaration that the London County Council were liable to carry out the necessary works for preventing the sewage of the houses from passing into the Thames, and also to recover the amount expended upon the sewer by the plaintiffs as money paid for and at the request of the London County Council:—

HELD—that the London County Council were not by reason of the Metropolis Management Acts, 1855, s. 135, and 1858, s. 1, under any obligation to construct or pay for the construction of the sewer.

WESTMINSTER CORPORATION *v.* LONDON [COUNTY COUNCIL, [1906] 2 K. B. 379; 75 L. J. K. B. 549; 70 J. P. 390; 54 W. R. 616; 94 L. T. 791; 22 T. L. R. 593; 4 L. G. R. 655 Bray, J.

81. *Duty of London County Council to provide Sewerage — Sewer a Nuisance* — Mandamus — *Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 135.]—Sect. 135 of the Metropolis Management Act, 1855, when speaking of draining the metropolis means all parts of the metropolis, and, although the drainage may be perfectly good in most parts of the metropolis, yet a part not drained has *primâ facie* a right to complain and ask for a *mandamus* compelling the London County Council to drain it, the character of the sewer being entirely in their discretion.

If the London County Council do not take all due care or diligence not to allow the sewer to be a nuisance, a *mandamus* will be granted to compel them to keep the sewer so as not to be a nuisance.

LEE DISTRICT BOARD *v.* LONDON COUNTY [COUNCIL, (1900) 82 L. T. 306—C. A.

82. *General Regulations issued by Vestry as to Drainage—Validity of Regulations—Fresh Regulations—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 76—*Metropolis Management Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 64.]—The appellant on February 23rd, 1899, gave notice to the respondents under sect. 76 of the Metropolis Management Act, 1855, on a form supplied by the respondents, of his intention to make certain drains to houses. The appellant's plan was returned approved by the respondents. On August 2nd respondents sent to the appellant a printed copy of "Regulations and directions of the vestry of the parish of Fulham as to the drainage of houses and buildings, and the construction of waterclosets, &c." Later the respondents' surveyor objected that certain inspection chambers were not made in accordance with the regulations.

HELD—that the respondents had exercised their discretion, and that it was not necessary for the respondents to make a fresh regulation as to each particular case, and that the general regulations must be complied with.

FROST *v.* FULHAM VESTRY, (1900) 64 J. P. 629; [82 L. T. 720—Div. Ct.

83. *House Drainage—Notice to alter System of Drainage—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76).]—The appellants, the vestry for the parish of Hammersmith, gave notice to the respondent to carry out certain alterations by cutting off the rain pipe from the main drain, such pipe having been put up before the passing of the Public Health (London) Act, 1891, and not being alleged to be in a defective condition, nor a matter as to which bye-laws could be made under sect. 39 of that Act.

HELD—that no offence had been committed under the Act which the Court could deal with.

HAMMERSMITH VESTRY *v.* AINSWORTH, (1898) [62 J. P. 103—Div. Ct.

84. *Metropolitan Drainage System—Prescriptive Right to Drain into—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120)—*London County Council (Acton Sewage) Act*, 1898 (61 & 62 Vict. *c.* cxliii.), *s.* 3 (1) (a).]—Before the passing of the Metropolis Management Act, 1855, certain houses in the Acton district drained into the Stamford Brook sewers, which connected with the Metropolitan Drainage system. By sect. 3 (1) (a) of the London County Council (Acton Sewage) Act, 1898, the Acton Urban Council were to pay to the London County Council, in respect of the future use of the Metropolitan main drainage system, a sum based upon the rateable value of the property within their district which drained into the Metropolitan system, other than houses or buildings which had acquired a prescriptive right to drain into the Stamford Brook sewers.

HELD—that, as no houses since the passing of the Metropolis Management Act, 1855, acquire by prescription a right to drain into a sewer discharging into the Metropolitan drainage system, in ascertaining the sum to be paid, the rateable value of houses connected with the Stamford Brook sewers before the Act of 1855 alone came within the exemption.

Decision of Ridley, J. ([1901] 17 T. L. R. 157) affirmed.

LONDON COUNTY COUNCIL *v.* ACTON URBAN [DISTRICT COUNCIL, (1902) 18 T. L. R. 689—C. A.

85. *New Building for Volunteer Purposes—Draining to Public Sewer—Exemption—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120),

Drainage—*Continued.*

s. 75.]—The appellants served a summons under sect. 75 of the Metropolis Management Act, 1855, upon the respondent, a builder, alleging that he had neglected to comply with their order that the lowest floor of a building in course of construction to be used as an armoury, store house, and drill hall by the 2nd Volunteer Battalion of Royal Fusiliers, and vested in their commanding officer, should be kept at such a level as would allow it to be drained into the public sewers. The magistrate dismissed the summons on the ground that the premises were exempted from the provisions of the Act as being property vested in a servant of the Crown, to be used exclusively for Crown purposes.

HELD, on appeal, that the building was not exempt because it was intended for Volunteer purposes, and that the matter must be remitted to the magistrate.

WESTMINSTER VESTRY *v.* HOSKINS, [1899] 2 [Q. B. 174; 68 L. J. Q. B. 810; 63 J. P. 725; 47 W. R. 649; 81 L. T. 390; 15 T. L. R. 414—Div. Ct.

86. *Permission to lay a Drain—"Order" of Vestry — Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 76.]—The respondent applied to the vestry for permission to lay a pipe drain in accordance with a plan. He was told by the surveyor of the vestry, by a letter, that he would be allowed to do so with certain alterations, and that that would be communicated to the vestry, the sanitary authority. This letter was ratified by a resolution of the vestry.

HELD—that the letter of the surveyor, ratified by the resolution of the vestry, was a good "order" within sect. 76 of the Metropolis Management Act, 1855.

STOKES *v.* HAYDON, (1901) 65 J. P. 756; 84 L. T. [531; 19 Cox, C. C. 690—Div. Ct.

87. *Obligation to make Sewers—Character of Sewers—Discretion—Duty of Council—Nuisance—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 135.]—Sect. 135 of the Metropolis Management Act, 1855, imposed upon the Board of Works the absolute obligation of making the sewers therein referred to, though it left the character of the sewers in the discretion of the Board. It further imposed on them a duty to keep their sewers in such a way as not to be a nuisance, or injurious to health. The result of making the main sewer on the southern side of the Thames resulted in a most abominable nuisance to the district of Charlton, within the administrative county of London. The county council might have put up a new pumping station, or they might have established a duplicate system of drainage at Crossness, or they might have adopted a scheme of storm overflows: yet they did nothing to remedy the state of affairs.

HELD—that the answers which the council had made, as to expense or otherwise, afforded no excuse for their doing nothing to remedy the state of affairs; that the county council had not performed the duty imposed on them of making the sewers required by the section; that they had not taken all care and diligence to keep their sewers so as not to be a nuisance, and that the rule ought to be made absolute for a *mandamus* to construct such works as might be necessary.

REG. *v.* LONDON COUNTY COUNCIL, (1900) 64 [J. P. 20; 16 T. L. R. 89—C. A.

88. *Old Drain restored on Old Level on New Concrete Bed—One Old Pipe and Gully replaced—Four New Pipes and Gully—"Reconstruction" or "Repair"—Bye-laws of London County Council made under sect. 202 of the Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120.]—A surface water drain in a yard, carrying slop water from a sink, which was not laid on concrete or ventilated, communicated with a sewer. A notice in respect of this drain having been served on the owner by the sanitary authority, he broke the socket of a pipe close to the sewer and removed five pipes and two gullies. Having laid a bed of concrete, he laid thereon four new lengths of pipe and a new gully and connection, replacing one old length of pipe and gully which had been at the other end of the drain to the sewer. This line of pipes was laid on the same line and on the same level as the old line, but it was not ventilated.

HELD—that the owner had "reconstructed" a drain within the meaning of certain bye-laws (Nos. 2 and 21) made by the London County Council under sect. 202 of the Metropolis Management Act, 1855.

AGAR *v.* NOKES AND NOKES, (1905) 69 J. P. 374; [3 L. G. R. 1168; 93 L. T. 605—Div. Ct.

IV. HACKNEY CARRIAGES.

89. *Cabs—Negligence of Driver—Proprietors of a Cab in Partnership—One Partner only Registered Proprietor of the Cab—Common Law Relation of Bailor and Bailee—Statutory Relation of Master and Servant—London Hackney Carriages Act*, 1843 (6 & 7 Vict. *c.* 86), *ss.* 2, 28, 35—*Metropolitan Public Carriage Act*, 1869 (32 & 33 Vict. *c.* 115), *s.* 6.]—At common law where a proprietor lets his cab to a driver the relation existing between them is that of bailor and bailee; but since the London Hackney Carriages Acts the result of the authorities is that the cab-driver must, as regards the general public, be assumed to be for all purposes the servant of the cab proprietor.

Through the negligence of the driver of a cab licensed to ply in the metropolis, the cab came into collision with a vehicle in which the plaintiff was riding, and personal injuries were thereby occasioned to the plaintiff. The defendants were mother and son, and there was a partnership between them in the business of cab proprietors. The son was registered proprietor of the cab in question. The cab was let to the cab-driver from day to day in the ordinary way to be employed by him free of control, he having to pay so much per day to the proprietors, and retaining any surplus for himself

Hackney Carriages—*Continued.*

HELD—that the mother being a partner with her son in the business of cab proprietors was liable ; and that the son having obtained a licence in his own name must be taken to have obtained it in that name as the trade name of the partnership for that purpose.

GATES *v.* R. BILL & SON, [1902] 2 K. B. 38 ; 71 [L. J. K. B. 702 ; 50 W. R. 546 ; 87 L. T. 288 ; 18 T. L. R. 592—C. A.

90. *Cabs—Obstruction of Street—Power to give Directions to Constables—Metropolitan Police Act*, 1839 (2 & 3 Vict. *c.* 47), *s.* 52—*Metropolitan Streets Act*, 1867 (30 & 31 Vict. *c.* 134), *s.* 11—*London Hackney Carriages Act*, 1843 (6 & 7 Vict. *c.* 86), *s.* 33.]—The Commissioners of Police gave directions under sect. 52 of the Metropolitan Police Act, 1839, to constables to turn empty cabs that were being driven at a walk out of the Strand into the side streets, in order to prevent obstruction. The driver of an empty cab, upon being directed by a constable, refused to turn out of the Strand, and an obstruction was caused thereby. Upon an information for a penalty against the cab-driver, under sect. 33 of the London Hackney Carriages Act, 1843, for causing an obstruction in the Strand by wilful misbehaviour, the magistrate found that the cab-driver knew of the directions, and that the Strand on the day in question was liable to be obstructed, and that the directions were lawful and reasonable for preventing obstruction. He accordingly convicted the driver.

HELD—that the Commissioners had power to give the directions under sect. 52 of the Act of 1839, though no regulations were made and published under sect. 11 of the Metropolitan Streets Act, 1867 ; and that, therefore, the driver was liable to be convicted for causing an obstruction by wilful misbehaviour.

REG. *v.* LUSHINGTON, EX PARTE KEEN, (1899) [15 T. L. R. 388—Div. Ct.

V. NUISANCES, &c.

And see title NUISANCE.

(a) Offensive Trades.

91. *Offensive Trade or Business—Gut-scraper—Trade where Gut is dealt with otherwise than for the Manufacture of Catgut—Prohibited Business—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *ss.* 19 (1) (b), 142 (2) (b)—*Order of Metropolitan Board of Works, November 19th*, 1880.]—By an order made in pursuance of sect. 3 of the Slaughterhouses Act, 1874, "the business of a gut-scraper, that is to say, any business in which gut is cleaned, scraped, or dealt with otherwise than for the manufacture of catgut," was declared an offensive business, and was not to be carried out anew without the sanction of the local authority. Sect. 3 of that Act was repealed by the Public Health (London) Act, 1891, but was re-enacted by the same statute, which made the consent of the county council necessary. The respondents purchased from gut-scrapers the guts of sheep which had been previously cleaned and scraped, to use as sausage cases, and their business consisted of sorting the guts into different lengths and sizes before supplying them to sausage makers.

HELD—that this was not a prohibited business.

LONDON COUNTY COUNCIL *v.* HIRSCH, (1899) [63 J. P. 822 ; 81 L. T. 447—Div. Ct.

(b) Removal of Refuse.

92. *House Refuse—Failure to remove without reasonable Cause—Notice to place Refuse on the Kerbstone—Bye-law — Reasonableness — Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 30.]—By a bye-law made by the London County Council under the Public Health (London) Act, 1891, it was provided that "Where a sanitary authority arrange for the daily removal of house refuse in their district or any part thereof, the occupier of any premises in such district or part thereof in which any house refuse may from time to time accumulate shall, at such hour of the day as the sanitary authority shall fix and notify by public announcements in their district, deposit on the kerbstone or on the outer edge of the footpath immediately in front of the house, or in a conveniently accessible position on the premises, as the sanitary authority may prescribe by written notice served upon the occupier, a movable receptacle in which shall be placed, for the purposes of removal by or on behalf of the sanitary authority, the house refuse which has accumulated on such premises since the preceding collection by such authority. The sanitary authority shall collect such refuse or cause the same to be collected between the hours of the day as they have fixed and notified by public announcement in their district." The appellants, in pursuance of such bye-law, issued a public notice requiring the occupiers in a specified portion of the borough to deposit on the kerb or edge of the footpath immediately in front of their respective houses a movable receptacle in which should be placed for the purposes of removal the house refuse. A printed circular was also issued to the occupiers explanatory of the said notice. The respondent, who was an occupier of a detached house standing some 40 feet from the highway, refused to put his house refuse on the kerbstone, but was willing to provide a convenient place on his premises where the house refuse might be placed for removal. The appellants refused to remove the respondent's house refuse unless it was placed by him on the kerbstone.

HELD—that a general notice such as that issued by the appellants was not such a prescription of a convenient place as was contemplated by the bye-laws; and that, therefore, the appellants could be convicted of refusing to remove the respondent's house refuse without reasonable cause.

WANDSWORTH BOROUGH COUNCIL *v.* BAINES, [1906] 1 K. B. 470 ; 75 L. J. K. B. 158 ; 70 J. P. 124 ; 54 W. R. 457 ; 94 L. T. 211 ; 22 T. L. R. 220 ; 4 L. G. R. 257—Div. Ct.

93. *House Refuse—Trade Refuse—Decision of Magistrate—Right of Appeal—Public Health*

Nuisances—*Continued.*

(London) Act, 1891 (54 & 55 Vict. *c.* 76), *s.* 33.]—Where a dispute arises between a sanitary authority and the owner or occupier of any premises within the district as to whether any particular refuse is house refuse or trade refuse within the meaning of the Public Health (London) Act, 1891, and the matter is brought before a magistrate under sect. 33 (2), the decision of the magistrate on the question is final, and no appeal will lie from it by way of special case or otherwise.

But, *semble*, per Buckley, L.J., if the decision is expressed by the magistrate to be made subject to a case stated by him, the Divisional Court may consider the question.

R. v. *Bridge* ((1890) 24 Q. B. D. 609 ; 59 L. J. M. C. 49 ; 54 J. P. 629; 62 L. T. 297 ; 38 W. R. 464 ; 17 Cox, C. C. 66—Div. Ct.) distinguished.

Decision of Div. Ct. ([1906] 2 K. B. 39 ; 75 L. J. K. B. 438 ; 70 J. P. 528 ; 94 L. T. 251 ; 22 T. L. R. 439 ; 4 L. G. R. 538) affirmed on another ground.

WESTMINSTER CORPORATION *v.* GORDON [HOTELS, LD., [1907] 1 K. B. 910 ; 76 L. J. K. B. 482 ; 71 J. P. 200 ; 96 L. T. 535 ; 23 T. L. R. 387 ; 5. L. G. R. 545—C. A.

Affirmed H. L., March 6th, 1908, 24 T. L. R. 402.

(c) Smoke.

94. *Black Smoke issuing from Chimney of Club — "Private Dwelling-house" — Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 24 (b).]—The respondent was the secretary of a West-end London club, consisting of 750 members, with the usual accommodation for such members and a staff of servants resident on the premises. The smoke from the cooking ranges and heating furnace passed up one chimney, which emitted black smoke in such quantity as to be a nuisance.

HELD—that the club did not come within the exception of "private dwelling-house" in sect. 24 (b) of the Public Health (London) Act, 1891 (54 & 55 Vict. *c.* 76).

M'NAIR *v.* BAKER, [1904] 1 K. B. 208 ; 73 L. J. [K. B. 120 ; 68 J. P. 66 ; 90 L. T. 24 ; 20 T. L. R. 95 ; 2 L. G. R. 143—Div. Ct.

95. *Black Smoke from Funnel of Steamer—Chimney—No Works specified in Order—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 24 (b).]—The appellant, the owner of a steamship on the Thames, was summoned for a nuisance, under sect. 24 (b) of the Public Health (London) Act, 1891, caused by the emission of black smoke from the funnel of the steamship. The magistrate made a prohibition order, but, though asked by the appellant, did not specify any works to be done to abate the nuisance.

HELD—that the funnel of a steamship is a chimney within the meaning of sect. 24 (b) of the Public Health (London) Act, 1891, and that as the magistrate had found that the only remedy for the nuisance was proper stoking, the order was not bad because it did not specify any works to be carried out.

TOUGH *v.* HOPKINS, [1904] 1 K. B. 804 ; 73 [L. J. K. B. 628 ; 68 J. P. 274 ; 52 W. R. 605 ; 90 L. T. 672 ; 20 T. L. R. 323 ; 9 Asp. M. C. 562 ; 20 Cox, C. C. 650—Div. Ct.

96. *Black Smoke—Notice to Abate—Prohibition Order—Specification of Works necessary to be done—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *ss.* 4 (1), 51 (b).]—The respondents, by their sanitary inspector, served a notice, dated February 5th, on the appellants that a chimney belonging to them was sending forth black smoke in such quantities as to be a nuisance on January 22nd, and that, although the nuisance had been abated, it was likely to recur, and the appellants were thereby required to do such things as might be necessary to prevent the recurrence of such nuisance. On April 8th six summonses were taken out against the appellants. The summonses were heard, and the appellants, while denying the nuisance, suggested that if any such nuisance occurred it was due to two furnace doors being opened at one time. The magistrate decided to make a prohibition order, and was then asked by the appellants to specify the works in such order, though they objected to his hearing any evidence on behalf of the respondents, as their case was closed. The magistrate made a prohibition order without hearing further evidence, and directed in such order that the appellants should fit up such apparatus as should prevent more than one furnace door being open at the same time.

HELD—that the magistrate, under the circumstances, was entitled to make a prohibition order, and that it was not necessary for him to specify the works in such order when the nuisance complained of was one arising from black smoke.

CENTRAL LONDON RY. CO. *v.* HAMMERSMITH [BOROUGH COUNCIL, (1904) 73 L. J. K. B. 623 ; 68 J. P. 217 ; 90 L. T. 645 ; 20 Cox, C. C. 633—Div. Ct.

97. *Black Smoke—Notice to Abate—Lapse of Time—Recurrence of Nuisance — Connection between Occurrences — Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76, *s.* 4]—The appellants gave notice to the respondent on March 18th, 1904, under sect. 4 of the Public Health (London) Act, 1891, forthwith to abate, and within the like period to prevent the recurrence of, a nuisance consisting of black smoke issuing from the chimney of a bakehouse. No further nuisance was observed till January 5th, 1906, when the chimney was seen to send forth black smoke in such a quantity as to be a nuisance. The appellants thereupon summoned the respondent for making default in complying with the notice of March 18th, 1904. The magistrate held upon the evidence that it must be assumed that immediately on receipt of the notice the nuisance was abated, and he dismissed the summons.

HELD—that it was open to the magistrate to

Nuisances—*Continued.*

hold that the two occurrences were not connected with one another, and to decide as he had done.

Battersea Borough Council *v.* Goerg, [(1907) 71 J. P. 11; 5 L. G. R. 62—Div. Ct.

98. *Black Smoke—Sending forth on a Series of Days—Evidence—Injury to Person or Property—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 24 (b).]—In order to support a conviction under sect. 24, sub-sect. (b), of the Public Health (London) Act, 1891, it is not necessary to show that any particular person or property has been annoyed or injured by the smoke. A magistrate who had found as a fact that on each of the several days mentioned in the complaints the smoke amounted to a nuisance, was entitled in arriving at that conclusion to take into consideration the fact that the subject-matter of each complaint was not the issue of smoke upon an isolated occasion, but upon one of a series of days. He might have declined to convict in respect of those days on which the issue of smoke was the least, but he could convict in respect of all if there was evidence to justify him in so doing.

South London Electric Supply Corpora- [tion *v.* Perrin, [1901] 2 K. B. 186; 70 L. J. K. B. 643; 65 J. P. 627; 49 W. R. 539; 84 L. T. 630; 17 T. L. R. 475; 19 Cox, C. C. 717—Div. Ct.

(d) In General.

99. *Food—Condemnation by Justice—Jurisdiction of Magistrate—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 47.]—A magistrate, when an article of food is seized and brought before him in order to be condemned under sect. 47 of the Public Health (London) Act, 1891, has only jurisdiction to decide whether it is unsound or unwholesome or unfit for the food of man, and cannot inquire whether it was intended for the food of man, or was sold or exposed for sale, or deposited in any place for the purpose of sale.

Thomas *v.* Van Os, [1900] 2 Q. B. 448; 69 [L. J. Q. B. 665; 64 J. P. 582; 49 W. R. 57; 82 L. T. 845; 16 T. L. R. 388—Div. Ct.

And see under Food and Drugs.

VI. OFFICERS.

And see Education; Public Authorities.

100. *Clerk of the Peace—"Not less Salaries or Remuneration"—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *ss.* 115, 118, 119.]—It was specially provided by the Local Government Act, 1888, sect. 118, that the person who had acted for the county of Surrey in Newington as clerk of the peace at the quarter sessions should for the purpose of future business at those sessions in the county of London, continue to be the clerk of the peace for those sessions, and be deemed to be clerk of the peace for London at those sessions. By sect. 115 of the Act, fees payable to clerks of the peace in the county of London were lower than the old Surrey scale.

Held—that the clerk of the peace of Surrey was by sect. 119 of the Act entitled to receive not less remuneration, whether by salary or by fees, than at the passing of the Act, though on this construction he might receive more than he was entitled to.

Wyatt *v.* London County Council, (1902) 66 [J. P. 325; 85 L. T. 629; 18 T. L. R. 110 (161 for minutes of judgment)—Wright, J.

101. *Officers—Compensation on Abolition of Office, Assessment of—Exercise of Discretion by Local Authority—Practice of Treasury—Appeal to Treasury—Mandamus—Adequate Remedy—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 120—*Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 81—*London Government Act*, 1899 (62 & 63 Vict. *c.* 14), *s.* 30.]—It is now well established that if a body who are charged with the performance of a public duty do not discharge it, a *mandamus* will lie to compel them to discharge it; or if an inferior Court do not entertain a case which it ought to entertain, a *mandamus* will lie to compel it to entertain it. It is equally clear that if there is an effective alternative, the Court has a discretion as to whether or not it will grant a writ of *mandamus;* and, as a rule, the Court does not grant the writ where there is a sufficient alternative remedy.

The duty of a local authority in fixing compensation to an officer, whose office has been abolished, under sect. 120 of the Local Government Act, 1888, is by sub-sect. 1 to have regard "to the conditions on which his appointment was made, to the nature of his office or employment, to the duration of his service, to any additional emoluments which he acquires by virtue of this Act, or of anything done in pursuance of or in consequence of this Act, and to the emoluments which he might have acquired if he had not refused to accept any office offered by any council or other body acting under this Act, and to all the other circumstance of the case, and the compensation shall not exceed the amount which, under the Act and Rules relating to Her Majesty's Civil Service, is paid to a person on abolition of office." The local authority ought, in the first place, to exercise their discretion upon the circumstances of the officer's particular case, and o assess the compensation with regard to them, and it is not an adequate remedy to say that the Treasury can, under sub-sect. 4 of sect. 120, fulfil the same function and discharge the same duty, even though they have not had the assistance of the exercise of the discretion of the local authority.

A *mandamus* lies to compel a London local authority, who in assessing the compensation to be paid on the abolition of an office had merely written to the Treasury and found out what they were in the habit of giving, and acted upon what the Treasury told them was their practice, to consider the matter, having regard to the circumstances of the particular case.

Rex *v.* Stepney Corporation, [1902] 1 K. B. [317; 71 L. J. K. B. 238; 66 J. P. 183; 50 W. R. 412; 86 L. T. 21; 18 T. L. R. 98—Div. Ct.

Officers —*Continued.*

102. *Officers—Compensation for Abolition of Office—Salary and Emoluments—Metropolitan Borough Council*—Ultra Vires—*Rescission of Resolution—Superannuation Act*, 1859 (22 Vict. *c.* 26), *ss.* 2, 7—*Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 120—*Local Government Act*, 1894, (56 & 57 Vict. *c.* 73), *s.* 81—*London Government Act*, 1889 (62 & 63 Vict. *c.* 14), *s.* 30.]—The plaintiff was an officer of a vestry, which was abolished by the London Government Act, 1899, and which was succeeded by the defendant council. The plaintiff's office was also abolished. By a resolution passed in August, 1901, the defendants fixed the allowance to be paid to the plaintiff at £518, being thirty-seven sixtieths of his average salary and emoluments for the five years next before the date of the abolition of his office. In November, 1902, they passed a resolution purporting to rescind that of August, 1901, and fixing the plaintiff's allowance at £432, the salary and emoluments on which it was calculated being taken at a less figure than before. but the proportion thereof remaining the same as in the previous resolution.

HELD—that the amount of the allowance was for the local authority to determine under sect. 120 of the Local Government Act, 1888, subject to an appeal to the Treasury, and, as the local authority had determined it, the Court could not interfere.

HELD, further, that the sum fixed by the resolution of August, 1901, at once became a specialty debt, by virtue of sect. 120 (6) of the Act of 1888, and the defendants had, therefore, no power to rescind that resolution.

LIVINGSTONE *v.* WESTMINSTER CORPORATION, [[1904] 2 K. B. 109 ; 73 L. J. K. B. 434 ; 68 J. P. 276 ; 52 W. R. 395 ; 20 T. L. R. 361 ; 2 L. G. R. 581—Buckley, J.

VII. RATES.

See Sect. X. WATER SUPPLY.
And see title RATES AND RATING.

103. *Assessment—Artizans' Dwellings—Gross Value—Sum paid for Cleaning, Lighting and Watching of Common Staircase — Valuation (Metropolis) Act*, 1869 (32 & 33 Vict. *c.* 67), *s.* 4.] —The owner of a building containing a large number of tenements, separately occupied as artizans' dwellings, and having staircases common to several tenements, employed P. as his agent to collect the rents. Each tenant, in addition to the rent, paid to P. a weekly sum for the cleaning, lighting, and watching of the common staircase, and for removing the dust.

HELD—that the weekly sum so paid was properly taken into account in arriving at the gross value of the tenements under sect. 4 of the Valuation (Metropolis) Act, 1869, for the purpose of rating the owner in respect thereof.

PULLEN *v.* ST. SAVIOUR'S UNION, [1900] 1 Q. B. [138 ; 69 L. J. Q. B. 139 ; 48 W. R. 186 ; 81 L. T. 583—Div. Ct.

104. *Exemption—Society exclusively for Purposes of Science—Manufacture and Sale of Medicines—Supported in Part by Donations and Subscriptions — Scientific Societies Act*, 1843 (6 & 7 Vict. *c.* 36), *s.* 1.]—The main object of a society was the manufacture of certain medicines which had been found of the utmost value in preventing and curing certain diseases, but which demanded the greatest skill in their manufacture. and which could only be properly manufactured by some such society as this. Having succeeded in manufacturing the materials or medicines of the necessary purity, they then sold them ; but as the prices charged or obtained for them were not sufficient to maintain the institution, it sought and obtained subscriptions and donations which enabled it to continue its most valuable work.

HELD—that the institute was not exempt under the Scientific Societies Act, 1843, from being assessed or rated and from the liability to the payment of rates.

JENNER INSTITUTE OF PREVENTIVE MEDICINE [*r.* ST. GEORGE'S, HANOVER SQUARE, ASSESSMENT COMMITTEE AND SURVEYOR OF TAXES, (1900) 69 L. J. Q. B. 814 ; 83 L. T. 344 ; 16 T. L. R. 444—Div. Ct.

105. *Goods seized by Sheriff—Withdrawal of Sheriff without paying Rate—Liability of Sheriff for Rate*—35 Geo. 3, *c.* 73, *s.* 195—*Metropolis Management Act*. 1855 (17 & 18 Vict. *c.* 120). *ss.* 161, 250.]—The defendant seized under a writ of *fi. fa.* the goods of a person liable to pay rates, comprising a poor rate and a general rate. The plaintiffs, by their collector, made a demand upon the defendant under sect. 195 of a local Act (35 Geo. 3, c. 73), to pay the sum due from the owner of the goods. The amount for which the execution was levied was paid, and the sheriff went out of possession.

HELD—that the goods were "taken in execution" within the meaning of sect. 195 of the local Act.

HELD, also, that the owner of the goods seized was liable to pay the poor rate "by virtue of" the local Act, and that sect. 161 of the Metropolis Management Act. 1855, made the powers given by sect. 195 of the local Act in respect of the poor rate applicable to the general rate, and that therefore the defendant was liable.

Judgment of Bigham, J. ([1900] 1 Q. B. 111 ; 69 L. J. Q. B. 69 ; 16 T. L. R. 50) affirmed.

MARYLEBONE VESTRY *v.* SHERIFF OF LONDON, [1900] 2 Q. B. 591 ; 69 L. J. Q. B. 848 ; 64 J. P. 628 ; 16 T. L. R. 512—C. A.

106. "*Name of Person liable to be Rated Omitted*"—"*Person described by Wrong Name*" —*Power of Magistrate to Insert a Correct Name —Valuation (Metropolis) Act*, 1869 (32 & 33 Vict. *c.* 67), *s.* 72.]—The respondent was at all material times the occupier of certain premises used as a club, but by mistake his predecessor's name was entered in a rate as the occupier. Two days after the expiration of the half year for which the rate in question was levied, a summons

Rates—*Continued.*

was taken out to have the respondent's name inserted in the rate under sect. 72 of the Valuation (Metropolis) Act, 1869. The magistrate dismissed the summons.

HELD—that the magistrate was wrong. The respondent had admittedly been in occupation for the whole period covered by the rate, and was therefore "liable to be rated," and his name was "omitted" within the meaning of sect. 72. The fact that the summons was not taken out until after the expiration of the half year was immaterial.

WESTMINSTER CORPORATION *v.* EDGCOMBE, [(1903) 67 J. P. 25—Div. Ct.

107. *Poor Rate—Increase of Rental after a Quinquennial Valuation—Insertion in next year's Supplemental List—"Alteration in Value"—Valuation (Metropolis) Act*, 1869 (32 & 33 Vict. *c.* 67), *s.* 46.]—The County of London Assessment Sessions, in accordance with their previous decision in *Stunt* v. *Lewisham Union*, (1902) 66 J. P. 167, ruled that a substantial increase in weekly rentals is an "alteration in value" within the meaning of sect. 46 of the Metropolis Valuation Act, 1869, and justifies the insertion of the property in a supplemental list.

KYFFIN *v.* WOOLWICH UNION ASSESSMENT [COMMITTEE, (1903) 67 J. P. 100—Loveland-Loveland, K.C.

108. *Poor Rate—Partial Exemption in respect of Land covered with Water—Protection of Exemption—Woolwich and Other Places—Effect of Valuation List—Objection Thereto—Division of Assessment—Right of Appeal—London Government Act*, 1899 (62 & 63 Vict. *c.* 14), *ss.* 10, 19—*Poor Relief Act*, 1743 (17 Geo. 2, *c.* 38), *s.* 4.]—Prior to the passing of the London Government Act, 1899, the district of Woolwich was subject to the Public Health Act, 1875, under sect. 211 of which there was an exemption in respect of land covered with water, providing that it should be rated upon one-fourth only of its annual value for certain rates. The district was also subject at that time to the Valuation (Metropolis) Act, 1869, and therefore, for the purposes of rating procedure, the provisions of that Act applied. By sect. 9, sub-sect. 1, of the Act of 1899 it was provided that a scheme under the Act should provide for placing Woolwich under the general law applicable to Metropolitan boroughs, and for the repeal of the application thereto of the Public Health Acts; and, by sect. 10, sub-sect. 1, that a scheme under the Act should provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of separate sewers and lighting rates, but should make provision for protecting the interests of owners and occupiers of any hereditament which was exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments. The London (Rating) Scheme, 1901, by sect. 2, sub-sect. 1, provided for maintaining the exemption by a particular method of levying the rate. The question arose upon the valuation list for 1900. The respondents sought to charge the appellants upon the full assessment.

HELD—that although Woolwich and other outlying places were to come within the Metropolis generally, yet the exemption given by sect. 211 was to continue; that the old right of appeal remained; that the effect of the valuation list for this purpose was only that the total valuation was conclusive, or, if there had been a division of the assessment made in the valuation list, the valuation of each divided part was conclusive, but the appellants were not bound to have the division made in the valuation list; and that, therefore, the appellants had a right of appeal against the rate to quarter sessions.

LONDON AND INDIA DOCKS CO. *v.* WOOLWICH [BOROUGH, [1902] 1 K. B. 750; 71 L. J. K. B. 394; 66 J. P. 484; 50 W. R. 639; 86 L. T. 619 —Div. Ct.

109. *Poor Rate—Premises inserted in Provisional List—Struck out by Assessment Committee—Valuation (Metropolis) Act*, 1869 (32 & 33 Vict. *c.* 67). *s.* 47 (7).]—At the quinquennial assessment of 1900 the assessment committee directed the assessment of the appellant's house to remain at £400 gross and £334 rateable value, promising to re-consider the question when a lease was actually granted to him. During the next year he obtained a lease at a rent of £250, and the overseers inserted the property in the provisional list at £300 gross and £250 rateable value. Upon the appellant objecting to these figures, and contending for £275 and £229, the assessment committee struck out the premises altogether, so that they did not appear in the supplemental list.

HELD—that the premises had been wrongly struck out by the committee in the absence of any objection other than that of the appellant.

PEAT *v.* CITY OF WESTMINSTER ASSESSMENT [COMMITTEE, (1903) 67 J. P. 100—Ct. of Sess., Loveland-Loveland, K.C.

110. *Poor Rate—Provisional and Supplemental Valuation Lists—Alteration in Value—"From any Cause"—Onus of Proof—Valuation (Metropolis) Act*, 1869 (32 & 33 Vict. *c.* 67), *ss.* 43, 46, 47.]—By sect. 47 of the Valuation (Metropolis) Act, 1869, it is enacted that "if in the course of any year the value of any hereditaments is increased by the addition thereto or the erection thereon of any building or is from any cause increased or reduced in value" then the provisions which follow in the section apply.

HELD—that those words could not be confined to structural alteration or addition or anything of that kind, but that the words "from any cause" are to be read as *ejusdem generis* in the sense—that it must be a cause which affects the value of the particular property. It lies upon those who desire to alter the assessment to prove the nature and cause of the alteration in value. It is not sufficient to say that there has been an alteration in value, but some definable cause to which that alteration is due must be pointed to. The cause must be one that affects the assessable value of the particular property. It is not

Rates—*Continued.*

sufficient to show that there has been a general increase in value in order to obtain a new assessment.

The respondent had been since October, 1896, the occupier of a public-house. At the quinquennial valuation in 1895 the gross and rateable values of the public-house were fixed and duly entered in the quinquennial valuation list made in that year. By a provisional list made in December, 1896, the assessment was increased but afterwards reduced by the assessment committee at the hearing of the objection made by the occupier. In the supplemental valuation list in 1897 it was again valued and assessed at the same reduced valuation. The occupier objected.

HELD—that as a matter of law the mere giving of evidence that the house was worth more than it was assessed at the quinquennial valuation was not evidence of an "alteration" in law which ought to be received; that the amount of premium paid by the occupier in October, 1896, for the premises was evidence, but although it was evidence it came to nothing unless a comparison between the two periods was established and it was shown that an enhanced premium was given, and that by itself the amount of such premium was no evidence in law of anything.

The decision of C. A. ([1900] 1 Q. B. 68; 69 L. J. Q. B. 202; 63 J. P. 820; 48 W. R. 162; 81 L. T. 661; 16 T. L. R. 39) affirmed.

CAMBERWELL ASSESSMENT COMMITTEE *v.* [ELLIS, [1900] A. C. 510; 69 L. J. Q. B. 828; 83 L. T. 201; 16 T. L. R. 504; 65 J. P. 132; 49 W. R. 238—H. L. (E.).

111. *Poor Rate—Provisional and Supplemental Valuation Lists—Alteration in Value—Valuation (Metropolis) Act*, 1869 (32 & 33 Vict. *c.* 67).]—Evidence that public-house premises had been enhanced in value in consequence of their having become the terminus of a new line of omnibuses, and that a large premium had been paid for the business, but the date of payment was before the beginning of the statutory year on which the supplemental valuation list was based, is not sufficient to justify the inclusion of the premises in the supplemental valuation list at an enhanced value.

Camberwell Assessment Committee v. *Ellis* ([1900] A. C. 510; 69 L. J. Q. B. 828; 83 L. T. 201; 16 T. L. R. 504—H. L. (E.) *supra*) followed.

ROLLES *v.* ST. SAVIOUR'S UNION ASSESSMENT [COMMITTEE, (1901) 64 J. P. 809—County of London Qr. Sess.

112. *Poor Rate—Provisional and Supplemental List—Alteration in Value—Increase of Weekly Rental—Valuation (Metropolis Act*, 1869 (32 & 33 Vict. *c.* 67), *ss.* 46, 47.]—An increase in the weekly rental of houses, in respect of which the owner is responsible for the payment of the rates, is an alteration in value within the meaning of sect. 46 of the Valuation (Metropolis) Act, 1869, and they may accordingly be inserted in a supplemental list.

STUNT *v.* LEWISHAM UNION ASSESSMENT COM- [MITTEE, (1902) 66 J. P. 167—County of London Qr. Sess.

113. *Rating Acts—Implied Repeal—Exemption in Special Act from "all Taxes and Assessments whatsoever"—Intention to Repeal by subsequent General Act imposing new Rate—Decisions*—7 Geo. 3, *c.* 37, *s.* 51—*City of London Sewers Act*, 1848 (11 & 12 Vict. *c.* clxii.) *s.* 169.]—By 7 Geo. 3, c. 37, s. 51, "The ground and soil of the said river [Thames] so to be enclosed and embanked, in the front of every such respective wharf or ground . . . shall vest and the same is hereby vested in the owner or owners, proprietor or proprietors, of such adjoining wharf or ground according to his, her, or their respective estates, trusts, or interests therein, free from all taxes and assessments whatsoever."

By the City of London Sewers Act, 1848, the Corporation of London was empowered to make a rate for the sanitary improvement of the city of London upon every occupier in the city, "whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place or otherwise."

HELD—that the result of the decisions was that the Act of 7 Geo. 3, c. 37, s. 51, only created an exemption from taxes and assessments then in existence, and not from substantially new ones coming into existence at a later date, and that the rate imposed by the London Sewers Act, 1848, was a substantially new rate, and was not within the exemption.

Judgment of Div. Ct. ([1900] 2 Q. B. 581; 69 L. J. Q. B. 766; 83 L. T. 76; 16 T. L. R. 449) affirmed.

SION COLLEGE *v.* LONDON CORPORATION, [1901] [1 K. B. 617; 70 L. J. K. B. 369; 65 J. P. 324; 49 W. R. 361; 84 L. T. 133; 17 T. L. R. 223—C. A.

VIII. SANITARY CONVENIENCES, WATER-CLOSETS, &c.

And see Sect. II. BYE-LAWS (b)

114. *Privies—Emptying Privy in any Street or Public Place—Privy near but not on Soil of Street—Metropolitan Police Act*, 1839 (2 & 3 Vict. *c.* 47), *s.* 60 (4).]—By sect. 60 of the Metropolitan Police Act, 1839: "Every person who, in any street or public place within the limits of the metropolitan police district, shall be guilty of any of the following offences, shall be liable to a penalty . . . 4. Every person who shall empty or begin to empty any privy between the hours of six in the morning and twelve at night . . ."

HELD—that an offence was committed under sub-sect. 4 if a privy on premises near to the road or pathway of a street was emptied within the prohibited hours.

HOWARD *v.* DANIELS, (1905) 69 J. P. 439; 93 [L. T. 669; 3 L. G. R. 1282—Div. Ct.

Sanitary Conveniences, Waterclosets, &c.—*Continued.*

115. *Public Conveniences—Approaches—Subway—Subsoil of Roadway and Footway—Injunction—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 44.]—For the purpose of making public conveniences where they may deem them to be suitable, the subsoil of the roadway, exclusive of the footway, is vested in the sanitary authority of the district by sect. 44 of the Public Health (London) Act, 1891.

HELD—that in the absence of any bad faith, this section empowered the sanitary authority to make underground approaches to such conveniences from either side of the street in the nature of a subway, although such subway might be used by persons not using the conveniences.

Decision of C. A. ([1904] 1 Ch. 759 ; 73 L. J. Ch. 386 ; 68 J. P. 249 ; 52 W. R. 596 ; 90 L. T. 461 ; 20 T. L. R. 340—C. A.) reversed.

WESTMINSTER CORPORATION *v.* LONDON AND [NORTH WESTERN RY., [1905] A. C. 426 ; 72 L. J. Ch. 629 ; 69 J. P. 425 ; 54 W. R. 129 ; 93 L. T. 143 ; 21 T. L. R. 686 ; 3 L. G. R. 1120—H. L. (E.).

116. *Public Urinal — Nuisance — Mandatory Injunction—City of London Sewers Act*, 1848 (11 & 12 Vict. *c.* clxiii.), *s.* 104.]—The inhabitants of the neighbourhood who were annoyed by the nuisances which had hitherto existed in the locality, had induced the defendants to erect the urinal, and the defendants put it up in a passage close to the premises of the plaintiff in such a position that his wall actually formed a part of the entrance to the urinal, that entrance being only two feet away from the only door of the plaintiff's premises.

HELD—that there was a serious interference with the exercise of the right of ingress and egress to the plaintiff's premises : that the sanitary condition of the passage was improved since the erection of the urinal was no answer to the claim of the plaintiff for an injunction ; and that there would be a mandatory order upon the defendants, similar to that made in *Sellors* v. *Matlock Bath Local Board* ((1885) 14 Q. B. D. 928 ; 52 L. T. 762—Denman, J.), to remove the urinal within six weeks.

PARISH *v.* CITY OF LONDON CORPORATION. (1902) 18 T. L. R. 63 ; 67 J. P. 55—Joyce, J.

117. *Sanitary Conveniences—"Workplace"—Stable-yard—Persons "in attendance"—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *s.* 38.]—Sect. 38 of the Public Health (London) Act, 1891, provides that every factory, workshop, and workplace shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, regard being had to the number of persons employed in, or in attendance at such building.

HELD—that the stable-yard and stables of a cab proprietor, where a number of men were employed as horsekeepers and cab-drivers and cab-cleaners, and where cab-drivers were daily in attendance for the hiring of cabs and horses, constituted a "workplace" within the meaning of the section, and that the cab-drivers were "in attendance" at the premises, and that sanitary conveniences must be provided for the persons employed in the premises, and for the cab-drivers who came there to hire cabs.

BENNETT *v.* HARDING, [1900] 2 Q. B. 397 ; 69 [L. J. Q. B. 701 ; 64 J. P. 676 ; 48 W. R. 646 ; 83 L. T. 51 ; 16 T. L. R. 445—Div. Ct.

118. *Waterclosets — Power of Sanitary Authority to enter Premises—Reasonable Grounds—Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *ss.* 10, 40, 115 (3) (a).]—Evidence that the sanitary inspector is honestly desirous of entering premises for the purpose of ascertaining whether or not any nuisance exists thereon calling for abatement under the Public Health (London) Act, 1891, or for the purpose of examining works under sect. 40 of that Act, but without any evidence that any nuisance exists on such premises, is not reasonable ground for entry so as to empower a justice to issue a warrant under sect. 115 of the Act, authorising an entry on the premises.

VINES *v.* NORTH LONDON COLLEGIATE AND [CAMDEN SCHOOLS, (1899) 63 J. P. 244—Div. Ct.

IX. STREETS.

And see title HIGHWAYS, &c.

(a) Breaking up Streets.

119. *Breaking up of Streets by Water Company — Reinstatement by Local Authority — Expenses of Reinstatement—Cost of Supervision—General Paving (Metropolis) Act*, 1817 (57 Geo. 3, *c.* xxix), *s.* 23—*Waterworks Clauses Act*, 1847 (10 & 11 Vict. *c.* 17), *ss.* 28, 31, 32, 34—*Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 114.]—When a local authority in London employ a contractor to reinstate streets broken up by a company under statutory powers, they are not entitled to recover from the company, over and above the contractor's charge, any sum for supervision exercised by their officers, unless it be proved that they have incurred substantial extra expense beyond what it would have cost them to supervise the same work, had it been done by the company's workmen.

Decision of Div. Ct. (73 L. J. K. B. 1009 ; 68 J. P. 358 ; 90 L. T. 792 ; 20 T. L. R. 507, *sub nom. New River Co.* v. *Westminster Corporation*) reversed by consent.

METROPOLITAN WATER BOARD *v.* WESTMIN- [STER CORPORATION, (1906) 75 L. J. K. B. 384 ; 70 J. P. 52 ; 22 T. L. R. 92 ; 4 L. G. R. 237—C. A.

120. *Breaking up Streets by Company for Gas Pipes—Duty of Gas Company to make good—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 111, 114—*Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 82.]—The appellants, a gas company, under statutory powers opened up the surface of streets for the purpose of laying and repairing pipes. The respondents, a borough council,

Streets—*Continued.*

exercised their powers of filling in the ground and making good the pavement and soil so excavated. It was found, however, impossible to replace all the excavated earth back in the trench, and consequently a subsidence would take place in course of time. To obviate this the respondents placed, where there had been concrete before, along the line of excavation and the parts contiguous thereto, a line of concrete three inches thicker than it was before. A course of concrete was laid in the excavation where there had before been no concrete. The appellants refused to pay so much of the respondents' claim for making good the surface of the road as was represented by the course of concrete laid where there was no concrete before, and by the extra thickness of concrete where concrete had been before. It was found as a fact that the whole of the concrete, the cost of which the appellants refused to pay, was necessary in order that the streets should be as good, and remain as good, as they were before the excavation by the appellants.

HELD—that the appellants were liable to pay the cost of the extra concrete.

COMMERCIAL GAS CO. *v.* POPLAR BOROUGH [COUNCIL, (1906) 70 J. P. 178 ; 94 L. T. 222 ; 4 L. G. R. 267—Div. Ct.

121. *Vesting of Street in Local Authority—Extent of Property in Sub-soil—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 96, 109.]—In 1896, the defendants, after failing to come to terms with the plaintiffs, and knowing perfectly well that the plaintiffs would object to the defendants laying down their pipes under the streets, took the law into their own hands, and wilfully, and in a very high-handed manner, broke up the street for about thirty yards, and laid down their electric mains under it, at a depth of about two feet, outside their statutory district and in excess of their statutory powers, and they got the work done on a Sunday night.

HELD—that the vesting of the street, by virtue of sect. 96 of the Metropolitan Management Act, 1855, vests in the vestry such property, and such property only, as is necessary for the control, protection and maintenance of the street as a highway for public use, and that the plaintiffs could not maintain an action for a mandatory injunction to compel the defendants to remove their pipes and wires.

Tunbridge Wells Corporation v. *Baird* ([1896] A. C. 434 ; 65 L. J. Q. B. 451 ; 60 J. P. 788 ; 74 L. T. 385—H. L. (E.)) applied.

BATTERSEA VESTRY (ST. MARY) *v.* COUNTY OF [LONDON AND BRUSH PROVINCIAL ELECTRIC LIGHTING CO., [1899] 1 Ch. 474 ; 68 L. J. Ch. 238 ; 80 L. T. 231 ; 15 T. L. R. 175—C. A.

122. *Road Transferred to and Vested in Public Authority by Private Act—Land over which Road made Vested in Company for the Purposes of its Undertaking — Metropolitan Board of Works (Bridges, &c.) Act*, 1883 (46 & 47 Vict. *c.* clxxvii.), *s.* 44.]—Land under which a company proposed to run a pipe or drain was vested in them for the purpose of their undertaking. Under a private Act a road running over this land had been transferred to and vested in a local authority. The local authority gave no consideration for the road. On the local authority applying for an injunction to restrain the company from laying a pipe or drain under or trespassing on the road :—

HELD—that the road was vested in the local authority only for the purposes of a road ; that they had no right to the subsoil, and consequently that no injunction could be granted.

Tunbridge Wells Corporation v. *Baird* ([1896] A. C. 434 ; 65 L. J. Q. B. 451 ; 60 J. P. 788 ; 74 L. T. 385—H. L.) applied.

POPLAR BOROUGH COUNCIL *v.* MILLWALL DOCK [CO., (1894) 63 J. P. 339—Farwell, J.

(b) Laying Out.

123. *Commencing to Form or Lay Out a Street—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *ss.* 7, 8.]—The owner of a building estate, having erected a row of houses adjoining a street, sold a piece of land on the same side of the street to the respondent, who commenced to erect a row of houses in a line with the first row and fronting the street. A space of forty feet, the statutory width of a street for carriage traffic, was left between the two rows of houses. In the house adjoining the space the respondent put a doorway and windows looking on to the space, and the sole means of access for carriages to the stables at the back of the premises was across the space. The respondent had no control over the space, which remained the property of the owner of the building estate. The space was marked in the building plan of the estate as "proposed street," but before the respondent erected his houses it had not been laid out as a street.

HELD—that the respondent did not commence to form or lay out a street within the meaning of sect. 8 of the London Building Act, 1894.

LONDON COUNTY COUNCIL *v.* DIXON, [1899] 1 [Q. B. 496 ; 68 L. J. Q. B. 526 ; 63 J. P. 390 ; 47 W. R. 521 ; 80 L. T. 232 ; 15 T. L. R. 206—Div. Ct.

124. *Commencing to Form or Lay Out a Street—Courtyard—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *s.* 7.]—The appellant was summoned upon an information charging him with having commenced to form and lay out a street for carriage traffic or foot traffic without having first obtained the sanction of the local authority pursuant to sect. 7 of the London Building Act, 1894.

The appellant began to form the road in part straight, intending to build blocks of residential flats on each side of that straight part and facing into it, and the other part of the road ran into and formed the boundary of a square, round which again it was intended to build a continuous line of houses facing into the square.

Streets—*Continued.*

The length of the entire road would be 600 feet, and about 40 feet in width. The road was to be formed and sewered as an ordinary street, although gullies used for draining a courtyard would also be required. The road was to be entered by gates, and no part of it was to be dedicated to the public, but was intended to be used only as a private road.

HELD — that the road in question was a "street" within the meaning of sect. 7 of the London Building Act, 1894, and that the justices were right in convicting the appellant.

HELD also, that the question whether a place was a "street" within the meaning of the section was one largely of fact, and the decision in each case must depend on its particular circumstances.

Wood v. *London County Council* ((1895) 64 L. J. M. C. 276; 59 J. P. 615; 44 W. R. 144; 73 L. T. 313; 15 R. 569—Div. Ct.) overruled.

ARMSTRONG *v.* LONDON COUNTY COUNCIL, [1900] 1 Q. B. 416; 69 L. J. Q. B. 267; 64 J. P. 197; 48 W. R. 367; 81 L. T. 638; 16 T. L. R. 128—Div. Ct.

125. *Commencing to Form or Lay Out a Street or to Adapt a Street for Carriage Traffic without Leave of the County Council—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii), *ss.* 7, 8, 10, 200 (1) (a).]—The respondent was the owner of land across which was a private way over which a few other persons had a right to go to premises abutting on the way. It was paved with granite and had gates at the end. The respondent enlarged a building in his possession by extending it backwards along one side of the way, but he had no intention of commencing to form or lay out a street. He had done nothing to the way itself beyond widening it by four feet of additional land, not paved or made up to alter or adapt it for carriage traffic.

HELD—that on the facts the magistrate had rightly refused to convict the respondent under sect. 7 of the London Building Act, 1894, of commencing to lay out or form a new street, or under sect. 10 of altering and adapting a street.

Armstrong v. *London County Council* ([1900] 1 Q. B. 416; 69 L. J. Q. B. 267; 64 J. P. 197; 48 W. R. 367; 81 L. T. 638—Div. Ct.) (*supra*) distinguished.

LONDON COUNTY COUNCIL *v.* HEATHMAN, [(1905) 69 J. P. 222; 3 L. G. R. 1016—Div. Ct.

126. *Commencing to Form or Lay Out Street—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.), *s.* 7.]—X. was charged before a police court magistrate for unlawfully commencing to form and lay out a street in London within the metropolitan police district, without having first obtained the consent of the London County Council under sect. 7 of the London Building Act, 1894. Three rows of houses, A, B and C, run parallel to each other, a footway running between row B and row C. Row B was demolished, leaving a space between row A and row C. X., on rebuilding row A, excavated the site of row B and made a paved space, erecting twenty-four shops on the one side and fifty-five smaller shops on the other. Most of these shops were let by X. to weekly tenants. The aforesaid footway behind row C was relaid, the arches underneath the said footway having been cleared away and the aforesaid fifty-five shops erected in their stead. The whole space was on a lower level than the neighbouring highway. At the time when the information was laid access was obtained to the space and the shops from a highway by a main flight of steps passing between the new blocks of buildings in row A, by six flights of steps leading down from and through the six blocks of new buildings in row A, and by two flights of steps leading to the aforesaid footway over the shops, whence an exit could be obtained to various neighbouring highways. All these means of access were under the control of X. by means of gates, which were locked at certain times, except the access through the six blocks in row A. There was nothing to prevent any person walking into the said blocks, and instead of ascending the stairs therein descending into the space in question. The whole space was lighted and cleansed at the expense of X. The police court magistrate held that X. had formed a market or bazaar, and had not commenced to form and lay out a street within the meaning of sect. 7.

HELD, on appeal, that X. had so commenced to form and lay out a street.

LONDON COUNTY COUNCIL *v.* DAVIS, (1904) 68 [J. P. 520; 91 L. T. 555—Div. Ct.

127. *Formation of new Street not in accordance with conditions of sanction by London County Council—Erection of Building "upon either side of such Roadway, or upon a Site abutting on such Roadway"—London Building Act*, 1894 (57 & 58 Vict. *c.* 213), *s.* 200 (1) (a).]—X. was the freeholder of a triangular piece of ground, bounded by two loops of a railway, the only access to which was a tunnel under one of the loops. A rough road with clinkers led through this tunnel to a factory on the ground, and to a place used for the deposit of rubbish, stopping abruptly in the middle of the piece of ground. An 18-inch sewer was laid along this road as far as the factory. X. submitted for the approval of the London County Council the plan of a proposed new street to run through the tunnel (to be widened to 40 feet), over the line of the rough road, and onwards right across the piece of ground, and over the railway loop on the other side of the ground by a bridge, to be built, thus connecting two roads on the outer sides of the two loops. This plan was sanctioned by the council on the conditions (1) that the roadway of the new street should be clearly defined and thrown open as a highway within a certain time, and (2) that no new building should be commenced to be erected "upon either side of such roadway or upon a site abutting on such roadway," unless the roadway should have been made up in a certain way, and other provisions complied with. X. agreed to lease a plot of his ground, which was fenced off, the nearest corner

Streets—*Continued.*

of which was 187 feet from the existing road, with a right of way over the intervening strip of about an acre in extent, and over the road through the tunnel, and also over the roadway of the new street, if it should afterwards be erected. X. also placed fresh clinkers from time to time on the road, and lengthened the sewer along the road to serve two new buildings which he commenced to erect on the plot he had agreed to lease. The road was not continued across X.'s ground, the tunnel was not widened, and the bridge was not built.

A summons under sect. 200 (1) (a) of the London Building Act, 1894, against X. for commencing to form and lay out a street not in accordance with the said conditions of the council was dismissed by the magistrate, who found (1) that X. had commenced to form and lay out a part of the proposed new street, but (2) that he had not commenced to erect new buildings "upon either side of such roadway or upon a site abutting on such roadway."

HELD—that X. had not commenced to form and lay out the proposed new street.

Semble, also, X. had not commenced to erect new buildings "upon either side of such roadway or upon a site abutting on such roadway" within the meaning of the second condition of the council's sanction.

LONDON COUNTY COUNCIL *v.* COLLINS, (1905) [69 J. P. 401; 93 L. T. 540; 3 L. G. R. 1103—Div. Ct.

128. *Formation and laying out of new Street—Adapting a Way for Carriage Traffic—Erecting permanent Oak Fence—Laying Foundations of a House fifty yards from Private Road—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii), *ss.* 7, 8, 10.]—At the end of the year 1903, the respondent bought a plot of land adjoining a private road laid out and sewered in 1870, the soil of which was not vested in him. On this plot he built a house 50 yards from the private road. To facilitate the entrance of building materials he took down a post and rail fence along the front of the plot, afterwards replacing it by a permanent oak fence pursuant to an undertaking contained in the conveyance, by which he had a right of way along the private road to his plot. The private road extended about 1,200 feet, and afforded access to some four or five residences built shortly after the road was laid out. In 1904 it appeared from notices placed in the vicinity that land adjoining the private road was for sale, and that the respondent was erecting or would erect other residences.

HELD—that the respondent, by building his house, and by erecting a permanent oak fence along the front of his plot, had not commenced to form and lay out a street within the meaning of sect. 7, or to adapt a way for carriage traffic within the meaning of sect. 10 of the London Building Act, 1894.

LONDON COUNTY COUNCIL *v.* KING, (1905) 69 [J. P. 406; 3 L. G. R. 1046—Div. Ct.

129. *Plans—Refusal to sanction—"Direct communication"—Law or Fact—London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii.) *s.* 9.]—Whether or no a new street forms a direct communication between two streets so as to enable the council to refuse their sanction to the laying out of such new street under sect. 9 of the London Building Act, 1894, is a question of fact.

WOODHAM *v.* LONDON COUNTY COUNCIL, [1898] [1 Q. B. 863; 62 J. P. 342; 67 L. J. Q. B. 707; 78 L. T. 553—Div. Ct.

(c) Obstruction.

And see title STREET TRAFFIC.

130. *Exposing Goods for Sale on Carriage-way—Costermongers—Metropolitan Police Act*, 1839 (2 & 3 Vict. *c.* 47), *s.* 60, *sub-s.* 7—*Metropolitan Streets Act Amendment Act*, 1867 (31 & 32 Vict. *c.* 5), *s.* 1—*Police Regulations of December 28th*, 1869.]—By sect. 60, sub-sect. 7, of the Metropolitan Police Act, 1839, "every person who shall expose anything for sale . . . upon or so as to hang over any carriage-way or footway . . . so as to cause annoyance or obstruction in any thoroughfare within the Metropolitan Police District, shall be liable to a penalty of not more than 40*s.*"

By regulation 6 of the Police Regulations dated December 28th, 1869, and made under the Metropolitan Streets Act Amendment Act, 1867, it is provided that costermongers and others and their barrows are thereby made liable to be removed from any street and public way in which they cause an obstruction to the traffic, or where they are an annoyance to the inhabitants.

HELD—that sect. 60 and the above regulations do not cover the same ground, and that sect. 60 was not impliedly repealed by the regulation, nor was the penalty provided for by the said section superseded by them.

WANDSWORTH BOARD OF WORKS *v.* PRETTY. [1899] 1 Q. B. 1; 68 L. J. Q. B. 193; 63 J. P. 132; 47 W. R. 256—Div. Ct.

131. *Exposing Goods for Sale on Carriage-way—Costermongers—Metropolitan Police Act*, 1839 (2 & 3 Vict. *c.* 47), *s.* 60, *sub-s.* 7—*Metropolitan Streets Act*, 1867 (30 & 31 Vict. *c.* 134), *s.* 6—*Metropolitan Streets Act Amendment Act*, 1867 (31 & 32 Vict. *c.* 5), *s.* 1—*Police Regulations of December 28th*, 1869.]—The penalty imposed by sect. 60 (7) of the Metropolitan Police Act, 1839, for exposing anything for sale in any carriage-way or footway so as to cause annoyance or obstruction, is not impliedly repealed or superseded by the 6th Police Regulation of December 28th, 1869, made under sect. 1 of the Metropolitan Streets (Amendment) Act, 1867. A private person who is aggrieved by such annoyance or obstruction can take proceedings by way of summons to recover the penalty imposed by the section. The magistrate has to decide as a matter of fact whether such annoyance or obstruction exists.

Wandsworth Board of Works v. *Pretty* ([1899]

Streets—*Continued.*

1 Q. B. 1; 68 L. J. Q. B. 193; 63 J. P. 132; 47 W. R. 256—Div. Ct., *supra*) followed.

Reg. *v.* Francis, Ex parte Walton, (1899) [68 L. J. Q. B. 609; 63 J. P. 469—Div. Ct.

132. *Erection of Lamp-post—Interference with Occupier loading Vans—Public and Private Rights—Individual Interest in Public Right—Discretion of Local Authority — Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 130.]—Under the Metropolis Local Management Act, 1855, s. 130, a statutory duty is cast upon the defendants to cause their streets to be lighted, and to erect in the highway lamps (which will be obstructions) so far as necessary for the purpose of doing that act. They, acting in good faith, erected a lamp-post in the street opposite the plaintiffs' business premises, which did not interfere with the access to the street from the plaintiffs' premises. The plaintiffs alleged that it would render the loading or unloading of their vans less convenient and easy, and so would obstruct them in their business, and they claimed an injunction to restrain the defendants from erecting the lamp-post or permitting it to remain at that spot.

Held—that the lamp-post was no obstruction to the plaintiffs' private right of stepping from the highway on to their own premises; that its erection was in no reasonable sense an obstruction to the plaintiffs in doing that which they sought to do in the course of their business: and that the plaintiffs were not entitled to the injunction claimed.

W. H. Chaplin & Co., Ld. *v.* Westminster [Corporation, [1901] 2 Ch. 329; 70 L. J. Ch. 679; 65 J. P. 661; 49 W. R. 586; 85 L. T. 88; 17 T. L. R. 576—Buckley, J.

133. *Motor placed in Road to drive Engine for cleaning House—No Evidence of Obstruction—"Wilfully causing Obstruction in any Thoroughfare"—Metropolitan Police Act*, 1839 (2 & 3 Vict. *c.* 47), *s.* 54 (6).]—The appellant placed in a street opposite a house a motor, which, by creating a vacuum, caused the dust and dirt to pass from the house through indiarubber tubes to a receptacle on the top of the motor. The tubes were passed over the foot pavement at such a height as not to interfere with persons using the footway. The appellant was summoned for obstruction of the highway under the Metropolitan Police Act, 1839.

The magistrate found that the business for which the motor was placed there was reasonable, that it did not remain there longer than was necessary to clean the house, and that the space occupied was not excessive, but that the system of cleaning was not necessary to the ordinary comfort of life, and was still in the experimental stage, and could not be regarded as an incident of every-day life, and the noise and collection of sightseers might be productive of discomfort to occupants of houses and people using the street, and convicted the appellant.

Held—that as there was no evidence of wilful obstruction or obstruction in fact, the conviction was wrong.

Dunn *v.* Holt, (1904) 73 L. J. K. B. 341; 68 [J. P. 271; 90 L. T. 577; 20 T. L. R. 297; 20 Cox, C. C. 625—Div. Ct.

134. *Summary Proceedings — Information — Power of Authority to lay Information—Metropolitan Police Act*, 1839 (2 & 3 Vict. *c.* 47), *s.* 60 (7).]—An inspector of streets in the employ of the borough council of Southwark laid an information on behalf of the council against a costermonger for unlawfully exposing certain articles for sale upon a highway within the limits of the borough, upon and so as to hang over the carriageway or footway of the highway, and causing annoyance and obstruction, contrary to the Metropolitan Police Act, 1839. The magistrate dismissed the summons on the ground that a corporation could not be a common informer unless expressly or impliedly authorised by statute, and could not, therefore, lay the information or instruct the appellant, their official, to do so on their behalf.

Held—that the offence under the Metropolitan Police Act, 1839, being an offence against the public, any person might prosecute, and that therefore the inspector was entitled to prosecute.

Allman *v.* Hardcastle, (1904) 67 J. P. 440; [89 L. T. 553; 20 Cox, C. C. 567—Div. Ct.

(d) Paving and Making up.

135. *Apportionment of Expenses — Rescission and Fresh Apportionment — Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 57, 105.]—The respondents passed a resolution for paving a new street, and apportioned the expense among the frontagers. A summons for the payment of such apportionment was issued, but withdrawn, and the respondents passed a fresh resolution rescinding the old apportionment, making a fresh one.

Held—that they had the power to do so.

Bishop *v.* Wandsworth District Board of [Works, (1900) 69 L. J. Q. B. 682; 64 J. P. 630; 82 L. T. 766—Div. Ct.

136. *Cross Streets—One Street running into but not beyond another Street — "Points of intersection"—Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 77.]—By sect. 77 of the Metropolis Management Amendment Act, 1862, which deals with the expenses of paving new streets in the metropolis, " . . . any such costs or expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board. . . ."

Held—that the words "points of intersection of streets" are not limited to the cutting or crossing of at least two streets each by the other, each street continuing its course from each end of the intersection, so as to constitute in effect four streets running into each other, forming the shape of an X, but also apply to the case of where street A runs into street B on one side thereof, but is not continued, forming the shape

Streets—*Continued.*

of a T, and the expenses of paving a granite crossing wholly on the soil of street B (the cross-line of the T), connecting the footpaths on one side of the street B, where street A joins it, may be apportioned under the Metropolis Management Acts on the frontagers of street A.

BRIDGETT *v.* WANDSWORTH BOROUGH COUNCIL, [(1905) 69 J. P. 394 ; 93 L. T. 519 ; 3 L. G. R. 1186—Div. Ct.

137. *Finality of Apportionment—Exception—Persons chargeable omitted altogether—Declaratory Judgment—Land "bounding or abutting"—Form of Apportionment—Illusory Apportionment—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 77.]—Although in the absence of *mala fides* the Court will not review an apportionment of paving expenses so as merely to alter the shares apportioned upon persons properly charged with some share, yet it will interfere, on the application of a person charged, if persons who ought to be charged are omitted altogether upon a mistaken view of the facts.

The Court will make a declaratory judgment in the case of an illegal or invalid apportionment, whether any consequential relief is claimed or not (*Grand Junction Waterworks Co.* v. *Hampton Urban District Council*, [1898] 2 Ch. 331 ; 62 J. P. 566 ; 46 W. R. 644 ; 78 L. T. 673—Stirling, J., *see* PUBLIC AUTHORITIES, 21) considered.

Houses, which front upon one road, but have gardens behind them which extend to the edge of a second road, if they are not "houses fronting" such second road, are yet "land bounding or abutting" on such road, and therefore should be included in the apportionment of the expenses of paving it.

The Court will consider the question whether an apportionment of expenses of paving is made upon the right people, including all liable.

Semble, an apportionment ought to refer to the owners by name, or specify the property, so as to preclude any possibility of mistake.

Semble, also, an authority cannot apportion a nominal sum on property, the owners of which are unknown to them, so as to put an unfair share on the other owners.

ELSDON *v.* HAMPSTEAD CORPORATION, [1905] [2 Ch. 633 ; 69 J. P. 434 ; 54 W. R. 43 ; 93 L. T. 335 ; 21 T. L. R. 772 ; 3 L. G. R. 1199 ; 75 L. J. Ch. 27—Joyce, J.

138. *"Land Bounding or Abutting"—Intervening Strip—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 77.]—In apportioning the expenses of making up a new street under the Metropolis Management Acts, a borough council apportioned a nominal sum of 10*s.* on a strip of land on which an old fence stood, lying on one side of the new street. Relying on this apportionment, the defendant took building leases of certain plots of land lying behind the old fence, and built houses thereon. The said houses fronted on another street and had gardens behind them extending up to the said strip of land, but had no access over the said strip to the new street. In an earlier action between the council and another frontager, it was held that the said strip of land had been conveyed to the adjoining owners together with the land on either side of it, and that the houses and gardens abutted on the said new street. A fresh apportionment was then made, including the said houses and gardens. In an action to recover the money so apportioned :—

HELD—that notwithstanding the earlier decision it was a question for the jury whether there was or was not an intervening strip between the defendant's land and the new street at the time when the defendant bought the said land.

The jury finding that there was such a strip, but that the borough council had taken possession of it as part of the new street :—

HELD further, that the defendant was liable for the apportioned sum.

HAMPSTEAD BOROUGH COUNCIL *v.* WESTERN, [(1907) 71 J. P. 565—Darling, J.

139. *Mews paved by Owner with Macadam to satisfaction of Local Authority—Notice to pave with Asphalt — Power of Local Authority — Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 99, 100.]—In 1892 the owner of a mews, in compliance with a notice from the local authority under sect. 100 of the Metropolis Management Act, 1855, paved the same with macadam, and twice subsequently repaired the same in compliance with notices from the local authority. In May, 1905, the owner was served with a notice to pave the said mews with compressed asphalt or concrete.

HELD—that the mews having been paved with macadam in 1892 in compliance with a notice from the local authority, the local authority were not entitled to call upon the owner to repave the same, but were only entitled to require him to keep the said macadam paving in repair.

HARRISON *v.* OWNER OF NEW STREET MEWS, [1906] 1 K. B. 703 ; 75 L. J. K. B. 510 ; 70 J. P. 355 ; 95 L. T. 57 ; 4 L. G. R. 703—Div. Ct.

140. *Necessary Works of Repair on Carriage Road—Sum included for Repair of Footpaths—Sum included for Work on Plans, &c. by Salaried Officials of Council — Metropolis Management Amendment Act*, 1890 (53 & 54 Vict. *c.* 66), *s.* 3.]—The expression "carriage road or way" in sect. 3 of the Metropolis Management Amendment Act, 1890, does not include the footpaths abutting on the actual way for carriages, and therefore an apportionment under that section, including a sum for necessary works of repair in such footpaths is invalid.

An apportionment under the said section, which includes a sum calculated at the rate of 4 per cent. on the actual cost of the works of repair for work done by a borough council's salaried officials in making plans and estimates,

Streets—*Continued.*

preparing the apportionment, serving notices, collecting the money and supervision—work relative to the carriage road or way in question—is invalid.

The question whether works done on a new road are "necessary works of repair" within the meaning of the section is a question of fact.

BALLARD *v.* WANDSWORTH BOROUGH COUNCIL, [(1906) 70 J. P. 331 ; 95 L. T. 118 ; 4 L. G. R. 708—Div. Ct.

141. "*New Street*"—*Boundary between two Parishes—Sewer Expenses—Frontagers—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. *c.* 102), *ss.* 52, 112.]—Whether a particular highway has become a "street" is a question, not of law, but of fact.

An old highway formed the boundary between the parish of Hornsey in the county of Middlesex and the parish of Clerkenwell in the county of London, the actual boundary running somewhere along the middle of the roadway, rather nearer the Hornsey side of it than the Clerkenwell side. The appellants, who were an authority acting under the provisions of the Metropolis Management Acts, were desirous, for the apportionment of sewer expenses, of treating the part of that highway which was in the parish of Clerkenwell as a new street. The justices found upon the facts that, before the Metropolis Management Act, 1855, came into operation, the highway, taken as a whole, had become a street by reason of houses having been built upon the Hornsey side of it ; and that therefore it was not a new street, but an old street, at the time when the Act took effect.

HELD—that the finding of the justices concluded the case, and that no portion of the old street could by itself subsequently become a new street through having houses built along it.

Judgment of Div. Ct. ([1901] 1 Q. B. 264 ; 70 L. J. Q. B. 9 ; 65 J. P. 55 ; 49 W. R. 171 ; 83 L. T. 501) affirmed.

CLERKENWELL VESTRY *v.* EDMONDSON & SON, [1902] 1 K. B. 336 ; 71 L. J. K. B. 198 ; 66 J. P. 324 ; 50 W. R. 345 ; 86 L. T. 137 ; 18 T. L. R. 248—C. A.

142. "*New Street*"—*Buildings on One Side only—Repairs—Paving—Expenses—Lapse of Time since Road became a New Street—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 105.]—The appellants were the owners of certain houses in the Fulham Palace Road, which, on the expiration of a Turnpike Act, became a highway repairable by the inhabitants at large, and was repaired from time to time by the respondents' predecessors. In 1864 it was not a street, but by 1883 it was built with houses along one side, the other side remaining vacant building land. Between 1879 and 1898 it was altered and repaired at various times by the respondents and others. In 1899 the respondents resolved that the road was not paved to their satisfaction and that it should be accordingly paved, and the expenses apportioned upon the owners.

HELD—that the magistrate was justified in holding that the Fulham Palace Road became a "new street" in 1883, within the meaning of sect. 105 of the Metropolis Management Act, 1855.

HELD, further, that where, in the metropolis, a highway repairable by the inhabitants at large becomes a new street by reason of the erection of houses along it, a vestry is not precluded from causing it to be paved at the cost of the frontagers by lapse of time, however long, after it became a new street, even though it was in fact already paved at the time it became a new street.

Bonella v. *Twickenham Local Board* ((1887), 20 Q. B. D. 63 ; 57 L. J. M. C. 1 ; 52 J. P. 356 ; 36 W. R. 50 ; 58 L. T. 299—C. A.) distinguished.

SIMMONDS BROTHERS, LD. *v.* FULHAM VESTRY, [1900] 2 Q. B. 189 ; 69 L. J. Q. B. 560 ; 64 J. P. 548 ; 48 W. R. 574 ; 82 L. T. 497—Div. Ct.

143. "*New Street*"—*Dismissal of Summons on ground of Street not being a New Street—Fresh Apportionment* — Res Judicata — *Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 250 — *Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. *c.* 102)—*Metropolis Management Act* (1862) *Amendment Act*, 1890 (53 & 54 Vict. *c.* 54).]—A local authority passed a resolution on November 9th, 1898, that a street should be paved as a new street, and apportioned the sum of £37 16*s.* 8*d.* on the respondent. On his refusal to pay he was summoned on September 15th, 1899, but the summons was dismissed on the ground that the said street was not a new street within the Metropolis Management Acts. On June 13th, 1900, the vestry passed a resolution rescinding the above apportionment, and on March 14th, 1901, the borough council (the successors of the vestry) resolved that the said street should be paved as a new street, and apportioned a sum of £32 16*s.* 1*d.* to be paid by the respondent. On his refusal to pay he was summoned, and the summons was dismissed on the ground that the adjudication on September 15th, 1899, was conclusive.

HELD—that the dismissal by the magistrate was wrong ; that the decision of September 15th, 1899, was not conclusive ; and that the case must be heard on its merits.

SCOTT *v.* LOWE, (1902) 66 J. P. 520 ; 86 L. T [421—Div. Ct.

144. "*New Street*"—*Permanent Paving of Part by Local Authority—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 98 *and* 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 112.]—The fact that the local authority have, under sect. 98 of the Metropolis Management Act, 1855, permanently paved and channelled the footway before a number of houses fronting a country road will not estop them afterwards, when that country road has, by having houses built continuously, and nearly continuously, on both sides of it,

Streets—*Continued.*

become a new street, from exercising the powers given by sect. 105 of that Act by directing the footways on both sides to be permanently paved and channelled, and apportioning the estimated cost among the frontagers, including among these the owners of the houses before which the footpath was previously paved and channelled under sect. 98.

"New street" within sect. 112 of the Metropolis Management (Amendment) Act, 1862, explained.

Crosse *v.* Wandsworth Board of Works, [(1898) 79 L. T. 351 ; 62 J. P. 807—Div. Ct.

145. "*New Street*"—*Road constructed by Act of Parliament through Agricultural Land—Sufficient Number of Houses — Question for Magistrate—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 105—*Metropolis Management (Amendment) Act*, 1862 (25 & 26 Vict. *c.* 102), *ss.* 77. 112.]—Under sect. 77 of the Metropolis Management (Amendment) Act, 1862, it is a question of fact for the magistrate whether a road has become at any given time a "new street" within the meaning of the Act, and the Court will not interfere with his decision unless it is clearly wrong upon the evidence. A road constructed as a highway by Act of Parliament through agricultural land, and taken over by the local authority, may become a new street as soon as houses have been constructed on both sides of it.

Allen *v.* Fulham Vestry, [1899] 1 Q. B. 681 ; [68 L. J. Q. B. 450 ; 63 J. P. 212 ; 47 W. R. 428 ; 80 L. T. 253 ; 15 T. L. R. 241—C. A.

146. "*New Street*"—*Widening old Street by adding Strip of Land—Frontagers—Metropolis Management Acts*, 1855 (18 & 19 Vict. *c.* 120), *s.* 105 ; 1862 (25 & 26 Vict. *c.* 102), *ss.* 77, 112—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 150—*London Building Act*, 1894 (57 & 58 Vict. *c.* ccxiii), *ss.* 9, 215.]—A new street can be formed by adding, and dedicating to the public, a longitudinal strip of land alongside of an old street.

A street 16 feet wide, had been a highway from the year 1815, and had become an old street. On the south side were a number of cottages ; the street was paved on that side, and from time to time substantial repairs were done to it ; the frontagers on the north side took no part in the acts of repair. In 1898 a new strip of land, 24 feet wide was dedicated to the public on the north side, houses were built on that side, and the local authority paved the new part of the street and made an apportionment upon the frontagers on the north side only. The magistrate found, and the Divisional Court upheld his view, that the added strip on the north side was itself a separate "new street," with the result that the paving expenses were thrown upon the owners of property abutting on that new street. On appeal :—

Held—that the paving expenses were thrown only upon the owners of property abutting on the north side of the new strip of land so dedicated to the public, whether under the Metropolis Management Acts, 1855 and 1862, or the Public Health Act, 1875.

Richards v. *Kessick* ((1888) 57 L. J. M. C. 48 ; 52 J. P. 756 ; 59 L. T. 318—Div. Ct.) and *White* v. *Fulham Vestry* ((1896) 60 J. P. 327 ; 74 L. T. 425—Div. Ct.) approved.

Decision of Div. Ct. ((1901) 65 J. P. 407 ; 84 L. T. 689 ; 17 T. L. R. 428) affirmed.

Property Exchange, Ld. *v.* Wandsworth [Board of Works, [1902] 2 K. B. 61 ; 71 L. J. K. B. 515 ; 66 J. P. 435 ; 86 L. T. 481 ; 18 T. L. R. 464—C. A.

147. "*Owner*"—*Building Agreement—Lease not yet Granted to the Builder — Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 250.]—A freeholder entered into an agreement with a builder, by which the builder had licence to enter on his land and build a number of houses, and the owner agreed to grant a lease of each house, as soon as it was completed. In the meantime the builder was to pay £200 a year for the land, a sum which was not a rack rent, being in fact the total amount of the intended ground rents to be divided amongst the various houses as completed. It was provided that the agreement should not operate as an actual demise of the premises, or "give the lessee any legal interest therein."

Held—that the builder was not the "owner" of the land (on which no house had yet been built) within the meaning of sect. 250 of the Metropolis Management Act, 1855.

Holland v. *Kensington Vestry* ((1867) L. R. 2 C. P. 565 ; 36 L. J. M. C. 105 ; 31 J. P. 758 ; 17 L. T. 73) followed.

Driscoll *v.* Borough of Battersea, [1903] [1 K. B. 881 ; 72 L. J. K. B. 564 ; 67 J. P. 264 ; 88 L. T. 795 ; 19 T. L. R. 403 ; 1 L. G. R. 511—Div. Ct.

148. "*Owner*" — *Land used to strengthen Bank of Public Navigable River—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 105, 250—*Metropolis Management (Amendment) Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 77.]—The Lee Conservancy Board, who were incorporated for the purpose of improving and maintaining the navigation of the river Lee, were the owners of a strip of land, about 26 feet wide, which had been acquired by their predecessors for the purpose of strengthening the bank of the river. The strip of land abutted upon a new street which the local authority made up under the powers conferred upon them by the Metropolis Management Acts, 1855 and 1862, and a part of the expenses was apportioned on the board under sect. 77 of the latter Act. By various statutes relating to the river Lee, the board were empowered (*inter alia*) to construct locks, docks, wharves, &c. ; to sell or otherwise dispose of any lands vested in them which were not required for the purposes for which they were incorporated, and to charge tolls ; but they were not empowered to make a profit. It was provided that the payment of the expenses incident to all the powers and duties under the Acts should be considered as among the purposes for which income received under those Acts was by law applicable.

Streets—*Continued.*

HELD—that the nature of the undertaking of the board and the conditions under which it was carried on did not place the land in question *extra commercium*, or make it incapable of being let at a rack rent, and that therefore the board were "owners" thereof within the meaning of sect. 250 of the Metropolis Management Act, 1855, and were liable to contribute to the expenses of making up the new street upon which it abutted.

Decision of Wright, J. (67 J. P. 459) reversed.

London and North Western Ry. Co. v. *St. Pancras Vestry* ((1868) 17 L. T. 654) followed and applied.

HACKNEY BOROUGH COUNCIL *v.* LEE CONSERVANCY BOARD, [1904] 2 K. B. 541; 73 L. J. K. B. 766; 68 J. P. 485; 91 L. T. 13; 20 T. L. R. 646; 2 L. G. R. 1144—C. A.

149. "*Owner*"—*Land adjoining Street—Land subject in Perpetuity to Burden imposed by Special Act for benefit of Individual—Land not* Extra Commercium — *Midland Railway Act*, 1900 (63 & 64 Vict. *c.* cxlii.), *s.* 18 (2)—*Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 105, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 77.]—By the Midland Railway Act, 1900, sect. 18 (2), it was provided that for the protection of the owners of certain lands taken for sidings, the railway company should leave a strip of land 20 feet wide along the whole length of a certain road, and at their own expense plant and maintain the same with shrubs and trees to the reasonable satisfaction of the owners, and should also fence off the said lands from the road by an open unclimbable iron fence seven feet high. The railway company acquired the land, and left a strip of land twenty feet wide along the whole length of the road, and planted it and fenced it off as required by that section. The local authority paved the road under sect. 105 of the Metropolis Management Act, 1855, and apportioned part of the expenses thereof on the railway company under sect. 77 of the Metropolis Management Amendment Act, 1862.

HELD—that, as the burden of the strip of land along the road was imposed for the benefit of an individual or individuals who might release it, the land was not incapable for ever of being let at a rack rent, and that therefore the company were the "owners" thereof within the meaning of sect. 250 of the Metropolis Management Act, 1855, and were liable to contribute towards the paving expenses.

Goldsmid v. *Great Eastern Ry.* ((1884) 25 Ch. D. 511; 53 L. J. Ch. 371; 32 W. R. 341; 49 L. T. 717—C. A.) and *Hackney Corporation* v. *Lee Conservancy Board* ([1904] 2 K. B. 541; 73 L. J. K. B. 766; 68 J. P. 485; 91 L. T. 13; 20 T. L. R. 646—C. A.), *supra*, followed.

Decision of Bigham, J. ([1904] 2 K. B. 802; 73 L. J. K. B. 896; 68 J. P. 574; 53 W. R. 187; 91 L. T. 661; 20 T. L. R. 752) affirmed.

HAMPSTEAD BOROUGH COUNCIL *v.* MIDLAND RY., [1905] 1 K. B. 538; 74 L. J. K. B. 431; 69 J. P. 133; 92 L. T. 252; 21 T. L. R. 272; 3 L. G. R. 455—C. A.

150. "*Owner*" — *Open Space Abutting on Street—User by Public for Exercise and Recreation—Beneficial Occupation*—"*Owner*"—*Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 250—*Metropolis Management Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 77.]—Where land or houses exist abutting upon a new street, then the person who receives the rent, or who, if rent were payable would receive the rent, and who is the owner within the definition given in the Metropolis Management Act, 1855, s. 250, is liable to contribute to the expenses of the new street, except where the premises held are of such a character that they are struck with a legal incapacity of ever being used or let at a rack rent.

Land was conveyed to a vestry, in fee simple, "to be kept and maintained as an open space for the perpetual use thereof of the public for exercise and recreation," and for no other purpose. The vestry possessed the power to erect and maintain on the open space buildings for the accommodation of keepers, constables, and other persons employed by them in connection with the maintenance of the open space, also such convenient and ornamental buildings and such appliances as they might think requisite for the purpose of exercise and recreation, and for refreshment rooms, bandstands, conveniences, and other like purposes, provided that the consent of the county council be first obtained. The question arose whether an apportionment of the estimated expenses of paving a new street under the Metropolis Management Acts, 1855, 1862, should include the vestry as the owners of the land bounding or abutting on the new street and held under the Open Spaces Acts, 1877, 1881, 1893.

HELD—that there was a beneficial occupation, and that the vestry were the owners of the land within the meaning of the definition given in sect. 250 of the Metropolis Management Act, 1855, of owners, and that they were liable to contribute to the expense of the new street.

FULHAM VESTRY *v.* MINTER, [1901] 1 Q. B. 501; [70 L. J. K. B. 348; 65 J. P. 180; 49 W. R. 415; 84 L. T. 49; 17 T. L. R. 192—Div. Ct.

Overruled by C. A. in *London County Council* v. *Mayor of Wandsworth*, (1903) *infra*.

151. "*Owner*" *of Adjoining Premises—Land Vested in County Council under Metropolitan Commons Act*, 1866 (29 & 30 Vict. *c.* 122)—*Metropolis Management Acts*, 1855 (18 & 19 Vict. *c.* 120), *ss.* 105, 250; and 1862 (25 & 26) Vict. *c.* 102), *s.* 77.]—A common was vested in the London County Council under a scheme framed under the Metropolitan Commons Act, 1866, and confirmed by Parliament, for the use of the public for ever as a common or recreation ground. By the scheme the county council had power to erect such buildings as were necessary for the maintenance and management of the common or recreation ground. The county council, in pursuance thereof, erected a lodge as a dwelling house for the inspector, and a refreshment room, which was let to a contractor at an annual rent; they also received a small sum of money for sheep grazing the common; but the expenses of maintaining it largely exceeded the receipts. The

Streets—*Continued.*

borough council paved a new street which ran along one side of the common, and apportioned part of the expenses thereof on the county council as the owners of the common.

HELD—that the common was by its dedication to the public *extra commercium*, and so was for ever incapable of yielding a rack rent and that therefore the county council were not the "owners" thereof within the meaning of sect. 250 of the Metropolis Management Act, 1855, and were not therefore liable to contribute towards the expenses of paving the street.

Fulham Vestry v. *Minter* ([1901] 1 K. B. 501; 70 L. J. K. B. 348; 65 J. P. 180; 49 W. R. 415; 84 L. T. 49; 17 T. L. R. 192) *supra*, overruled.

Decision of Div. Ct. reversed.

LONDON COUNTY COUNCIL *v.* MAYOR OF WANDSWORTH, [1903] 1 K. B. 797; 72 L. J. K. B. 399; 67 J. P. 215; 51 W. R. 499; 88 L. T. 783; 19 T. L. R. 372; 1 L. G. R. 462—C. A.

152. *Recovery of Expenses from Frontager—Court of Competent Jurisdiction — Metropolis Management Amendment Act*, 1890 (53 & 54 Vict. *c.* 66), *s.* 3.]—The expenses of repairing a carriage road under sect. 3 of the Metropolis Management Amendment Act, 1890, may be recovered by the local authority from the owners of houses and land upon whom such expenses have been apportioned, either by an action at law or in a summary manner before a magistrate.

REX *v.* GARRETT, [1907] 1 K. B. 881; 76 L. J. [K. B. 353; 71 J. P. 171; 96 L. T. 407; 23 T. L. R. 308; 5 L. G. R. 358—C. A.

153. *Street partly in one Borough and partly in another.*]—S. Road was the boundary between the metropolitan boroughs of Shoreditch and Hackney, the boundary of each borough being the centre of the street. The Shoreditch Council executed paving works in the path in S. Road within their borough. The defendant owned property abutting on the Hackney side of S. Road. No order had been made under the Metropolis Management Acts placing the street wholly under the control of one borough for paving purposes, nor had any order in council been made dealing with the matter. The Shoreditch Council sought to recover a proportion of the paving expenses from the defendant in respect of his property abutting on S. Road in the borough of Hackney.

HELD—that the defendant was not liable.

SHOREDITCH BOROUGH COUNCIL *v.* WAKEHAM, [(1905) 69 J. P. 209—Police Magistrate.

154. *Successive Owners—Action—Demand—Statute of Limitations—Metropolis Management Acts*, 1855 (18 & 19 Vict. *c.* 120), *s.* 105; and 1862 (25 & 26 Vict. *c.* 120), *s.* 77.]—The joint effect of the Metropolis Management Acts, 1855, s. 105; and 1862, s. 77, is that paving expenses may be recovered either by action or summary proceeding either from the original owner of a house or land, or from a succeeding owner. The statute does not run in the case of a succeeding owner until a demand is made from him.

A vestry did some paving works in 1891, and a demand was then made upon the owner of certain premises liable for a share of the expenses. They were not paid, and in 1896 the defendant became the owner of the premises. In 1898 a demand was made upon him. He was now sued for the apportioned amount.

HELD—that the action would lie; and that the claim was not statute-barred, as no demand was made upon the defendant until 1898.

BOROUGH OF HAMPSTEAD *v.* CAUNT, [1903] 2 [K. B. 1; 72 L. J. K. B. 440; 67 J. P. 344; 51 W. R. 700; 88 L. T. 599; 19 T. L. R. 407; 1 L. G. R. 507—Wright, J.

155. "*Surveyor for the time being*"—*Metropolis Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 105.]—An apportionment of expenses under sect. 105 of the Metropolis Management Act, 1855, is valid if made "by the surveyor for the time being of the Board"; and this phase includes a person by resolution "designated a Surveyor of the Board," the office of surveyor to the board being at the time in abeyance.

Lewis v. *Weston-super-Mare Local Board* ((1889) 40 C. D. 35; 58 L. J. Ch. 769; 37 W. R. 121; 59 L. T. 769—Stirling, J.), being decided under the Public Health Act, 1875, is no authority to the contrary.

KENDAL *v.* METROPOLITAN BOROUGH OF [LEWISHAM, (1903) 67 J. P. 236; 19 T. L. R. 384; 1 L. G. R. 416—Kekewich, J.

[This case was argued on appeal, but settled (20 T. L. R. 21; 2 L. G. R. 31—C. A.).]

(e) Widening.

And see title COMPULSORY PURCHASE, No. 53.

156. *Adjudication to take whole—Part to be thrown into Street—Action for Injunction—Severance—Michael Angelo Taylor's Act*, 1817 (57 Geo. 3, *c.* 29), *s.* 80.]—The plaintiff was assignee of the lease of certain premises where he carried on a tailor's business. In 1905 he was served with notice under Michael Angelo Taylor's Act, that the premises project into, and obstruct or prevent the corporation of W. from widening the street P., and requiring him to treat for the sale of the premises to the corporation of W.

The plaintiff alleged that the notice to treat was in fact given at the request of the London County Council, and that it was intended to throw 22 feet of the plaintiff's premises into the roadway, and assign the residue to an hotel company. The plaintiff alleged that the back portion of his premises constituted a valuable site for business purposes, and that he was desirous of retaining his interest therein. He asked for a declaration that the adjudication that the premises projected into P. was wrong and *ultra vires*, and for an injunction restraining the defendants from proceeding under the notice to treat. The defence was that if 22 feet 6 inches were cut off, only 20 feet would be left,

Streets—*Continued.*

and that it would be impossible to cut off 22 feet 6 inches from the front of the building without pulling it entirely down.

HELD—that the defendants had *bonâ fide* adjudicated that the whole house was essential to the widening of P., and that the action must be dismissed with costs.

PESCOD *v.* WESTMINSTER CORPORATION, [1905] 2 Ch. 475; 74 L. J. Ch. 664; 68 J. P. 387; 54 W. R. 89; 93 L. T. 160; 21 T. L. R. 743—Eady, J.

And see *Parry* v. *Hammersmith Borough Council, infra.*

157. *Borough Council working with County Council*—Bona fides—*Ulterior Motive*—*Michael Angelo Taylor's Act*, 1817 (57 Geo. 3, *c.* 29), *s.* 80.] — The London County Council had obtained powers to construct an electric tramway along Q. Street, H. Their bill had been opposed by the H. Borough Council on the ground that Q. Street was too narrow for the purpose; but after negotiations, this opposition was withdrawn, and an agreement was entered into between the county council and the borough council by which the road was to be widened, and the borough council was to assist the county council in obtaining consents to the widening. Subsequently the county council desired to purchase as much of St. Paul's churchyard as was necessary for the purpose of widening, but could not come to terms with the vicar and churchwardens. Having no compulsory powers of purchase, they applied to the borough council, and requested them, in pursuance of their agreement, to put into force the compulsory powers of Michael Angelo Taylor's Act. The borough council accordingly passed a resolution that these powers should be exercised, and formally adjudged that the land in question "projects into, obstructs or prevents the council from . . . altering, widening, or extending the said street." Notice to treat was served, and correspondence resulted in an action being brought by the vicar and churchwardens to restrain the borough council from exercising their powers under this Act, on the ground that this was not a *bonâ fide* adjudication by the borough council, and that the proposed improvement was not within the meaning of the Act.

HELD—upon the facts, that there was an honest and *bonâ fide* determination on the part of the borough council that it was expedient to widen the street, and that it was none the less *bonâ fide* because it was occasioned by the introduction of the tramway by the London County Council.

PARRY *v.* HAMMERSMITH BOROUGH COUNCIL, [(1905) 68 J. P. 35; 92 L. T. 161; 21 T. L. R. 56; 3 L. G. R. 95—Warrington, J.

And see *Pescod* v. *Westminster Corporation, supra.*

158. *Adjudication to take Whole—Part to be thrown into Street—Prior Agreement to Sell surplus Land subject to Rights of Pre-emption—Exercise of Statutory Powers*—Bona fides—*Michael Angelo Taylor's Act*, 1817 (57 Geo. 3, *c.* xxix.), *ss.* 80, 96.]—The London County Council being desirous of widening a street and having no compulsory powers for that purpose, entered into agreements whereby it was agreed that the defendant corporation should, if necessary, put in force their compulsory powers under Michael Angelo Taylor's Act, and give the land so acquired to the London County Council, who would throw it into the roadway. It was also agreed that the London County Council should assign all the surplus back lands to an hotel company for the purpose of building an hotel thereon, and the company agreed in return to pay all compensation, cost, charges and expenses incurred by the London County Council or the defendants and consequent upon the exercise of their compulsory powers. The county council thereupon sent a formal resolution to the defendants which they desired to have passed; and the defendants passed that resolution in exactly the form submitted.

The plaintiffs, the lessee and sub-lessee of a house, were served with notices to treat for the whole of their interests in the premises.

In an action asking for an injunction to restrain the defendants from proceeding under the notices to treat the plaintiffs alleged that the notice to treat was, in fact, given at the request of the London County Council; that a certain portion of the premises only was required for the widening, and that it was intended to assign the residue to a company for the purpose of building an hotel thereon; and also that the reduced depth would allow of premises suitable for their business, and that they desired to retain the 30 feet of back land and the portion of the building standing on it.

HELD—having regard to the fact that the owner desired and was willing to do what was necessary to make that which remained an effectual house, that the defendants were not entitled to take more than was wanted for the widening of the street, and that the 30 feet depth which would remain after the widening was a building which ought to be left as a house.

HELD, also, that the defendants did not *bonâ fide* adjudicate upon the matter and that their adjudication was not binding.

Gard v. *Commissioners of Sewers of the City of London* ((1885) 28 Ch. D. 486; 54 L. J. Ch. 486; 52 L. T. 827—C. A.) and *Lynch* v. *Commissioners of Sewers of the City of London* ((1886) 32 Ch. D. 72; 55 L. J. Ch. 409; 50 J. P. 356; 54 L. T. 699—C. A.) followed.

Pescod v. *Westminster Corporation* ([1905] 2 Ch. 475; 74 L. J. Ch. 664; 69 J. P. 387; 54 W. R. 89; 93 L. T. 160; 21 T. L. R. 743—Eady, J., No. 156, *supra*) distinguished.

DENMAN & CO., LD. *v.* WESTMINSTER CORPORATION, AND CORDING & CO., LD. *v.* WESTMINSTER CORPORATION, [1906] 1 Ch. 464; 75 L. J. Ch. 272; 70 J. P. 185; 54 W. R. 345; 94 L. T. 370; 22 T. L. R. 270; 4 L. G. R. 442—Buckley, J.

159. *Notice to Treat—Part only Required—Right of Pre-emption—Michael Angelo Taylor's*

Streets—*Continued.*

Act, 1817 (57 Geo. 3, *c.* xxix.), *ss.* 80, 96.]—A local authority who require a small portion only of houses belonging to A., for the purpose of widening a street, are not entitled to enter into an agreement with B. to sell to him such portions of the houses as are not required for the proposed improvement, without first offering such portions for sale to A.

In such a case the owner of the house is entitled to an injunction to restrain the local authority from proceeding with their notice to treat.

Fearnley *v.* Limehouse District Board of Works, (1899) 68 L. J. Ch. 344; 63 J. P. 310; 80 L. T. 351—Kekewich, J.

160. *Notice to Treat—Part only required—Taking the Whole—Right of Owner to retain Part not required—Michael Angelo Taylor's Act*, 1817 (57 Geo. 3, *c.* xxix.), *ss.* 80, 82, 96.]—Where the corporation of the city of London *bonâ fide* adjudged that part of a house obstructed and prevented the widening of a street, and served a notice on the owner to purchase and compulsorily acquire, under sects. 80 and 82 of Michael Angelo Taylor's Act, 1817, the whole of the house:—

Held—that, as the corporation failed to show that the part of the house remaining after they had taken as much as was absolutely required for the widening of the street would be useless to the owner, the owner was entitled to retain that part: and injunction granted restraining the corporation from acting on the notice to take the whole.

Aldis *v.* London Corporation, [1899] 2 Ch. 169; 68 L. J. Ch. 576; 63 J. P. 376; 47 W. R. 514; 80 L. T. 683—Kekewich, J.

161. *Power of Vestry to take Part of House—Compelling Vestry to take the Whole—Michael Angelo Taylor's Act*, 1817 (57 Geo. 3, *c.* xxix.), *ss.* 80, 82.]—Where the authority having control of the streets in a metropolitan district has adjudged that part of a house obstructs and prevents the widening of a street, sects. 80 and 82 of Michael Angelo Taylor's Act, 1817, give such authority power, under some circumstances, to purchase and take compulsorily such part from the owner; but where the part so desired to be taken is a substantial portion the taking of which will substantially injure the use of the house and prevent it from being occupied and enjoyed as the kind of building it was before, the authority has no such power, and can be compelled by an owner who is able and willing to sell and convey the whole to them to take the whole.

A limitation is to be placed on the word "part" in the construction of sect. 80 of Michael Angelo Taylor's Act, 1817.

Gordon v. St. Mary Abbott's, Kensington, Vestry ([1894] 2 Q. B. 742; 63 L. J. M. C. 193; 58 J. P. 463; 71 L. T. 196—Div. Ct.) applied.

Gibbon *v.* Paddington Vestry, [1900] 2 Ch. 794; 69 L. J. Ch. 746; 64 J. P. 727; 49 W. R. 8; 83 L. T. 136; 16 T. L. R. 538—Stirling, J.

162. *Power to take part of House undergoing Alterations—Michael Angelo Taylor's Act*, 1817 (57 Geo. 3, *c.* xxix.), *ss.* 80, 82.]—A local authority requiring part of a house for the purpose of widening a street under Michael Angelo Taylor's Act, cannot compel the owner to sell such part only if the removal of the part would practically destroy the building as a house.

Gordon v. Vestry of St. Mary Abbott's, Kensington ([1894] 2 Q. B. 742; 63 L. J. M. C. 193; 58 J. P. 463; 71 L. T. 196—Div. Ct.) and *Gibbon v. Paddington Vestry* ([1900] 2 Ch. 794; 59 L. J. Ch. 746; 64 J. P. 727; 49 W. R. 8; 83 L. T. 136—Stirling, J. *supra*) considered and followed.

The local authority's rights are not enlarged by reason of any intended voluntary alterations which the owners or lessees are going to make, or are under covenant to make, and the fact that at the time when the lease was granted the lessees were aware that the local authority contemplated such a scheme of street widening as would affect the premises is immaterial.

Thomas v. Daw ((1866) L. R. 2 Ch. 1; 26 L. J. Ch. 201; 31 J. P. 131; 15 W. R. 113; 15 L. T. 200) considered.

Thompson *v.* Hammersmith Corporation, [1906] 1 Ch. 299; 75 L. J. Ch. 129; 70 J. P. 100; 54 W. R. 279; 94 L. T. 135; 22 T. L. R. 179; 4 L. G. R. 331—Buckley, J.

163. *Removal of Sign-post—Michael Angelo Taylor's Act*, 1817 (57 Geo. 3, *c.* xxix.), *s.* 80—*Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 20), *s.* 144—*Metropolis Management Act*, 1862 (25 & 26 Vict. *c.* 102), *s.* 72.]—A corporation may so acquiesce in an informal contract not under seal, without actually rectifying it, as to be bound by it. A metropolitan borough council has power to enter into an agreement with a landowner, as part of a scheme for widening a road, to remove a sign-post belonging to him to a position on the edge of the public footpath.

Decision of Lawrance, J. ((1901) 85 L. T. 281; 17 T. L. R. 774) affirmed.

Hoare & Co., Ld. *v.* Lewisham Borough, [1902) 87 L. T. 464; 18 T. L. R. 816; 67 J. P. 20—C. A.

164. *Severance—Michael Angelo Taylor's Act*, 1817 (57 Geo. 3, *c.* xxix.), *ss.* 80, 96—*Metropolis Management Acts*, 1855 *to* 1890.]—Where a local authority in the county of London adjudicated under Michael Angelo Taylor's Act that two houses prevented a proposed improvement for widening a narrow street, and gave the owner notice to treat for the whole of his land and premises, stating in a letter that they were acting on the report of their surveyor that the improvement could not be effected with safety to the public unless the whole of such land and premises were taken, the owner's option of re-purchase of the land not being reserved:—

Held—that the adjudication and notice to treat for the whole of the land and premises, for the purpose of pulling down the houses, were good.

Fernley *v.* Limehouse Board of Works, [(1900) 64 J. P. 328; 82 L. T. 524—Kekewich, J.

Streets —*Continued.*

165. *Widening of Roadway — Narrowing of Footway — Statutory Powers — Delegation* — 57 Geo. 3, *c.* xxix. (*Michael Angelo Taylor's Act*), *s.* 52.]—In 1883 building land in the metropolis was demised to C., for a term of eighty-two years, and L., under an agreement with C., built several shops on a part of the land which fronted a highway. The shops were not built to the edge of the demised land, but a strip of land 3 feet wide was left between the front wall of the shops and the public footway. Later in 1883 L. applied to the local authority to pave the footway in front of his shops right up to the building line, and the local authority informed him that on the strip of land being given up to form part of the public footway the footway would be paved. L. made no reply, and the footway was paved up to the wall of the shops. In the meantime C., who had no knowledge of L.'s application to the local authority, had granted L. separate under-leases of the shops for eighty years and had also assigned to him for value the head lease, with a proviso against merger. In 1898 C. re-purchased the head lease for value from L.'s successors in title. In 1906 the London County Council, under the powers of a special Act, converted a horse tramway in the highway in question into an electrical tramway, and in connection with this work they widened the road and reduced the width of the footway and took up the pavement (including the pavement of the three-foot strip of land) in front of the shops. This work was done under an agreement made in May, 1906, with the borough council, whereby the borough council in consideration of the reconstruction of the tramway consented to the narrowing of the footway and agreed to pay part of the cost of paving, which was to be done by the county council.

In an action by C. and the assignees of some of the under-leases against the London County Council for an injunction and damages in respect of (1) the taking up of the pavement of the strip of land, (2) the reduction of the width of the footway, the defendants pleaded in answer to the first claim that the strip of land had been dedicated to the public by L. in 1883, and was part of the public footway, and in answer to the second that the borough council had power to authorise the defendants to make the reduction in the width of the footway, and that the work was done by the defendants under the authority of the borough council given by the agreement of May, 1906.

HELD—(1) on the evidence that, whatever claim the local authority might have had against L., there had been no dedication by the freeholders, and that the plaintiffs were entitled to relief in respect of the claim for trespass; but (2) that sect. 52 of Michael Angelo Taylor's Act empowered the borough council, as the road authority, to alter the division of the roadway into a footway and carriageway; that they must be taken by this agreement to have authorised the defendants to execute these alterations on their behalf, and that this was not a delegation of their statutory powers; consequently that in respect of the narrowing of the footway the plaintiffs' claim failed.

Decision of Neville, J. ([1907] 1 Ch. 704; 76 L. J. Ch. 313; 71 J. P. 219; 96 L. T. 614; 23 T. L. R. 366; 5 L. G. R. 577) varied.

CORSELLIS *v.* LONDON COUNTY COUNCIL, [1908] [1 Ch. 13; 77 L. J. Ch. 120; 6 L. G. R. 78; 71 J. P. 561; 24 T. L. R. 80—C. A.

(f) In General.

166. *Advertisements in — Street — Print distributed by way of Advertisement—Metropolitan Streets Act*, 1867 (30 & 31 Vict. *c.* 134), *s.* 9.]—A printed sheet, consisting of a publication of news, which was distributed gratuitously with the object of advertising a newspaper, is not for that reason a print "carried or distributed by way of advertisement" within the meaning of sect. 9 of the Metropolitan Streets Act, 1867.

GAGE *v.* BREALEY, (1898) 67 L. J. Q. B. 457; 14 [T. L. R. 324; 46 W. R. 415—Div. Ct.

167. *Alterations — Street "leading into" Street—Rectangular Turns—Slight Curvatures—London County Council (Improvements) Act*, 1899 (62 & 63 Vict. *c.* cclxvi.), *s.* 55 (6).]—Under a private Act a local authority was required, as part of certain alterations, to maintain a public street "leading into" another street. The authority proposed to do this by making two rectangular turns in the street before it arrived at the other street.

HELD—that the proposed street would not "lead into" the other street within the meaning of the Act but must be taken, allowing for slight curvatures, straight into the other street.

METROPOLITAN ELECTRIC SUPPLY CO., LD., [*v.* LONDON COUNTY COUNCIL, (1904) 68 J. P. 501; 2 L. G. R. 1286—Kekewich, J.

168. *Pavement — Reflector Light Outside Windows—"Any Meat or Offal or other Matter or Thing" Hanging over the Pavement—Reflector Light not within the Statute — Metropolitan Paving Act*, 1817 (57 Geo. 3, *c.* xxix.), *s.* 65.] —Sect. 65 of the Metropolitan Paving Act, 1817, imposes a penalty on any person who "shall hang out, or expose, or cause or permit to be hung out or exposed, any meat, offal or other matter or thing whatsoever, from any house . . ." over the pavements.

HELD—that the section applied to things hung outside a house temporarily, and did not extend to glass reflectors fixed permanently outside the windows of a bank by pivots and lugs let into the brickwork of the wall.

WINSBORROW *v.* LONDON JOINT STOCK BANK, [LD., (1903) 67 J. P. 289; 88 L. T. 803; 19 T. L. R. 500; 20 Cox, C. C. 478—Div. Ct.

169. *"Throwing Litter" in Streets—Advertisements—Metropolitan Police Act*, 1839 (2 & 3 Vict. *c.* 47), *s.* 60, *sub-s.* 3.]—By sect. 60, sub-sect. 3, of the Metropolitan Police Act, 1839, every person who in any thoroughfare shall throw or lay any dirt, litter, or ashes, shall be liable to a penalty.

A person drove in a van along a street, and

Streets—*Continued.*

threw out over the roadway printed bills containing an advertisement of a play about to be performed at a theatre.

HELD—that it was a question of fact whether the bills were thrown out in such numbers as to cause litter in the ordinary and popular sense.

HILLS *v.* DAVIES, (1903) 67 J. P. 198; 88 L. T. [464; 19 T. L. R. 352; 20 Cox, C. C. 398—Div. Ct.

X. WATER SUPPLY.

170. *Fire Hydrants—Right of Company to Use—User for other Purposes than Extinguishing Fires—Waterworks Clauses Act*, 1847 (10 & 11 Vict. *c.* 17), *ss.* 3, 37 *to* 43—*Metropolitan Fire Brigade Act*, 1865 (28 & 29 Vict. *c.* 90), *s.* 32—*Metropolis Water Act*, 1871 (34 & 35 Vict. *c.* 113), *s.* 34—*London County Council (General Powers) Act*, 1894 (57 & 58 Vict. *c.* ccxii.), *s.* 4.]—A waterworks company which, under statutory obligation, has provided hydrants at the request, and maintained and repaired them at the expense, of the London County Council, and which, by the various statutes above referred to, is bound to provide a supply of water for extinguishing fire and for certain other specified purposes, and to allow all persons to use the water for extinguishing fire without making compensation, may use the hydrants for other purposes in addition to the supply of water for extinguishing fires, and such additional user may take place without the consent of the London County Council, and the right may, with the permission of the water company, be exercised by other persons.

LONDON COUNTY COUNCIL *v.* EAST LONDON [WATERWORKS CO., [1900] 1 Q. B. 330; 69 L. J. Q. B. 304; 48 W. R. 252; 82 L. T. 268; 16 T. L. R. 141—Div. Ct.

171. *House Without — "Owner" — Public Health (London) Act*, 1891 (54 & 55 Vict. *c.* 76), *ss.* 4 (1), (3) (a), 48 (1), 141.]—The appellants, who were possessed for a term of years of a house and premises in Blackfriars Road, let them to one J. B., with a covenant by J. B. not to sublet without their consent. J. B., without their consent, sublet each floor to a separate tenant. The water supply of the house would have been sufficient if it had been in the occupation of one tenant, but the only water supply available for the tenant of the top floor was that provided by a tap in the yard.

HELD—that no order could be made against the appellants as owners under sect. 48 of the Public Health (London) Act, 1891, to abate the nuisance of there being an insufficient supply for the top floor, since it could not be treated as an occupied house for the purposes of sect. 48 of the Public Health (London) Act, 1891, as the words "occupied house" in that section mean a "structure as let," and since even if it could be so treated the appellants, not being in receipt of the rackrent, were not owners within the Act.

FIELD & SON *v.* SOUTHWARK BOROUGH [COUNCIL, (1907) 71 J. P. 240; 96 L. T. 646; 5 L. G. R. 567—Div. Ct.

172. *Inspection of Fittings — Obstructing—Regulations—Notice — Metropolis Water Act*, 1871 (34 & 35 Vict. *c.* 113), *ss.* 27, 30.]—The respondent, who was the occupier of premises provided with a constant supply of water by the Metropolitan Water Board, was summoned for hindering an officer of the Board from entering and inspecting the prescribed fittings, contrary to the Metropolis Water Act, 1871. There was no evidence that a notice to provide and keep in repair the prescribed fittings was ever served on the owner or occupier under sect. 27 of the Act, and there was no evidence of the regulations prescribing the fittings.

HELD—that notice under sect. 27 was not a condition precedent to the right of the officer of the Board, under sect. 30, to enter and inspect the prescribed fittings, but that, as there was no evidence of the regulations, the summons was rightly dismissed.

METROPOLITAN WATER BOARD *v.* NORTHCOTT, [(1907) 71 J. P. 338; 96 L. T. 708; 5 L. G. R. 770—Div. Ct.

173. *London Water Companies—Transfer of Undertakings to the Metropolitan Water Board—Valuation—Obligation to Contribute to Sinking Fund—Whether to be taken into Account—Metropolis Water Act*, 1902 (2 Edw. 7, *c.* 41), *ss.* 2, 6, 37.]—In valuing the undertaking of a metropolitan water company upon its transfer to the new Metropolitan Water Board, the Court of Arbitration ought to take into account the fact that under one of its special Acts the company is compelled to make contributions to a sinking fund.

EAST LONDON WATERWORKS CO. AND OTHERS [*v.* THE METROPOLITAN WATER BOARD, (1904) 20 T. L. R. 245—C. A.

174. *Obligation to Give—"Premises"—Building Land — Waterworks Clauses Act*, 1847 (10 & 11 Vict. *c.* 17), *s.* 43—*East London Waterworks Act*, 1852 (16 & 17 Vict. *c.* clxvi.), *s.* 79.]—By sect. 79 of the East London Waterworks Act, 1853, "the company may, at their own instance, and shall at the request of any owner or occupier of any premises situate in or adjoining any street in which any main or service pipe of the company is or shall be laid, and who requires a supply of water by measure for purposes other than the purposes in respect of which rates are by this Act provided or limited, by means of communication pipes and other necessary and proper apparatus to be provided, laid, and maintained at the cost of the person requiring such supply, afford a supply of water by meter," at certain specified rates.

HELD—that the word "premises" in the section did not include land, and that therefore the owner or occupier of building land upon part of which the foundations of houses were only laid out, and which was otherwise unbuilt upon, was not entitled under the section to demand a supply of water on the land for use in his building operations.

METROPOLITAN WATER BOARD *v.* PAINE, [1907] 1 K. B. 285; 76 L. J. K. B. 151; 71 J. P. 63; 96 L. T. 63; 23 T. L. R. 55; 5 L. G. R. 227—Div. Ct.

Water Supply—*Continued.*

175. *Purchase of Metropolitan Waterworks—Scheme for Distribution of Compensation—Meeting of Shareholders—"Majority in value of the Shareholders"—Metropolis Water Act*, 1902 (2 Edw. 7, *c.* 41), *Sched. IV., s.* 1.]—The "majority in value of the shareholders, or of the shareholders of a particular class," which is required by Sched. IV., sect. 1, of the Metropolis Water Act, 1902, to enable a scheme of the directors for the distribution of the compensation payable for the purchase of a metropolitan water undertaking to be submitted to the Chancery Division of the High Court, means a majority in value of all the shareholders of the company or of the particular class, and not merely a majority in value of the shareholders present at the meeting.

Clay and Others *v.* The Grand Junction [Waterworks Co., (1907) 21 T. L. R. 31—Warrington, J.

176. *Subways—Charge for use of—Reduced Scale for Water Companies—Hydraulic Company with Water Mains—London County Council (Subways) Act*, 1893 (56 & 57 Vict. *c.* ccii.), *s.* 5.]—A company which supplies hydraulic pressure by water mains, is not a water company within the exemption in the London County Council (Subways) Act, 1893 (56 & 57 Vict. c. ccii.), s. 5. It is not, therefore, to be charged by the London County Council for the use of the council's subways on the reduced scale, applicable to "a water or gas company having statutory powers to break up streets."

London County Council *v.* London [Hydraulic Co., (1898) 62 J. P. 229; 14 T. L. R. 301—C. A.

177. *Water Company—Contract—Dissolution of Company—Water Board—Liability—Metropolis Water Act*, 1902 (2 Edw. 7, *c.* 41), *s.* 45 (b).]—By an indenture dated 1841, a water company covenanted, as from December 25th, 1842, and thenceforth during the continuance of the existence of the company, to supply water to certain houses at a certain rate.

The water company was scheduled to the Metropolis Water Act, 1902, and by sect. 29 was dissolved as soon as compensation had been paid.

It was submitted that under sect. 45 (b) of that Act the Metropolitan Water Board was bound to perform the contract of the water company.

Held—that the section dealt with enforcing a contract and not with altering its terms, and that owing to the dissolution of the company the contract could not now be enforced.

Edge *v.* Metropolitan Water Board, [(1907) 71 J. P. 436; 97 L. T. 279; 23 T. L. R. 698; 5 L. G. R. 1183—Eady, J.

178. *Water Pipes, Repair of—Leak in Communication Pipe in the Street—Liability of Occupier to Repair—Refusal of Supply by Undertakers—Waterworks Clauses Act*, 1847 (10 & 11 Vict. *c.* 17), *ss.* 42, 43—*Metropolis Water Act*, 1871 (34 & 35 Vict. *c.* 113), *s.* 32.]—A leak occurred in a communication pipe leading to the respondent's premises, the pipe being the property of his landlord. The water company having opened up the street called upon the respondent to repair and make good the pipe and intimated that in default they would disconnect it from the main. The company offered to reconnect the pipe, after repair, upon payment of the expenses. The respondent communicated with his landlord, upon whom he contended the liability rested, and took no further steps in the matter. The appellants accordingly cut off the water supply. On an information by the respondent for refusal to supply:—

Held—that the respondent, under the circumstances, was not a person who was entitled to a constant supply under sect. 43 of the Waterworks Clauses Act, 1847, as he or his landlord ought to have repaired the pipe.

Grand Junction Waterworks *v.* Rodo- [canachi, [1904] 2 K. B. 230; 73 L. J. K. B. 441; 68 J. P. 290; 52 W. R. 508; 90 L. T. 819; 20 T. L. R. 410; 2 L. G. R. 689—Div. Ct.

179. *Streets (London) Water Pipes—Lowering Surface of Street—Duty of Local Authority to lower Water Pipes—Metropolis Management Act*, 1855 (18 & 19 Vict. *c.* 120), *s.* 98.]—A local authority under powers conferred on them by the Metropolis Management Act, 1855, s. 98, proposed to lower the surface of streets in their district. Upon motion by a water company whose pipes lay under the streets to restrain the local authority from carrying out their proposed works without also lowering the pipes at least the same distance:—

Held—that the section imposed no duty on the defendants to lower the plaintiffs' pipes; that they had in no way injured them or otherwise interfered with them; and therefore the plaintiffs were not entitled to the injunction claimed.

The Gas Light and Coke Co. v. *The Vestry of St. Mary Abbotts* (15 Q. B. D. 1) and *Geddis* v. *Proprietors of the Bann Reservoir* (3 A. C. 430) distinguished.

Decision of Kekewich, J. (62 J. P. 519; 14 T. L. R. 508) reversed.

Southwark and Vauxhall Water Co. *v.* [Wandsworth District Board of Works, [1898] 2 Ch. 603; 62 J. P. 756; 79 L. T. 132; 14 T. L. R. 576; 47 W. R. 107—C. A.

180. *Water Rates—Rebate granted by Waterworks Company—Right of Metropolitan Water Board to discontinue Rebate—Waterworks Clauses Act*, 1847 (10 & 11 Vict. *c.* 17), *ss.* 75—80—*West Middlesex Waterworks Act*, 1852 (15 & 16 Vict. *c.* clix.), *ss.* 3, 39—*Metropolis Water Act*, 1902 (2 Edw. 7, *c.* 41), *ss.* 2, 3, 15 (6), 46.]—The West Middlesex Waterworks Company for some years before 1904 allowed to the consumers of water within their district a rebate, under sect. 80 of the Waterworks Clauses Act, 1847, at 5 per cent. from the water rates charged by them for the supply of water. In 1904 the

Water Supply—*Continued.*

undertaking of the waterworks company was transferred to the Metropolitan Water Board, under the Metropolis Water Act, 1902, subject to all the obligations of the company.

HELD—that the water board were not bound to continue to allow the rebate.

CHISWICK URBAN DISTRICT COUNCIL *v.* THE [METROPOLITAN WATER BOARD, (1905) 69 J. P. 457 ; 21 T. L. R. 620 ; 3 L. G. R. 917—Joyce, J.

XI. MISCELLANEOUS.

181. *Betterment—Charges—Initial Valuation—Licensed Premises—Takings and Payments—Tying Covenants—London County Council (Tower Bridge Southern Approach) Act*, 1895 (58 & 59 Vict. *c.* cxxx.), *s.* 36.]—For the purpose of creating a charge on properties benefited by improvements carried out in pursuance of the London County Council (Tower Bridge Southern Approach) Act, 1895, an initial valuation was to be made of all the properties affected apart from the proposed improvements. In making such valuation the valuer was to assess (1) the site, (2) the site and buildings, (3) the separate value of the owner and of every lessee having a term of not less than twenty-one years to run at the date of the valuation excluding any trade interest.

With regard to takings and payments, and tying covenants concerning licensed premises :—

HELD—(1) that neither takings and payments nor the tying covenant are elements of the value of the site, and that evidence of them should not be admitted even for the purpose of testing the evidence of witnesses ; (2) that the rule is the same as to takings and payments when considering the site and buildings, but as to the tying covenant the valuation must be the same whether the tying covenant is considered or not, as the covenant would only affect the apportionment between the lessor and the lessee ; (3) with regard to the third part of the valuation, namely, the interests of the owner and all lessees having twenty-one years unexpired, the fact that the house is tied ought to be considered.

Re LONDON COUNTY COUNCIL AND CITY OF [LONDON BREWERY CO., [1898] 1 Q. B. 387 ; 61 J. P. 808 ; 67 L. J. Q. B. 382 ; 77 L. T. 463 ; 14 T. L. R. 69 ; 46 W. R. 172—Div. Ct.

182. *Betterment—Improvement Area—Lands abutting on a Street—London County Council Improvements Act*, 1897 (60 & 61 Vict. *c.* 243), *Loc. & Pers.*).]—By the London County Council Improvements Act, 1897, the council were empowered to widen Tottenham Court Road by pulling down the isolated block of buildings between that road and Bozier's Court, and to charge an improvement charge upon all lands within the improvement area therein defined in respect of any substantial and permanent increase in value derived from the improvements.

The improvement area was defined as "in the case of the Tottenham Court Road widening, the lands all or any part of which front or abut on the west side of Tottenham Court Road and Bozier's Court, between Oxford Street and Hanway Street."

The Oxford Music Hall occupies a considerable piece of ground bounded on the south by the houses on the north side of Oxford Street, and on the east by the houses on the west side of Tottenham Court Road. The principal entrance is formed by a building which fronts on Oxford Street.

The pit and gallery entrance is carried into Tottenham Court Road through the ground floor of No. 2 in that road, being a house between Hanway Street and Oxford Street.

No. 2 was held by the owners of the hall under a different lease from the rest of their property, and all but the ground floor was let off and separately occupied from the hall.

The council claimed that the whole of the music-hall was liable to an improvement charge ; the owners claimed that the charge should be limited to No. 2, Tottenham Court Road.

HELD—that the whole music-hall came within the improvement area.

THE OXFORD, LD. *v.* LONDON COUNTY COUNCIL, [1898] 2 Ch. 491 ; 67 L. J. Ch. 655 ; 79 L. T. 22—North, J.

183. *Contract—Contract made by Company with Commissioners of Sewers—Member of Corporation a Shareholder in Company—Contract declared Void—City of London Sewers Acts*, 1848 (11 & 12 Vict. *c.* clxiii.), *s.* 42, *and* 1851 (14 & 15 Vict. *c.* xci.), *s.* 53.]—Sect. 42 of the City of London Sewers Act, 1848, makes void any contract entered into by the Commissioners of Sewers with a company in which a commissioner, alderman, or common councilman is, at the time of the contract, a shareholder.

No valid distinction in this respect can be drawn between "contracts of supply" and "contracts of construction," and a contract for lighting the City of London by electricity is therefore within the prohibition.

Where, however, the contract is in the beginning valid, it is not necessarily invalidated by the fact that the company subsequently transfers it to another company, in which members of the corporation hold shares.

Decision of C. A. ([1901] 1 Ch. 602 ; 70 L. J. Ch. 334 ; 17 T. L. R. 294) affirmed.

CITY OF LONDON ELECTRIC LIGHTING CO., LD. [*v.* CORPORATION OF LONDON, [1903] A. C. 434 ; 72 L. J. Ch. 737 ; 89 L. T. 310 ; 19 T. L. R. 694 ; 67 J. P. 437 ; 52 W. R. 158—H. L. (E.).

184. *County Council—Corporation—Statutory Powers—Business of Tramway Company—Business of Omnibus Proprietors—Incidental Business*—Ultra vires—*Jurisdiction of Attorney-General—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *ss.* 1, 2, 68, 79—*London County Tramways Act*, 1896 (59 & 60 Vict. *c.* lx.), *ss.* 2, 10.]—The London County Council claimed the power to carry on the business of omnibus proprietors, not in general, but in respect of a particular line of

Miscellaneous—*Continued.*

omnibuses which in great part was used by the London Tramways Company, who were entitled, as the council's predecessors, to certain tramways which, under an Act of Parliament, the council were authorised to work. The Attorney-General, on the relation of certain persons and companies carrying on the business of omnibus proprietors, being ratepayers in London, brought an action against the London County Council claiming a declaration that it was beyond the powers of the council to run the omnibuses, and an injunction.

HELD—that the council had not all the powers of a common law corporation, they had express authority of Parliament to carry on the business of a tramway company, but no authority at all to carry on the business of omnibus proprietors; that the business of an omnibus proprietor was not incidental to the business of a tramway company; that where there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not, that which the Courts can decide is whether there is the excess of power which he, the Attorney-General, alleges.

The decision of C. A. ([1901] 1 Ch. 781; 70 L. J. Ch. 367; 84 L. T. 245; 17 T. L. R. 309) affirmed.

LONDON COUNTY COUNCIL *v.* ATTORNEY-GENERAL, [1902] A. C. 165; 71 L. J. Ch. 268; 66 J. P. 340; 50 W. R. 497; 86 L. T. 161; 18 T. L. R. 298—H. L. (E.).

185. *Metropolitan Common Poor Fund—Provision of Permanent Casual Wards—Value of Land—Metropolitan Poor Act*, 1867 (30 & 31 Vict. *c.* 6), *s.* 69, *sub-s.* 9.]—Permanent casual wards for paupers were erected by the Holborn union upon lands which they had acquired many years before, the union borrowing money for the purpose of erecting the wards, which was repaid by instalments out of the metropolitan common poor fund as established by the Metropolitan Poor Act, 1867. The Holborn union sought to have the value of the land so used repaid to them out of the metropolitan common poor fund in one particular half-year. The auditor disallowed the item. Upon rules for a *certiorari* to quash the disallowance and for a *mandamus* to grant a certificate of allowance:—

HELD — that the whole sum could not be allowed in one half-year, and therefore the rules must be discharged.

Quære, whether the union were not entitled to include in their accounts for the purpose of having repaid to them out of the common poor fund the fair value of the land for the six months.

REX *v.* MOWATT, (1905) 69 J. P. 461; 20 T. L. R. [646; 93 L. T. 789—Div. Ct.

186. *Open Space—Disused Burial Ground—Erection of Hoarding to prevent Acquisition of Right to Light—"Building"—Metropolitan Open Spaces Acts*, 1877 (40 & 41 Vict. *c.* 35), *s.* 1, *and* 1881 (44 & 45 Vict. *c.* 34), *s.* 5—*Open Spaces Act*, 1887 (50 & 51 Vict. *c.* 32), *s.* 4—*Disused Burial Grounds Act*, 1884 (47 & 48 Vict. *c.* 72), *s.* 3.]—A local authority in the metropolis, in whom a disused burial ground is vested as an open space for the use of the public, have power to erect a screen upon the open space for the purpose of preventing the owner of the adjoining land from acquiring a right to the access of light over it so long as such screen is not so constructed as to be a "building" within the meaning of sect. 3 of the Disused Burial Grounds Act, 1884. It is quite possible to erect a screen which will not be a "building."

Decision of C. A. ([1903] 2 Ch. 557; 72 L. J. Ch. 695; 68 J. P. 49; 52 W. R. 114; 89 L. T. 383; 19 T. L. R. 648) reversed.

PADDINGTON BOROUGH COUNCIL *v.* ATTORNEY-[GENERAL, [1906] A. C. 1; 75 L. J. Ch. 4; 70 J. P. 41; 54 W. R. 317; 93 L. T. 673; 4 L. G. R. 19; 22 T. L. R. 55—H. L. (E.).

187. *Property liable to Apportionment—Records of the County of Middlesex—Custody of—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 40, *sub-s.* 7.]—The plaintiffs claimed a declaration that the records of the old county of Middlesex existing on April 1st, 1889, and then deposited at the Guildhall, Westminster, were in the legal custody of the *custos rotulorum* of the county of London and the *custos rotulorum* of the county of Middlesex, or that such of the said records as related to the locality now known as the county of London were in the legal custody of the *custos rotulorum* of the county of London, and that the said records existing on April 1st, 1889, were properly liable to apportionment between the present counties of London and Middlesex within the meaning of sect. 40, sub-sect. 7, of the Local Government Act, 1888.

HELD—that the Legislature never intended that any such apportionment should take place, that the Legislature did not intend that any of the records and documents should pass out of the custody of the *custos rotulorum* of the county of Middlesex into the possession of the clerk of the council, that the records and documents in question were at present where they ought to be, and that there they ought to remain.

DUKE OF WESTMINSTER *v.* DUKE OF BEDFORD, [(1900) 16 T. L. R. 114—Bigham, J.

188. *Thames—Duty of Corporation to provide Steam Tug under Corporation of London (Tower Bridge) Act*, 1885—*Liability.*]—By sect. 54 of the Corporation of London (Tower Bridge) Act, 1885 (48 & 49 Vict. c. cxcv.), it is provided that if and so long as the Conservators of the Thames shall require them to do so, the corporation shall, from and after the commencement of any temporary works in connection with the construction of the piers of the Tower Bridge, at all times thereafter during the construction of the Tower Bridge, and after the completion thereof, provide and maintain a steam tug upon the river Thames between the Shadwell entrance to the London Docks and London Bridge, for the purpose of assisting vessels and barges navigating the centre channel of the Upper Pool. The

Miscellaneous—*Continued.*

captain or other person in charge of the said steam tug shall in all things observe the bye-laws for the regulation of the navigation of the river Thames for the time being in force, and also the directions of the harbour master and other officers of the corporation.

HELD—that it was the duty of the corporation under this section to provide and maintain a tug and also to assist vessels navigating the centre channel, and that the master of the tug was the servant of the corporation who were responsible for his acts.

Decision of Mathew, J. affirmed.

MERSEY STEAMSHIP CO., LD. *v.* LONDON CORPORATION, (1898) 14 T. L. R. 197—C. A.

189. *Vestry Hall—Vicar of Parish—Transfer to Borough Council—Burial Act*, 1816 (56 Geo. 3, *c.* 141), *s.* 4—*Poor Relief Act*, 1819 (59 Geo. 3, *c.* 12), *s.* 17—7 Geo. 4, *c.* 77, *ss.* 35, 36—*Metropolis Local Management Act*, 1855 (18 & 19 Vict. *c.* 120)—*London Government Act*, 1899 (62 & 63 Vict. *c.* 14), *ss.* 4, 23 (3).]—In the year 1719 the parish church of St. Martin-in-the-Fields was rebuilt under the Act 6 Geo. 1, c. xxxii., which also provided for the building of a parish vestry room. This vestry room was built on ground which was purchased for and added to the churchyard, and the site of the vestry room and certain burial vaults constructed underneath it were consecrated and used as a place for burials. In 1826 this vestry room was pulled down and replaced by a building erected under 7 Geo. 4. c. 7, which provided that the new vestry room and the ground on which it was erected should be vested in the persons or bodies corporate in whom the original room would have been vested if the Act had not been passed. In the basement of the new vestry room vaults were constructed and used for burials, the site having been previously consecrated. This vestry room was used, as its predecessor had been, for meetings of the vestry, and for other ecclesiastical and civil purposes connected with the affairs of the parish.

In 1891 the vestry, which had then become a corporation under the Metropolis Local Management Act, 1855, having built a new town hall at some distance from the church, gave up possession of the old vestry room to the vicar and churchwardens.

By the London Government Act, 1899, the property and powers of the old vestry were transferred to the plaintiffs, who in 1903 brought an action against the vicar and churchwardens to recover possession of the old vestry room.

HELD—that by virtue of the Act of 56 Geo. 3, c. 141, s. 4, the then vestry room, being erected on a site which was consecrated as a burial ground, was vested in the vicar of the parish, that the vestry room of 1826 was by the Act under which it was erected similarly vested, and that therefore it did not pass in 1899 to the plaintiffs as "property of the vestry."

WESTMINSTER CORPORATION *v.* VICAR AND CHURCHWARDENS OF ST. MARTIN-IN-THE-FIELDS, (1907) 71 J. P. 82; 96 L. T. 491; 23 T. L. R. 112; 5 L. G. R. 500—Joyce, J.

MIDWIVES.

See PUBLIC HEALTH.

MILITIA.

See ROYAL FORCES.

MILK.

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MINES, MINERALS, AND QUARRIES.

COL.

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I. MINING LEASE.

1. *Construction—Covenant to win, work and get, fairly, duly and honestly, the whole of the Coal—Excessive Cost of Working—Liability of Lessees to Work.*]—By a mining lease lessors demised for a term the coal under certain lands at a rent of £5 per annum till work commenced, and thenceforward at a rent of £100 for every acre of coal won.

The lessees covenanted that they would at all times during the term fairly, duly and honestly win, work and get the whole of the coal in a proper and workmanlike manner.

Owing to unsuspected faults it became impossible to work the coal except at a heavy loss, and the lessees refused to work it.

HELD—that upon the true construction of the lease the words "fairly, duly and honestly" did not detract from the obligation to win, work and get the coal, and that the lessees were liable in damages for breach of the covenant, the damages to be the amount which the lessors would probably have received if the lessees had worked the coal regardless of loss to themselves.

Walker v. *Jeffreys* ((1842) 1 Hare, 341—Wigram, V.-C.) and *Jerris* v. *Tomkinson* ((1856) 1 H. & N. 195—Ex.) followed.

Decision of C. A. ([1905] 1 K. B. 74; 74 L. J. K. B. 155; 92 L. T. 46) affirmed.

CHARLESWORTH *v.* WATSON AND OTHERS, [1906] A. C. 14; 75 L. J. K. B. 137; 94 L. T. 6—H. L. (E.).

Mining Lease—*Continued.*

2. *Lease of Coal—Subsequent Lease of Fireclay—New Lease of Coal—Coal ungettable without injury to Fireclay—Derogation from Grant.*]—In 1896 A.'s tenants were to the knowledge of S. working some of the coal on his property. In that year S. took a lease of all the fireclay on the property, A. reserving no right to work coal.

In 1902 A. granted to the defendants a lease of all the workable seams of coal, limestone, and fireclay so far as they belonged to him. It subsequently proved that neither the fireclay nor coal could be worked without injury to the lessees of the other.

HELD (Ld. Moncreiff dissenting)—that S. could have the defendants restrained from so working coal as to interfere with the winning of the fireclay.

SHAWSRIGG FIRECLAY CO. *v.* LARKHALL [COLLIERIES, (1904) 5 F. 1131—Ct. of Sess.

3. *"Mines, seams, veins, and beds"—"Tap-cinder" Mounds—Natural or Artificial Formations—Chattels.*]—"Tap-cinder" mounds accumulated out of the refuse from puddling furnaces in the manufacture of pig-iron, are artificial formations, and do not pass under a lease of "all mines, seams, veins, and beds . . . of minerals," nor are they chattels.

BOILEAU *v.* HEATH, [1898] 2 Ch. 301 ; 67 L. J. [Ch. 529 ; 78 L. T. 622 ; 46 W. R. 602—Bigham, J.

II. MINING REGULATIONS.

(a) Coal Mines.

And see title COMPULSORY PURCHASE, No. 22.

4. *Abandonment of Seam—Sending Plan to Secretary of State—Notice to Owner to comply with Requirements of Act—Complaint or Information—Six Months' Limit—Coal Mines Regulation Act*, 1887 (50 & 51 Vict. *c.* 58), *s.* 38, *sub-s.* 5 *— Coal Mines Regulation Act*, 1896 (59 & 60 Vict. *c.* 43), *s.* 4.]—The Coal Mines Regulation Act, 1887, s. 3, sub-s. 5, provides that, "A complaint or information of an offence under this section may be made or laid at any time within six months after abandonment of the mine or seam, or after service on the owner aforesaid of a notice to comply with the requirements of this section, whichever last happens."

HELD—that the sub-section is a clause of limitation, and limits the time for laying an information to within six months after either the abandonment of the mine or seam or the service of the notice.

A notice referred to the requirements of the section, and called attention to the plan required thereby, and ended with the words, "Will you please give the matter your early attention."

HELD—that this was a notice within the meaning of the section, requiring compliance with the provisions of the section.

STOKES *v.* HILL, [1901] 1 K. B. 493 ; 70 L. J. [K. B. 331 ; 65 J. P. 280 ; 49 W. R. 375 ; 84 L. T. 122 ; 17 T. L. R. 221 ; 19 Cox, C. C. 629 —Div. Ct.

5. *Check-weigher — Grounds for Summary Removal of—Interference with any of the Workmen—Coal Mines Regulation Act*, 1887 (50 & 51 Vict. *c.* 58), *s.* 13.]—By sect. 13 of the Coal Mines Regulation Act, 1887, if the owner, agent, or manager of a mine "desires the removal of a check-weigher on the ground that the check-weigher has . . . interfered with the weighing, or with any of the workmen, or with the management of the mine . . . " he may complain to a Court of summary jurisdiction, who may make a summary order for his removal. A check-weigher, who was president of the local miners' association, took the chair at a meeting held to consider the question of working on "play days," and there gave certain advice to miners as to their future action. This meeting was held at an hotel, away from the mine where the check-weigher was employed. He also made speeches and threats as to miners working on "play days" at two meetings (known as "pit gate meetings") held just outside the pit gates where the miners passed going to work. A Court of summary jurisdiction found that on those three occasions the check-weigher had interfered with certain of the workmen of the mine and made a summary order for his removal as check-weigher.

HELD—that the facts justified the decision.

Per Kennedy, J.—Interference with workmen by the check-weigher within the meaning of the section is not limited to acts done by him *virtute officii* as check-weigher, or to acts done within the gates of the mine. But an order for removal could not be justified merely because, either as an official of a miners' association or as a private individual, a check-weigher took some part in the legitimate work of a miners' association, and was present or spoke or presided at meetings called to consider and resolve upon matters affecting the miners' interest or action.

Per Phillimore. J.—Interference at the pit gate meetings was interference at the mine, and it was not necessary to decide whether interference with workmen right away from the mine, as at the hotel, was interference with workmen within the meaning of the section.

SYKES *v.* BARRACLOUGH, [1904] 2 K. B. 675 ; [73 L. J. K. B. 920 ; 68 J. P. 561 ; 53 W. R. 205 ; 91 L. T. 560 ; 20 T. L. R. 680—Div. Ct.

6. *Check-weigher — Removal by Order of Justices—Order "that from henceforth he cease to perform his duties"—Coal Mines Regulation Act*, 1887 (50 & 51 Vict. *c.* 58), *s.* 13.]—Justices, acting under the Coal Mines Regulation Act, 1887, s. 13, on proof that a check-weigher had interfered with certain workmen employed at the mine, ordered "that he be forthwith removed from his office of check-weigher on behalf of the persons employed at the said mine, and that from henceforth he do cease to perform his duties as check-weigher on behalf of the persons employed at the mine."

HELD—that the order of the justices was good in law, the latter portion not vitiating it, since clearly it was never intended that, if removed, a check-weigher might at once be re-elected, and

Mining Regulations—*Continued.*

"henceforth" does not necessarily imply a permanent prohibition.

REX *v.* LLEWELLYN AND OTHERS, (1907) 71 J. P. [51 ; 96 L. T. 32—Div. Ct.

7. *Explosives—Prohibition of Use of Dangerous Explosives—Order of Secretary of State—Notice of Order—Coal Mines Regulation Act*, 1896 (59 & 60 Vict. *c.* 43), *s.* 6—*Liability of Manager for Workman's Disobedience to Rule—Coal Mines Regulation Act*, 1887 (50 & 51 Vict. *c.* 58), *s.* 50.]—By sect. 6 of the Coal Mines Regulation Act, 1896, "a Secretary of State, on being satisfied that any explosive is, or is likely to become dangerous, may, by order, of which notice shall be given in such manner as he may direct, prohibit the use thereof in any mine or in any class of mines."

HELD—that the fact that the Secretary of State has undoubtedly made an order is sufficient evidence that he was satisfied that the explosive was likely to become dangerous ; that the directions contained in the section about notice are directory only ; that the order comes into force when it is made by the Secretary of State ; and that the fact that no notice is given does not prevent the order having effect.

HELD, also, that the manager of a mine may be guilty of an offence under sect. 50 of the Coal Mines Regulation Act, 1887, though the explosive was brought into the mine by one of the workmen without his knowledge or authority.

JONES *v.* ROBSON, [1901] 1 K. B. 673 ; 70 L. J. [K. B. 419 ; 65 J. P. 278 ; 84 L. T. 230 ; 19 Cox, C. C. 651—Bruce, J.

8. *Ventilation, Inadequate amount of—Contravention of Rules—Liability of Agent of Mine—Case stated—"Either party to the Proceeding"—"Any person aggrieved"—Summary Jurisdiction Act*, 1857 (20 & 21 Vict. *c.* 43), *s.* 2—*Coal Mines Regulation Act*, 1887 (50 & 51 Vict. *c.* 58), *ss.* 49, 50.]—The respondent was charged, on the information of the appellant, one of His Majesty's inspectors of mines, which alleged that the respondent, being the agent of the B. Mine, the same being a mine within the meaning of the Coal Mines Regulation Act, 1887, unlawfully did fail to cause an adequate amount of ventilation to be constantly produced in the said mine to dilute and render harmless noxious gases to such an extent that the working places, levels, and workings of the said mine would be in a fit state for working therein, contrary to sect. 49, rule 1, of the Coal Mines Regulation Act, 1887. The respondent was admitted to be the agent of the mine within the meaning of the Act. The question of law was whether, having regard to sect. 50 of the Act, the justices were or were not justified, upon the evidence before them, in dismissing the charge against the respondent. The heading of the case only referred to the Summary Jurisdiction Act, 1879. The justices had found "that the respondent had taken the proper steps to enforce the rules by appointing a duly qualified manager and under-manager who knew the rules and whose duty it was to carry out the rules."

HELD—(1) that sect. 33 of the Summary Jurisdiction Act, 1879, which enables "any person aggrieved" to apply to the Court to state a special case, does not cut down the right of "either party to the proceeding" before the justices, under sect. 2 of the Summary Jurisdiction Act, 1857, to appeal by case stated, and that it could not be assumed that, because the heading of the case only referred to the Act of 1879, the case was not stated under both Acts; (2) that as the justices had found that the violation of the rules was in no way caused by the respondent omitting to enforce the rules, that the non-ventilation of the heading was caused by the temporary diversion of the air-pipes at the entrance to an adjacent heading, which was then being driven, and that "only an occasional irregularity was proved, and not one which has been continuous," and that the manager and under-manager were convicted and the agent acquitted, it could not be contended that the agent should have been called as a witness in his own defence; and that further, as the rules had been published, the justices were entitled to find as a fact that the agent had taken all reasonable means to prevent a contravention of the rules, and were justified in refusing to convict the agent.

STOKES *v.* MITCHESON, [1902] 1 K. B. 857 ; 71 [L. J. K. B. 677 ; 66 J. P. 615 ; 50 W. R. 553 ; 86 L. T. 767 ; 18 T. L. R. 543 ; 20 Cox, C. C. 255—Div. Ct.

9. *Winding Engineman—Person not Qualified allowed to work Engine for Raising Material only—Responsibility of Manager—Coal Mines Regulation Act*, 1887 (50 & 51 Vict. *c.* 58), *ss.* 49, 51.]—In a coal mine, which is usually entered by machinery, sect. 49, rule 24, of the Coal Mines Regulation Act, 1887, requires that a man not under twenty-two years of age shall be appointed for working the machinery which is employed in lowering and raising persons, and shall attend for that purpose during the whole time that any person is below ground in the mine. A special rule in force in a particular mine provided that the engineman "should remain in charge and so near his engine as at all times to have it under his control . . . should not allow any person to interfere with the engine while being wrought."

HELD—that these rules did not allow an engineman under twenty-two years of age to work the engine for raising material only ; and that the manager who allowed him to do so was guilty of an offence under sect. 51 for not having taken reasonable care to enforce the rules.

SOUTAR *v.* CLARK, (1906) 7 F. 1—Ct. of [Justy.

(b) Fencing Abandoned Mines.

10. *Obligation to Fence—Person interested in Minerals — Derbyshire Mining Customs and Mineral Courts Act*, 1852 (15 & 16 Vict. *c.* clxiii.) — *Metalliferous Mines Regulations Act*, 1872 (35 & 36 Vict. *c.* 77), *s.* 13.]—A. was the owner of certain land in which there was a lead mine, containing, besides lead ore, calk and calespar,

Mining Regulations—*Continued.*

minerals having a marketable value. By the mining customs of the county—as recognised by 15 & 16 Vict. c. clxiii.—any member of the public was entitled to work this mine for the lead ore, subject to his paying to the Crown (as Duchy of Cornwall) a certain royalty on all lead ore brought to the surface. The lead ore could not be got without raising the calk and calcspar, which were intermixed with it, and by the custom of the county A. was entitled to such calk and calcspar on its being separated from the lead ore. The mine having become abandoned, though both lead ore and calk and calcspar were still in it, the question arose, who was liable to fence the mine under sect. 13 of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77).

HELD—that A. was liable to fence it, as he was a person interested in the minerals of the mine within that section, inasmuch as (1) the calk and calcspar while in the mine were his property as part of his freehold; and (2) on being taken from the mine by one entitled to take them they were his property by the custom of the county.

STOKES *v.* ARKWRIGHT, (1897) 61 J. P. 775; 66 [L. J. Q. B. 845; 77 L. T. 400; 14 T. L. R. 6—Div. Ct.

11. *Abandoned Shaft—Now used as a Public Well—Vested as such in Local Authority—No Statutory Duty to Fence—"Owner"—Metalliferous Mines Regulation Act*, 1872 (35 & 36 Vict. *c.* 77), *ss.* 13, 41—*Public Health Act*, 1875 (38 & 39 Vict. *c.* 55), *s.* 64.]—Where an abandoned shaft of a disused mine within the meaning of the Metalliferous Mines Regulation Act, 1872, has become a public well, and as such is vested in the local authority under sect. 64 of the Public Health Act, 1875, the authority are not the "owners" of the shaft within the meaning of sect. 41 of the first-named Act, so as to render them liable under sect. 13 to fence it.

KNUCKEY *v.* REDRUTH RURAL DISTRICT [COUNCIL, [1904] 1 K. B. 382; 73 L. J. K. B. 265; 68 J. P. 172; 52 W. R. 558; 90 L. T. 226; 20 T. L. R. 164; 2 L. G. R. 456—Div. Ct.

(c) Quarries.

12. *Fatal Accident—"Other Minerals"—Gravel and Sand—Quarries Act*, 1894 (57 & 58 Vict. *c.* 42), *s.* 1—"*In the Course of working the Railway*"—*Notice—Regulation of Railways Act*, 1871 (34 & 35 Vict. *c.* 78), *s.* 6—*Metalliferous Mines Regulation Act*, 1872 (35 & 36 Vict. *c.* 77), *ss.* 11, 28.]—The object of the Quarries Act, 1894, is to afford protection to, and insure investigation for the benefit of, workmen who are working in places where there are special dangers, and gravel and sand come within the term "other minerals" of sect. 1 of the Quarries Act, 1894.

The Corpusty ballast siding is a place from which gravel or sand is taken by the defendant company's workmen as they want it. A fatal accident occurred to one of their workmen engaged in taking gravel from the place.

HELD—that this was not an accident which took place "in the course of working the railway" within sect. 6 of the Regulation of Railways Act, 1871, and notice of the accident was not required to be sent to the Board of Trade; but if it were, the notice required by the Metalliferous Mines Regulation Act, 1872, should have been given to the inspector of mines.

SCOTT *v.* MIDLAND RY. CO., [1901] 1 Q. B. 317; [70 L. J. Q. B. 228; 65 J. P. 135; 49 W. R. 318; 83 L. T. 737—Div. Ct.

III. RESERVATION OF MINERALS.

13. "*All Mines and Veins of Coal in or under*" *the Land—Construction—Underground Roadway—Payment of Rent—Mistake as to Legal Rights—Estoppel.*]—The owners of land conveyed it to the predecessors in title of the plaintiffs, but excepted and reserved "all mines and veins of coal in or under" the land. The owners and their successors, the defendants, then worked coal under the land, and cut an underground road; such road lay in the line of one of the coal seams, but was in part cut through the adjacent soil, the actual seam being only some 2 feet in depth. Along this road the defendants carried coal from distant working not under land conveyed to the plaintiffs' predecessors.

HELD—that the defendants had the property in the strata below the surface, and were entitled to construct the road and use it for such purposes as they wished.

Proud v. *Bates* ((1865) 34 L. J. Ch. 406), *Duke of Hamilton* v. *Graham* ((1871) L. R. 2 H. L. Sc. 166—H. L. (SC.)) and *Eardley* v. *Granville* ((1876) 3 Ch. D. 326; 45 L. J. Ch. 669; 34 L. T. 609; 24 W. R. 528) followed.

Ramsay v. *Blair* ((1876) 1 App. Cas. 701) distinguished.

HELD, also, that the fact that the defendants had for some years paid a rent for the use of the road under a mistaken belief that they were bound to do so created no obligation or estoppel.

BATTEN POOLL *v.* KENNEDY, [1907] 1 Ch. 256; [76 L. J. Ch. 162—Warrington, J.

14. *Railway—Compulsory Purchase of Land—Exceptions—"Other Minerals"—"Clay"—Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. *c.* 20), *ss.* 77, 78.]—Sect. 77 of the Railways Clauses Act, 1845, excepts from conveyances of lands made under a statutory purchase "mines of coal, ironstone, slate or other minerals." The question arose whether "clay" underlying the soil passed to a railway company by the conveyance of the land under sect. 77.

HELD—that the proposition which lay at the root of the true solution of the question was that to a case dependent upon the operation of the statute different considerations applied from those which arose in a case where the relations between the parties existed by contract or grant. Where by way of grant land passes from A. to B. reserving the minerals to A., A. cannot so work the reserved minerals as to let down the surface, for that would be to destroy that which

Reservation of Minerals—*Continued.*

he had granted, and in such a case the word "minerals" has the widest meaning, as A. cannot work the reserved thing so as to injure B. Where by conveyance under the Railways Clauses Act, 1845, land passes from A. to B. excepting the minerals, A. can work the excepted thing so as to injure B.

HELD, also, that the question whether the word "mineral" does or does not include clay is to be determined by ascertaining the true nature of the transaction and the object of the contracting parties. Clay may be a mineral in one district and not in another.

HELD, also, that where the facts are that the clay in question is the soil and that the railway company has paid so many hundred pounds an acre for the land, then the clay is not a mineral reserved by force of sect. 77, but has passed to the railway company by the conveyance of the land under sect. 77.

Lord Provost and Magistrates of Glasgow v. *Faire* ((1888) 13 App. Cas. 657; 58 L. J. P. C. 33; 37 W. R. 627; 60 L. T. 274—H. L. (E.)) applied.

Hext v. *Gill* ((1872) L. R. 7 Ch. 699; 41 L. J. Ch. 761; 20 W. R. 957; 27 L. T. (N.S.) 291) not applied.

GREAT WESTERN RY. CO. *v.* BLADES, [1901] [2 Ch. 624; 70 L. J. Ch. 847; 65 J. P. 791; 85 L. T. 308; 17 T. L. R. 693—Buckley, J.

15. *Strata of Red Rock and Coal—Use and Value—Injunction.*]—The defendants were the lessees of certain lands under a lease dated September 30th, 1860, granted by the predecessor in title of the plaintiff, the lease containing the reservation "except nevertheless and always reserved out of this demise all mines and minerals within or under the said land." The defendants, in boring for water, had bored through a stratum of red rock and a layer of coal from six to eight inches in thickness, and the plaintiff moved for an injunction to restrain their so doing, on the ground that, although it was admitted that the red rock and coal could not be worked for profit at the present time, these substances were mines and minerals within the reservation.

HELD—that the plaintiff was entitled to the injunction on the principle that the substances in question were such as had "a use and a value of their own independent of and separable from the rest of the soil."

Hext v. *Gill* ((1872) L. R. 7 Ch. 699; 41 L. J. Ch. 761; 20 W. R. 957; 27 L. T. (N.S.) 291—C. A.), *Earl of Jersey* v. *Neath Union* ((1889) 22 Q. B. D. 555; 58 L. J. Q. B. 573; 53 J. P. 404; 37 W. R. 388—C. A.) and *Lord Provost and Magistrates of Glasgow* v. *Fairie* ((1888) 13 App. Cas. 657; 58 L. J. P. C. 33; 37 W. R. 627; 60 L. T. 274—H. L. (Sc.)) applied.

JOHNSTONE *v.* CROMPTON & CO., [1899] 2 Ch. [190; 68 L. J. Ch. 559; 47 W. R. 601; 81 L. T. 165—Byrne, J.

16. *Sandstone lying 60 feet below Surface—Conditions of Sale not Admissible to Explain Conveyance.*]—A reservation of minerals includes every substance that can be got from under the surface of the earth for profit, unless there is something in the nature of the transaction to restrict the meaning of the word.

Earl of Jersey v. *Neath Union* ((1889) 22 Q. B. D. 555; 58 L. J. Q. B. 573; 53 J. P. 404; 37 W. R. 388—C. A.) followed.

A conveyance reserved to the vendors "all coal, ironstone and other mines and minerals (including fireclay) lying or being within or under" a plot of land, with power to them to enter on the land, and search for, dig, raise, and carry away the said coal, ironstone, and other mines and minerals, and also to "work and get the coal, ironstone, and other minerals by underground working, and to use or allow lessees to use so much of the clay lying within or under the land as might be necessary for making bricks for colliery purposes." A conveyance of another plot reserved "all mines, beds, and quarries of coal, ironstone, and other minerals (including fireclay) lying under the land."

HELD—that a bed of sandstone lying 60 feet below the surface, which could not be worked except by breaking the surface, was in each case included in the reservation, and must not be worked by the purchaser without leave.

HELD, also, that, in order to construe the conveyance, the conditions of sale could not be looked at.

GREVILLE AND ANOTHER *v.* HEMINGWAY, (1903) [87 L. T. 443—Ld. Alverstone, C.J.

17. *Inclosure Act—Minerals—Owner of Soil—Sinking Pits—Using Existing Pits—Existing Buildings.*]—Where, under an Inclosure Act, passed in 1763 (4 Geo. 3, c. 45), full enjoyment of the minerals under the common inclosed is reserved to the owner of the soil, it must be held that the intention of the Legislature was to confer on the owner all powers which are reasonably necessary for him to dig, win, work and carry away the minerals. The owner of mines is, therefore, entitled to sink pits, use existing pits, and erect buildings and engines for the purpose of winning, working the pits on any part of the inclosed common, though he is not justified in destroying or using existing buildings or engines which are the property of the surface owners.

Bell v. *Lore* ((1883) 10 Q. B. D. 547; 52 L. J. Q. B. 290; 47 J. P. 468; 48 L. T. 592—C. A.; (1884) 9 App. Cas. 286; 53 L. J. Q. B. 257; 48 J. P. 516; 32 W. R. 725; 51 L. T. 1—H. L. (E.)) considered and applied.

HAYLES *v.* PEASE AND PARTNERS, LD., [1899] [1 Ch. 567; 68 L. J. Ch. 222; 47 W. R. 370; 80 L. T. 220—Stirling, J.

IV. SUPPORT.

18. *Brine Pumping—Brine Pumped from neighbouring Subsoil—Brine formed by Dissolution of Neighbour's Salt Rock—Cause of*

Support—*Continued.*

Action.]—The defendants, who were the owners of a shaft and a certain area of underground salt rock in a salt district, pumped salt brine to the surface through the shaft, the brine being what is known as mine brine, and a considerable portion of it being formed by dissolution of the salt rock in the plaintiffs' land. Subsidences occurred owing to the brine pumping operations of various salt mine owners in the district, and the plaintiffs' land was injured thereby. The plaintiffs brought an action for an injunction to restrain the defendants from pumping salt brine from the shaft, for damages for extracting salt brine or salt rock from the plaintiffs' land, and damages for injury by subsidence.

HELD—that, in the circumstances connected with the pumping of brine in the district, the defendants were not liable for the removal by dissolution of the salt rock belonging to the plaintiffs, or for the abstraction of the brine which had collected in the plaintiffs' beds of rock salt.

SALT UNION *v.* BRUNNER, MOND & CO., [1906] [2 K. B. 822; 22 T. L. R. 835; 76 L. J. K. B. 55; 95 L. T. 647—Ld. Alverstone, C.J.

19. *Canal—Coal Subjacent or Adjacent—Right to Work—Compensation for unworked Coal left for Support.*]—The plaintiff company were incorporated under a private Act passed in 1790, which authorised them to make a canal. The defendant company claimed to be entitled to work their coal even though the result would be to destroy the canal.

HELD—that the defendants were entitled to get so much of the subjacent and adjacent coal as they could get without destroying or injuring the proper support of the canal and works, but that they were not entitled to get the coal to the destruction or injury of such support; that the defendants could not be entitled to compensation for coal left unworked for affording support, for in respect of that they had already been compensated; and that though by the private Act certain assurances were to be enrolled by the clerk of the peace, the neglect to do so did not disentitle the plaintiffs to sue.

Decision of Byrne, J. ((1901) 17 T. L. R. 184) affirmed.

GLAMORGANSHIRE CANAL NAVIGATION *v.* [NIXON'S NAVIGATION CO., LD., (1902) 85 L. T. 53; 17 T. L. R. 647—C. A.

20. *Damage to adjoining Property caused by Act of Predecessor of Present Owner—Duty of Successor to prevent Subsidence.*]—The plaintiff's land adjoined land of which the defendant's predecessor in title was the owner in fee, and which comprised certain seams of coal, and a colliery carried on in connection therewith. The defendant's predecessor in title worked one of the seams of coal in close proximity to the plaintiff's land and died in July, 1895. In and subsequently to November, 1895, subsidences occurred in the plaintiff's land, and the walls and ceilings, and various other parts of the house cracked in consequence of the workings of the defendant's predecessor in title. The plaintiff brought an action against the defendant in respect of the damage alleged to have been caused to his property by such subsidence.

HELD—that the right of action did not accrue till November, 1895; that there was no duty on the part of the defendant to prevent the subsidence.

Greenwell v. *Low Beechburn Coal Co.* ([1897] 2 Q. B. 165; 66 L. J. Q. B. 643; 76 L. T. 759; 13 T. L. R. 471—Bruce, J.) followed.

Darley Main Colliery Co. v. *Mitchell* ((1886) 11 App. Cas. 127; 55 L. J. Q. B. 529; 54 L. T. 882—H. L. (E.)) considered.

HALL *v.* DUKE OF NORFOLK, [1900] 2 Ch. [493; 69 L. J. Ch. 571; 64 J. P. 710; 48 W. R. 565; 82 L. T. 836; 16 T. L. R. 443—Kekewich, J.

21. *Inclosure Act—Manor—Surface Rights—Lord of Manor.*]—An Inclosure Act allotted certain waste land among commoners, and provided that nothing therein contained should diminish the lord's seigniorial rights. The Act authorised the lord of the manor to work the mines as fully and freely as if the Act had not been passed without making satisfaction for so doing, and gave any person injured through such working compensation (to be assessed in a summary way) from the occupiers of allotments in the same township.

HELD—that the Act did not deprive the surface owner of an allotment of his common law right of support, and that such owner was entitled to an injunction to restrain the lessees of the lord's mineral rights from interfering with the surface.

Construction of Inclosure Acts in general discussed.

Decision of Farwell, J. (73 L. J. Ch. 335; 68 J. P. 177; 90 L. T. 149; 20 T. L. R. 204) affirmed.

BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE [FLOUR AND PROVISION SOCIETY, LD. *v.* BUTTERKNOWLE COLLIERY CO., LD., [1904] 2 Ch. 419: 73 L. J. Ch. 635; 68 J. P. 459; 91 L. T. 441; 20 T. L. R. 675—C. A.

22. *Inclosure Act—Working—Letting down Surface—Compensation Clause—Inclosure Act,* 1757 (31 Geo. 2).]

HELD—that upon the true construction of a particular Inclosure Act the owner of the minerals under land which had formerly been part of the waste of the manor, and which had been allotted to a commoner, was not entitled to work the minerals so as to let down the surface, though there was a compensation clause in the Act.

Where there has been a severance in title and the surface of the land and the minerals underneath are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless

Support—*Continued.*

such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication. Provision for compensation is not of itself sufficient to show that the mine-owner, working in the usual and proper manner, is at liberty to let down the surface; on the other hand, the absence of any provision for compensation is an indication that the ordinary rights of the surface owner were intended to be left untouched; so, too, the presence of a provision for compensation, which is obviously inadequate, or plainly inappropriate, if applied to damage by subsidence, is cogent evidence to prove that subsidence was not contemplated.

When the nature of a commoner's interest in the waste land of a manor is changed by an Inclosure Act, his right to support changes also (unless it is otherwise provided), so that the owner of the minerals must work them in a way not to damage the extended interest which the commoner has acquired under the Act.

Decision of C. A. ([1904] 2 Ch. 419; 73 L. J. Ch. 635; 68 J. P. 459; 91 L. T. 441; 20 T. L. R. 675) affirmed.

Butterknowle Colliery Co., Ld. *v.* Bishop [Auckland Industrial Co-operative Flour and Provision Society, Ld., [1906] A. C. 305; 75 L. J. Ch. 541; 70 J. P. 361; 94 L. T. 795; 22 T. L. R. 516—H. L. (E.).

23. *Reservation of Minerals—Right to let down Surface.*]—S., in conveying to trustees certain property, excepted from the conveyance all mines, with power to work them, and with a provision that any person exercising such reserved rights should make reasonable compensation for all damage caused to the inheritance to the trustees, and for all damage caused to things upon the surface to the persons entitled to the surface for the time being.

Held—that S. could not, under the reservation, authorise lessees so to work the mines as to let down the surface; but

Held—that, as tenant for life of the settled land, S. could grant a lease of the right to let down the surface.

Sitwell *v.* Londesborough (Earl of), [1905] [1 Ch. 460—Warrington, J.

24. *Right of Support of Persons giving Right to Work Coal—Compensation Clause.*]—The mere fact of giving a right to sink pits, and to work or get coal, does not of itself establish a right to get rid of that which is the common law right of the surface owner to have his surface undisturbed. Where there is no express permission to let down the surface the onus lies on the person who says that he has a right to do it to show something in the instrument which gives him that right. A covenant to pay compensation for doing a thing which a person is prohibited from doing, is in no way contrary to or inconsistent with the continuance of the obligation not to do it.

Judgment of C. A. (80 L. T. 846) affirmed.

New Sharleston Collieries Co. *v.* Earl of [Westmoreland, (1900) 82 L. T. 725; [1904] 2 Ch. 443 (n.)—H. L. (E.).

25. *Water Reservoir—Support from Minerals under adjacent Land—Site of Reservoir purchased from different Owners—Common Law and Statutory Rights—Waterworks Clauses Act*, 1847 (10 & 11 Vict. *c.* 17), *ss.* 22, 23.]—In 1875 the plaintiffs purchased, by agreement, under the powers of a special Waterworks Act of 1847, (1) an estate from S., who reserved to himself the minerals thereunder, with full powers to work the same without making compensation; (2) an adjoining estate from T., including the minerals. Later in 1875 the plaintiffs obtained a further special Act which incorporated the Waterworks Clauses Act, 1847, and under this special Act they constructed a reservoir, partly on the S. land and partly on the T. land. By sect. 22 of the Waterworks Clauses Act, 1847, if the owner, lessee, or occupier of any mines lying under the reservoirs of the undertakers, or within 40 yards therefrom, be desirous of working the same, he must give the undertakers notice in writing of his intention so to do thirty days before the commencement of working, and if it appear to the undertakers, after an inspection of the mines, that the working of the mines is likely to damage their works, and they be willing to pay compensation for the mines to the owner, lessee, or occupier thereof, then he shall not work the same; and by sect. 23, if before the expiration of the thirty days the undertakers do not state their willingness to pay compensation to such owner, lessee, or occupier, he may work the mines as if that Act and the special Act had not been passed. The defendants, who were lessees of the mines under the S. land, gave notice to the plaintiffs of their intention to work the mines under and adjacent to the reservoir, but the plaintiffs gave no counter-notice of their willingness to pay compensation for the mines, and accordingly the defendants worked the mines and caused a subsidence of the T. land. In an action to restrain the defendants from so working their mines as to damage the T. land, it was found that the subsidence would have occurred even if there had been no reservoir on the land.

Held—that the mining sections (18—27) of the Waterworks Clauses Act, 1847, did not deprive undertakers of their common law right to lateral support, and that the plaintiffs as successors of T. were entitled to an injunction in respect of the defendants' workings, both within and without the 40 yards limit.

Decision of Farwell, J. ([1906] 1 Ch. 278; 75 L. J. Ch. 145; 70 J. P. 83; 54 W. R. 240; 93 L. T. 762; 22 T. L. R. 132; 4 L. G. R. 66) reversed.

Manchester Corporation *v.* New Moss [Colliery, Ld., [1906] 2 Ch. 564; 75 L. J. Ch. 772; 70 J. P. 409; 95 L. T. 277; 22 T. L. R. 808; 4 L. G. R. 1129—C. A.

V. MISCELLANEOUS.

27. *Crown's Rights—Coal below Low Water-Mark—Barony Title.*]—By the law of Scotland,

Miscellaneous—*continued.*

the *solum* underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three-mile limit, and also the minerals beneath it, are vested in the Crown.

That the Crown can make an effectual grant of that *solum* or any part of it to a subject appears doubtful.

The Crown cannot, without the sanction of the Legislature, lawfully convey any right or interest in the *solum* which, if exercised by a grantee, might by possibility disturb the *solum* or interfere with the uses of navigation, or with any right of the public.

The Crown can communicate the right of working the mineral strata below the bed of the sea, in so far as they are capable of being worked without causing disturbance, to a subject, in the character either of tenant or proprietor.

Submarine minerals, if expressly included, may, to the extent above indicated, be competently made parts and pertinent of a baronial or other Crown grant of adjacent lands.

Prescription by partial working of minerals under the sea *ex adverso* of a barony, under a general grant which does not expressly include those minerals, will not give a baron a title to the whole minerals which are capable of being continuously worked from his lands.

The partial working of one seam ought not to be regarded as proprietary possession of the whole seams of such minerals so far as workable from the barony.

Decision of First Div. of Ct. of Sess. ((1896) 24 R. 216) reversed.

LORD ADVOCATE *v.* WEMYSS, [1900] A. C. 48—[H. L. (Sc.).

28. *Purchase of Minerals—Adjoining Railway—Rule as to* medius filus—*Rectification—Evidence—Wrongful Working of Minerals—Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 1.]—A grant of land adjoining a railway does not pass the subsoil *ad medium filum*; therefore if A. grants to B. the land and minerals on each side of a railway, the minerals under such railway (not having been originally bought from him by the company) still remain in him.

The Court will not rectify upon the ground of mutual mistake a conveyance which has been executed in conformity with a previous written agreement between the parties, inasmuch as evidence of the intention of the parties outside the written agreement is not admissible. *Davies* v. *Fitton* (2 Dr. & War. 225) and *May* v. *Platt* ([1900] 1 Ch. 616; 69 L. J. Ch. 357; 83 L. T. 123; 48 W. R. 617—Farwell, J.) followed.

The mere wrongful working of neighbouring coal by a mine-owner twelve years before the commencement of an action against him confers no title upon him to the minerals under the Real Property Limitation Acts, 1833 and 1874. *Ashton* v. *Stock* (6 Ch. D. 719) followed.

A. gave to B. an option agreement over, and subsequently a conveyance of land and minerals lying on both sides of a railway. The railway company had not bought the underlying minerals. For twenty-two years B. worked the minerals in fact bought by him, and also (in good faith) some of the minerals below the railway.

HELD—(1) that B. had not by possession or under the Statute of Limitations acquired a title to those minerals, and (2) that oral evidence was not admissible to prove mutual mistake in the option agreement and subsequent conveyance.

THOMPSON *v.* HICKMAN, [1907] 1 Ch. 550; 76 [L. J. Ch. 254; 96 L. T. 451; 23 T. L. R. 311—Neville, J.

MISDEMEANORS.

See CRIMINAL LAW.

MISREPRESENTATION AND FRAUD.

COL.

I. FRAUD 958

II. MISREPRESENTATION.

(*a*) False Misrepresentation . . 959

(*b*) Innocent Misrepresentation . 963

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And see ACTION, 1, 2; AGENCY, 59, 60; AUCTIONS, 3, 10, 14; BANKRUPTCY, 174; MASTER AND SERVANT, 133; TRADE MARKS.

I. FRAUD.

See also title MONEY.

1. *Fraudulent Misrepresentation—Inducement to do an act not manifestly unlawful or immoral, but which is so in fact—Ignorance—Damages—Foreign Enlistment Act*, 1870 (33 & 34 Vict. *c.* 90), *s.* 11.]—Where an innocent person has been induced by the fraudulent and false misrepresentations of another to do an act which is neither manifestly unlawful nor immoral, but which is in fact criminal in the circumstances under which it is done, he can, if he has acted in ignorance of the circumstances which made the act a crime, maintain an action for injuries sustained by him in the commission of the crime against the person who so induced him to commit it.

BURROWS *v.* RHODES, [1899] 1 Q. B. 816; 68 [L. J. Q. B. 545; 63 J. P. 532; 48 W. R. 13; 80 L. T. 591; 15 T. L. R. 286—Div. Ct.

2. *Money obtained by Fraud—Recovery of with Interest.*]—Both in a Court of Equity and in a Court of Common Law money obtained and retained by fraud can be recovered with interest.

Secus—where a plaintiff sues for money paid by mistake, abandoning all charges of fraud, even though the defendant has been actually convicted of fraud in relation to the same subject-matter.

JOHNSON *v.* REX, [1904] A. C. 817; 73 L. J. P. C. [113; 91 L. T. 234; 20 T. L. R. 697—P. C.

Fraud—*Continued.*

3. *Sale of Goods—Advertisement by Dealer to sell Manufacturer's Goods not in his possession—Damage alleged to be caused thereby to Manufacturer.*]—A dealer offered by advertisement to sell goods of a manufacturer at less than trade price, such goods not being at the time in the dealer's possession. In an action by the manufacturer claiming an injunction to restrain such advertisements, and damages :—

HELD—that having regard to sect. 5 of the Sale of Goods Act, 1893, the mere fact of the goods not being in stock was no ground of complaint ; and that in the absence of fraud the defendant was entitled to offer the goods at any price he thought fit ; and that the advertisement was not fraudulent nor the damage complained of the result of the misrepresentation contained therein ; and that the action failed.

AJELLO *v.* WORSLEY, [1898] 1 Ch. 274 ; 67 [L. J. Ch. 172 ; 77 L. T. 783 ; 14 T. L. R. 168 ; 46 W. R. 245—Stirling, J.

4. *Vendor and Purchaser — Material Fact concealed by Purchaser—Setting Aside Deed of Assignment.*]—The plaintiff, who had a claim against an estate for £300, assigned the same to the defendant in consideration of the sum of £15. The Court set this assignment aside, on it appearing from the letters that had passed between the parties that the plaintiff had been induced to believe, before making the assignment, that there was nothing more to be got out of the estate, whereas there was in fact sufficient to pay twenty shillings in the pound.

Duty of a solicitor to disclose facts within his knowledge discussed.

DAVIS *v.* OHRLY, (1898) 14 T. L. R. 260—[Barnes, J.

II. MISREPRESENTATION.

(a) False Misrepresentation.

5. *Agent—False Representation as to Principal — Contract — Specific Performance.*]— If, in negotiations for a contract, an agent make a false representation as to the name of his principal, knowing that, if he disclosed the true name the other party would not enter into the contract, the Court will not order specific performance of the contract.

A. signed a contract for the sale of a house to B. Before signing, he asked, "Are you buying for C. or his nominees?" B. answered, "No." He was, in fact, buying for nominees of C., to whom he afterwards assigned his contract. He and they brought an action for specific performance.

HELD—that the contract could not be specifically performed.

ARCHER *v.* STONE, (1898) 78 L. T. 34—North, J.

6. *Insurance Company—Policy—Agent—False and Fraudulent Statement by—Return of Premiums—Statute of Limitations—Discovery of Fraud.*]—The plaintiff sued the P. Assurance Company, Ld., to recover back the premiums paid by her under a policy of insurance on the life of her father granted by the defendants in 1881. The policy was granted upon a proposal signed by her father and was in form valid and regular, but it was proved that all the premiums had been paid by the plaintiff. It appeared that she had been repeatedly urged by an agent of the defendants to take out the policy before she consented to do so, and she made the payments in consequence of a statement by the defendants' agent that she would be entitled to receive the money on her father's death, which statement was false and fraudulent. The plaintiff did not know until shortly before she brought her action in 1902 that the policy was void. The defendants, among other defences, set up the Statute of Limitations.

HELD—that the plaintiff was entitled to a return of the premiums, and that the Statute of Limitations did not begin to run until the discovery of the fraud.

BEER *v.* PRUDENTIAL ASSURANCE CO., LD., [(1902) 66 J. P. 729—Judge Bompas—Cy. Ct.

7. *Insurance Company—Policy—Construction of Contract—"Tricky and misleading" Documents—Ground for Reseission.*]—The plaintiff in 1881 insured his life in the defendant association, and duly paid all mortuary calls, which according to the contract were to take the form of an assessment on all the members "to be apportioned among the members according to the age of each member." For many years these calls were apportioned according to age of members at the date of their policy ; but the directors suddenly began to apportion them according to the age of each member at the date of the call.

The plaintiff claimed a declaration that the contract did not allow of this course, and also rescission on the ground of misrepresentation.

HELD—that the contract (which is too long to refer to here in any detail) must be set aside on the ground of misrepresentation (apart from fraud) ; for the documents circulated by the association, and especially one headed "Life Assurance at half the usual rates," were "inaccurate, tricky, and misleading," and the nature of the policy granted to the plaintiff was quite inconsistent with the agent's letters and verbal representations, as to which there had been no cross-examination of the plaintiff.

The order was for rescission, and a return of all monies paid under the policy, with interest at the rate of 4 per cent. from the date of each payment.

Decision of C. A. (19 T. L. R. 342) affirmed.

FOSTER *v.* MUTUAL RESERVE FUND LIFE [ASSOCIATION, (1904) 20 T. L. R. 715—H. L. (E.).

8. *Insurance Company — Policy — Misrepresentation — Delay — Rescission of Contract.*]—Policy holders in a mutual insurance company brought actions for rescission and return of premiums with interest on the ground of misrepresentation ; the complaint being that it had been represented to them that the maximum

Misrepresentation—*Continued.*

amount of calls was fixed, whereas in fact they were not fixed and in recent years largely increased calls had been made upon him.

The company did not dispute the misrepresentation, but contended that the plaintiffs had lost their rights by *laches*.

HELD—that in paying the increased calls under protest the plaintiffs had not waived their rights, and that under the circumstances they had not been guilty of unreasonable delay and were entitled to succeed. The question as to what was a reasonable time within which to apply for relief was "inextricably involved in the nature of the transactions."

Foster v. *Mutual Reserve Life Insurance Co.* (20 T. L. R. 715—H. L., *supra*) followed.

CROSS *v.* MUTUAL RESERVE LIFE INSURANCE [CO., (1905) 21 T. L. R. 15—Buckley, J.

MERINO *v.* MUTUAL RESERVE LIFE INSURANCE [CO., 21 T. L. R. 167—Joyce, J.

[A similar point was involved in *Molloy* v. *Mutual Reserve Life Insurance Co.*, *infra*, where the decision of Eady, J. to the above effect was reversed by C. A.]

9. *Insurance Company — Policy — Misrepresentation — Knowledge of Facts — Statute of Limitations.*]—The plaintiff, who had effected an insurance on his life with the defendants, brought an action on April 16th, 1898, in the county court, to recover back part of a premium which he alleged to have been wrongly charged against him and which he had paid under protest. Judgment in that action was entered for the defendants. Another policy-holder brought an action against the defendants for rescission of his contract and repayment of the premiums on the ground of misrepresentation, and in July, 1904, the House of Lords finally decided that the plaintiff in that action was entitled to succeed (see *Foster* v. *Mutual Reserve Fund Life Association*, No. 7, *supra*). The plaintiff thereupon brought the present action for rescission of the contract and repayment of the premiums paid by him upon the same grounds as the other policy-holder had done.

HELD — that, as after the decision in the county court the plaintiff knew all the facts which would have enabled him to bring an action for misrepresentation, the action was barred by the Statute of Limitations.

Decision of Eady, J. (22 T. L. R. 59) reversed.

MOLLOY *v.* THE MUTUAL RESERVE LIFE INSUR- [ANCE CO., (1906) 94 L. T. 756; 22 T. L. R. 525—C. A.

10. *Insurance Company—Policy—Representation by Agent — Inducing Assured to Continue Policy — Recovery by Assured of Premiums Paid — Authority of Agent.*] — The plaintiff took out a policy of insurance with the defendants through an agent of the latter upon the life of another. The policy provided for the payment of the premiums during the life of the person whose life was insured; and one of the conditions was that all alterations in the policy must be made and signed at the defendants' office on their printed and stamped forms. After paying one year's premiums, upon the plaintiff stating that she would pay no more premiums, the agent told her that when she had paid five years' premiums in all she would be entitled to the policy free of future premiums. The plaintiff thereupon paid the premiums for four years more, and refused to pay any further premiums. The defendants, who had not authorised the agent's representation, demanded premiums after the five years as a condition of the policy being kept on foot. The plaintiff thereupon sued to recover the four years' premiums.

HELD—that plaintiff was entitled to recover.

KETTLEWELL *v.* REFUGE ASSURANCE CO., LD., [1907] 2 K. B. 242; 76 L. J. K. B. 711; 97 L. T. 106; 23 T. L. R. 506—Div. Ct.

Affirmed, [1908] 1 K. B. 545; 77 L. J. K. B. 421; 97 L. T. 896—C. A.

11. *Master and Servant—Accident—Compensation—Agreement to Compound Payments.*]—The appellant, who had been employed by the respondents, sustained an accident, for which he was in receipt of 18*s.* per week under a recorded agreement. He was paid this sum for nearly a year prior to September 3rd, 1903. On that date he was induced by the manager of an insurance company with whom the respondents were insured to accept £20 in full satisfaction. In an action for rescission, it was proved that the appellant could never work again, whereas the manager had led him to believe that the doctor had reported that he could resume work in October.

HELD—that on the facts there had been misrepresentation, and that the agreement should be set aside.

CALEDON SHIPBUILDING CO. *v.* CROSSAN, [1906] [W. N. 104—H. L. (Sc.)

12. *Reckless Statement of Fact — Duty to Exercise Reasonable Care—Water-Finder—Employer's Cause of Action.*]—Where there is a reckless statement of fact, intended to be acted on, made to another by a person who owes a duty to that other to exercise reasonable care, it is actionable if it causes damage.

The plaintiff had a house and about an acre of land in Suffolk, and for 25*s.* the defendant agreed to point out on the plaintiff's premises a spot where water could be obtained. The defendant pointed to a particular spot, and said that water would be found at a depth of less than 30 feet. In reliance on this statement the plaintiff sunk a well to that depth, but found no water, and she claimed damages from the defendant. The county court judge found that the defendant had made the statement recklessly, and that he knew that the plaintiff would act on it.

HELD—that the statement had relation to the duty which the defendant owed to the plaintiff;

Misrepresentation—*Continued.*

and that there was a cause of action in tort on the case.

PRITTY *v.* CHILD, (1902) 71 L. J. K. B. 512 ; 18 [T. L. R. 460—Div. Ct.

13. *Representation as to Credit—"Writing"—"Signed by the Party to be charged therewith"—"Person"—Corporation—Signature of Company's Agent—Statute of Frauds Amendment Act,* 1828 (9 Geo. 4, *c.* 14), *s.* 6.]—A corporation formed under the Companies Acts is a "person" within the meaning of sect. 6 of Lord Tenterden's Act (Statute of Frauds Amendment Act, 1828). Therefore a banking company incorporated under the Companies Acts is not liable in damages for a statement alleged to be a misrepresentation made by the manager of one of their branches, within the scope of his employment and in their interests, with regard to the credit and position of a certain trading company, who were customers of the defendants, acting on the faith of which misrepresentation the plaintiff had incurred loss, the representation complained of being contained in a letter signed by the defendants' manager.

Swift v. *Jewsbury* ((1874) L. R. 9 Q. B. 301 ; 43 L. J. Q. B. 56 ; 22 W. R. 319 ; 30 L. T. (N.S.) 31—Ex. Ch.) followed.

HIRST *v.* WEST RIDING UNION BANKING CO., [1901] 2 K. B. 560 ; 70 L. J. K. B. 828 ; 49 W. R. 715 ; 85 L. T. 3 ; 17 T. L. R. 629—C. A.

(b) Innocent Misrepresentation.

14. *Executed Contract—No Fraud—Delay—Rescission.*]—In the case of an executed, as distinguished from an executory contract for the sale of a business, a chattel or chose in action, the Court will not grant rescission on the ground of an innocent misrepresentation.

Fraud must be proved, and there must be no undue delay.

Wilde v. *Gibson* ((1848) 1 H. L. C. 605—H. L.) ; *Kennedy* v. *Panama, &c., Mail Co.* ((1867) L. R. 2 Q. B. 580 ; 36 L. J. Q. B. 260 ; 15 W. R. 1039 ; 17 L. T. 62—Q. B.) ; and *Brownlie* v. *Campbell* ((1880) 5 App. Cas. 925—H. L. Sc.) followed and applied.

SEDDON *v.* NORTH EASTERN SALT CO., LD., [1905] 1 Ch. 326 ; 74 L. J. Ch. 199 ; 53 W. R. 232 ; 91 L. T. 793 ; 21 T. L. R. 118—Joyce, J.

15. *Insurance Company—Innocent Misstatement as to Age—Different Conditions in Proposal and Policy—Reading Documents Together—Acceptance of Premiums after Discovery of Mistake—Affirmance of Contract.*]—A lady took out a policy entitling her to receive a lump sum on attaining the age of sixty. In the proposal form she by error stated herself to be three years younger than she really was.

The mistake when discovered was notified to the company, who subsequently accepted two annual premiums.

The proposal contained a clause to the effect that the proposal and declaration as to age should be the basis of the contract, and that any untrue statement therein should render the policy void and premiums forfeited.

The policy contained a proviso for avoidance and forfeiture in the event of the policy having been obtained by wilful misrepresentation.

HELD—(1) that the proposal and declaration must be read with the policy.

Fowkes v. *Manchester and London Life Assurance and Loan Association* ((1863) 3 B. & S. 917) followed.

(2) That, therefore, only a wilful misrepresentation would entitle the company to avoid the policy and forfeit the premiums.

(3) That on discovering the error they might have returned past premiums and declined to continue the policy, but

(4) That, on the facts, they had elected to affirm the policy, and must pay the policy moneys upon the assured actually attaining the age of 60.

HEMMINGS *v.* SCEPTRE LIFE ASSOCIATION, [LD., [1905] 1 Ch. 365 ; 74 L. J. Ch. 231 ; 92 L. T. 221 ; 21 T. L. R. 207—Kekewich, J.

16. *Rescission — Damages.*] — Innocent misrepresentations inducing a contract may be a ground of rescission, but will not found a claim for damages.

MANNERS *v.* WHITEHEAD, (1898) 1 F. 171 ; 36 [S. L. R. 94—Ct. of Sess.

17. *Rescission—No fraudulent Intention.*]—A plaintiff claimed rescission of an agreement to enter into partnership with the defendant, and satisfied the Court that he had been induced to enter into such agreement by erroneous statements made by the defendant as to the profits of the business.

HELD—that, although the defendant had not fraudulently misrepresented the profits, the plaintiff was intended to, and did, rely upon the statements, and was entitled to have the agreement rescinded.

FERGUSON *v.* WILSON, (1905) 6 F. 779—Ct. of [Sess.

18. *Sanitary Condition of House — Lease—Rescission—Indemnity—Damages.*]—The plaintiffs asked for rescission of a lease on the ground of admittedly innocent misrepresentations and also an indemnity from the consequences of having entered into the contract. Innocent misrepresentations as to the sanitary condition of the premises had been actually made.

HELD—that to make good the consequences of misrepresentation was the same thing as damages, and damages could not be recovered for innocent misrepresentations ; and that the plaintiffs were not entitled to anything more than what they had paid and expended under the actual terms of the lease. Anything else would be damages pure and simple.

The law as laid down by Bowen, L.J., in *Newbigging* v. *Adam* ((1886) 34 Ch. D. 582 ; 56

Misrepresentation—*Continued.*

L. J. Ch. 275; 35 W. R. 597; 55 L. T. 275—C. A.) followed.

WHITTINGTON *v.* SEALE-HAYNE, (1900) 82 L. T [49; 16 T. L. R. 181—Farwell, J.

18a. *Sham Antiques—Silence of Vendor*—Res ipsa loquitur.]—*Per* Ld. Kyllachy: The offer for sale by a dealer of articles appearing to be, but not in fact, antiques is in itself a misrepresentation; in such a case the seller is not entitled to leave the articles to speak for themselves, but must displace the inference which to his knowledge they are calculated to suggest to a customer.

PATTERSON *v.* LANDSBERG AND SON, (1905) 7 F. [675—Ct. of Sess.

(c) Misrepresentation as to the Nature of Documents.

See also title DEEDS.

19. *Validity of — Misrepresentation as to Contents — Right to Repudiate — Mortgage.*]—If a person knows that a deed which he is executing deals with a particular property, he cannot afterwards repudiate it on the ground that misrepresentations were made to him as to the way in which the deed dealt with that property.

The defendant acted as nominee of one H., to whom he was managing clerk, in respect of a certain building estate at E. On his leaving H.'s service, the latter asked him to execute certain deeds, saying that they were deeds transferring the E. estate to himself; in fact, one of them was a mortgage from the defendant to W., and contained the usual covenant to pay principal and interest. To an action by W.'s assignee, the defendant pleaded that the deed was not his deed by reason of the misrepresentation as to its contents.

HELD—that he was liable on the covenant.

National Provincial Bank of England v. *Jackson* ((1886) 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597—C. A.) followed.

Foster v. *Mackinnon* ((1869) L. R. 4. C. P. 704: 38 L. J. C. P. 310; 20 L. T. 887; 17 W. R. 1105) distinguished.

Decision of Warrington, J. ([1907] 1 Ch. 537; 76 L. J. Ch. 346) affirmed.

HOWATSON *v.* WEBB, [1908] 1 Ch. 1; 77 L. J. [Ch. 32; 97 L. T. 730; W. N. 211; 52 Sol. Jo. 11—C. A.

20. *Validity of — Misrepresentation as to Nature and Character of Deed.*]—A married woman was induced by her husband's misrepresentations to execute a deed by which in fact she mortgaged her reversionary interest in a sum of money and covenanted to repay the sum advanced upon mortgage with interest. The money was advanced to her husband, and she did not receive any part of it. When she executed the deed, her husband asked her "to sign a paper" because it might make things easier for him in case he should require any money later, and she signed the document. Nothing was said about her becoming liable to repay any money her husband had. In an action against her for foreclosure and to recover the sum advanced with interest upon her covenant to pay, the judge found that she understood that she was signing a document in the nature of a power of attorney to enable her husband to raise money at some future time, and if necessity arose to create some charge upon her reversionary interest; that the document which she signed was of a different nature and character from that which she thought she was signing; and that she had no idea that the document created an immediate mortgage of her reversionary interest or contained a covenant by her to repay the advance, nor had she any intention to execute any document imposing a personal liability on herself.

HELD—that the deed was not binding upon her, as upon the issue of *non est factum* the deed must be held not to be her deed; and, further, that even if the charge on her reversionary interest was valid, the covenant to pay principal and interest was void.

Howatson v. *Webb* (*supra*) distinguished.

BAGOT *v.* CHAPMAN, [1907] 2 Ch. 223; 76 L. J. [Ch. 523; 23 T. L. R. 562—Eady, J.

21. *Fictitious Deeds — Knowledge of Third Party — Non-disclosure — Party to Deceit—Liability for Damages.*]—Though a person may be deceived by another with the knowledge of a third person, if that third person is not party to the deceit, and owes no legal duty or obligation to the person deceived, and does nothing but preserve silence, then, however morally blameworthy he may be in standing by and not preventing the deceit being carried into effect, he cannot be held liable in an action for damages at the instance of the party deceived.

The defendant C. was well aware that he had been defrauded by the defendant W. by means of certain fictitious leases which had been mortgaged to him by W. C. received notice that his mortgage would be paid off by the plaintiff, who was about to advance his money on the faith of the fictitious leases. In answer to the defendant C's invitation, the leases were inspected, and the transaction was carried through. The defendant C. was paid off out of the plaintiff's money and executed a reassignment of the so-called leasehold premises as if they had had a genuine existence.

HELD—that the defendant C. was liable to the plaintiff for the damage suffered by him by reason of his having advanced his money.

MARNHAM *v.* WEAVER, (1899) 80 L. T. 412—[Romer, J

22. *Husband and Wife—Security given by Wife for Husband's Debts—Security obtained by Wife's Trustee — Pressure — Concealment — Validity.*]—D., the husband of the respondent, was in business in Jamaica, and was in pecuniary difficulties and indebted to the appellants, whose agent in Jamaica was C. C. was an executor and trustee of the will of Mrs. D.'s father. Her father died in January, 1898, and Mrs. D. was

Misrepresentation—*Continued.*

entitled to one-fifth of her father's residuary estate. It was arranged that C. should have a security for £1,000 on Mrs. D.'s property prepared, and that D. should get her to sign it. Accordingly, in August, 1898, it was prepared by C.'s solicitors from his instructions. C. gave it to D.; D. got his wife to sign it.

HELD—that it was quite impossible to uphold the security given by Mrs. D., as it was open to the double objection of having been obtained by a trustee from his *cestui que trust* by pressure through her husband, and without independent advice, and of having been obtained from his wife by pressure and concealment of material facts; that the document was very different from what Mrs. D. supposed it to be, and was a document of the true nature of which she had no conception: that it was impossible to hold that C. or the appellants were unaffected by such pressure and ignorance, as they left everything to D., and must therefore abide the consequences.

TURNBULL & Co. *v.* DUVAL, [1902] A. C. 429; [71 L. J. P. C. 84; 87 L. T. 154; 18 T. L. R. 521—P. C.

23. *Insurance Company—Policy—No Insurable Interest — Innocent Misrepresentation by Agent as to Validity of Policy—Recovery of Premiums paid on Void Policy—Life Assurance Act*, 1774 (14 Geo. 3, *c.* 48), *s.* 1—*Gaming Act*, 1845 (8 & 9 Vict. *c.* 109), *s.* 18.]—Where a contract has been entered into through an innocent misrepresentation, the person on whose behalf it is made is not entitled to retain the money paid by the other party.

The respondent, a collier, effected through an agent of the appellant company an insurance on a life in which the respondent had no insurable interest. The justices found that the agent knew this and yet informed the respondent that the policy would be "all right" and the money would be paid on the death of the assured. The respondent effected the assurance relying on this statement. The respondent, having been advised that the policy was bad, as he had no insurable interest, claimed the return of the premiums. The justices held that the respondent was entitled to the return of the premiums.

HELD—that the man with whom the respondent negotiated was skilled in insurance matters and any statement made by him would be justly relied upon; that there was evidence on which the justices could come to the conclusion that the representation led the respondent to believe that the policy would be valid and effective in law; and that the justices were right.

Decision of Div. Ct. ((1902) 18 T. L. R. 425) affirmed.

BRITISH WORKMAN'S AND GENERAL ASSURANCE [CO., LD. *v.* CUNLIFFE, (1902) 18 T. L. R. 502 —C. A.

24. *Mortgagor's Signature obtained by his Solicitor's Fraud.*]—K. who was not a man of much education, employed E. a solicitor. K. signed a deed which E. advised him was necessary. The deed was a mortgage. E. applied the mortgage money to his own uses, paid interest on the mortgage to the mortgagees for some time, and then absconded. K. brought an action to obtain a declaration that the mortgage was void.

HELD—that K.'s recollection of the circumstance of the execution of the deed was an absolute blank; he never meant to execute a mortgage; he was never told that the true effect of the deed was a mortgage; he had absolute confidence in E. and executed any deed relating to his property that E. put before him, but K. knew that he was doing something with his property when the deed was put before him. Therefore the mortgage was a valid deed as against K. in the hands of the mortgagees.

KING *v.* SMITH, [1900] 2 Ch. 425; 69 L. J. Ch. [598; 83 L. T. 815; 16 T. L. R. 410— Farwell, J.

MISTAKE.

And see ARBITRATION, 17, 30; AUCTIONS, 11, 12, 14; BANKERS. 39; BANKRUPTCY, 203; WILLS, 67–89.

1. *Cablegrams—Mistake—Parties not at One* —Onus probandi.] — Falck, the plaintiff and appellant, was a shipowner residing in Norway. Williams, the respondent, was a shipbroker in Sydney, New South Wales. Buch was a shipbroker and chartering agent at Stavanger, in Norway. Falck did a good deal of business with Williams. Buck and Williams corresponded by means of a telegraphic code, or rather a combination of two codes arranged between them. Falck sued Williams for breach of a contract of affreightment to load the *Semiramis* with a cargo of copra, in Fiji, for delivery in the United Kingdom or some port in Europe.

Williams understood the proposal made to him to be a proposal for carriage of a cargo of shale to be loaded at Sydney and delivered at Barcelona, and he accepted the proposal under this impression. Both parties acted in good faith, and the mistake was unintentional.

HELD—that it was the duty of the appellant, as plaintiff, to make out that the construction he put upon Buch's telegram was the true one, and that he must fail if the message was ambiguous—as it was in fact. If the respondent had been maintaining his construction as plaintiff he would equally have failed. It was not for the Court to determine what was the true construction to be put on Buch's telegram.

FALCK *v.* WILLIAMS, [1900] A. C. 176; 69 L. J. [P. C. 17—P. C.

2. *Mistake as to Law—Compromise—Setting aside*—Bonâ fides.]—A compromise will not be set aside merely because one party to it put forward a claim which was in law incapable of

being supported, if it was put forward in good faith.

HOLSWORTHY URBAN DISTRICT COUNCIL *v.* [HOLSWORTHY RURAL DISTRICT COUNCIL, [1907] 2 Ch. 62 ; 76 L. J. Ch. 389 ; 71 J. P. 330 ; 23 T. L. R. 452 ; 5 L. G. R. 791—Warrington, J.

3. *Money credited by Plaintiff's Mistake to Defendant in an Action—Receipt in full given by Plaintiff—Defendant's* Mala fides—*Recovery of Money credited as Money had and received.*] —An allowance in account made by a plaintiff to a defendant under a mistake of fact which was known to the defendant, and of which he unfairly took advantage, entitles the plaintiff to recover the amount of that account from the defendant as money had and received by him to their use.

In general a plaintiff who has given the defendant in an action credit for a sum on account and been paid after writ, cannot be allowed to re-open the matter either by suing afresh upon the same cause of action or by suing for the amount for which he wrongly gave credit as money had and received to his use. There must, however, be *bonâ fides* on the part of the party who has got the benefit of his opponent's payment in order to bring the principle enunciated into force. Therefore, if the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle may not prevent the defendant from recovering the money back. A similar limitation applies to the converse case where the plaintiff has on the face of the writ credited the defendant with the payment of a sum of money on account which the defendant must have known to have been so credited by a mistake on the plaintiff's part.

WARD & CO. *v.* WALLIS, [1900] 1 Q. B. 675 ; 69 [L. J. Q. B. 423 ; 82 L. T. 261 ; 16 T. L. R. 193—Kennedy, J.

4. *Money paid in Mistake of Fact—Liability to Refund.*] —Whatever may be the true position of the defendant in an action brought to recover money paid to him in mistake of fact, he is liable to refund it if it be established that he dealt as a principal with the person who paid it to him.

Whether he will be liable if he dealt as an agent with such a person will depend upon whether, before the mistake is discovered, he has paid over the money he received to his principal, or has settled such an account with his principal as amounts to payment, or has done something which has so prejudiced his position that it would be inequitable to require him to refund.

KLEINWORT, SONS & CO. *v.* DUNLOP RUBBER [CO., (1907) 97 L. T. 263 ; 23 T. L. R. 696—H. L. (E.).

5. *Money paid under Mistake of Fact—Paid to Agent—Accounted for to Principal—Recovery.*] —A trader paid to a railway company a lump sum as a "through charge" for the carriage of goods over their own line and over that of another company with whom the contract of carriage had been made. The recipient company accounted for such money to the contracting company.

The trader, discovering subsequently that an overcharge had (as he alleged been made), claimed to recover a portion of the charge from the recipient company.

HELD—that he could not do so, since the money had been received by innocent agents and settled for in account with their principals before complaint made, and that this principle applied also to the share due (as between the companies) to the recipient company, for there had been a lump sum payment under a contract to which such company was not a party.

TAYLOR *v.* METROPOLITAN RY. CO., [1906] 2 [K. B. 55 ; 75 L. J. K. B. 735 ; 95 L. T. 149 ; 22 T. L. R. 479—Div. Ct.

6. *Money Paid under Mistake of Fact—Rates for Supply of Water—Over-payment—Voluntary Payment — Grand Junction Waterworks Act*, 1856 (19 & 20 Vict. *c.* cxvi.), *s.* 4.]—The plaintiff, who occupied, as assignee of a sub-lessee, a house on the estate of the Bishop of London, was on that account entitled, under the water company's special Act, to a supply of water at a lower rate than the occupiers of houses not on that estate were liable to pay. The plaintiff for years paid water rates on the highest scale, neither he nor the water company knowing that his house was on that estate—a fact not apparent on the face of his assignment. In an action to recover back the sums so overpaid,

HELD—that the payments were not voluntary payments ; that they were made under a mistake of fact ; and that therefore they were recoverable back.

MEADOWS *v.* GRAND JUNCTION WATERWORKS [CO., (1905) 69 J. P. 255 ; 21 T. L. R. 538 ; 3 L. G. R. 910—Div. Ct.

7. *Money paid under a Mistake of Fact to Bankers — Credited by Bank to Principal's Account—Recovery of Money so paid from the Bank — Position of Bankers.*] — The plaintiffs owed to K. & Co. two sums of money, which had been assigned by K. & Co., the one to B., and the other to the defendants. By an error both sums were paid to the defendants, who thereupon credited them to K. & Co.'s account with them, which was largely overdrawn, K. & Co. knew that one payment must have been made in error, but the defendants believed both sums to have been rightly paid to them.

HELD — that under the circumstances the plaintiffs could recover the sum erroneously paid, as being money received by the defendants to their use. The defendants could only resist such a claim by showing that they were merely intermediaries, who had passed on the money before their principal informed them of the mistake, whereas in fact they had received the money as assignees.

Newall v. *Tomlinson* ((1871) L. R. 6 C. P. 405 ; 25 L. T. 382) followed.

Decision of Bigham, J. (51 W. R. 541 ; 19

T. L. R. 427; 8 Com. Cas. 277) affirmed on different grounds.

CONTINENTAL CAOUTCHOUC AND GUTTA [PERCHA CO. *v.* KLEINWORT SONS & CO., (1904) 52 W. R. 489; 90 L. T. 474; 20 T. L. R. 403; 9 Com. Cas. 240—C. A.

8. *Money paid under Mistake of Fact — Recovery—Cheque—"Certified" Cheque—Alteration—Forgery—Payment through Clearing-house—Liability for Loss—Delay.*]—A customer of the respondent bank drew a cheque upon that bank for five dollars, and had the cheque certified by the bank as good. The customer thereupon inserted the word "hundred" after the "five" and paid the cheque so altered into the appellant bank and opened an account there, and he drew against the amount which was placed to his credit. The appellant bank presented the cheque through the clearing-house, and it was paid by the respondent bank. The next day the respondent bank discovered the fraud, and claimed repayment of 495 dollars from the appellant bank. It was proved that certified cheques, apparently in order and presented through the clearing-house, were paid by bankers as a matter of course, and it was not usual for bankers to turn to their customers' account on the day of presentment to see whether there was anything wrong before passing the cheques, but it was usual to check the returns with the customers' account the next day.

HELD—that the respondent bank was entitled to recover the 495 dollars as money paid under a mistake of fact.

Kelly v. *Solari* ((1841) 9 M. & W. 54; 11 L. J. Ex. 10) followed.

Decision of the Supreme Court of Canada (31 Can. Sup. Ct. Rep. 344) affirmed.

IMPERIAL BANK OF CANADA *v.* BANK OF [HAMILTON, [1903] A. C. 49; 72 L. J. P. C. 1; 51 W. R. 289; 87 L. T. 457; 19 T. L. R. 56—P. C.

9. *Mutual Mistake — Agreement to Assign Policy on Life of a Third Person — Assured in fact Dead at Date of Agreement—Knowledge or Suspicion of one Party before Assignment — Assignment Set Aside.*]—Plaintiffs agreed to sell to defendants a policy on the life of D., whom they both believed to be alive. D. was in fact dead at the time, and defendants had reason to suspect the fact; but allowed plaintiffs to execute the formal assignment, without informing them of the fact.

HELD—that the material date was the date of the contract; that both parties contracted on the basis of D. being alive, and therefore at law (apart from equity) the contract could not be enforced; that the defendants by improperly taking the assignment could not improve their position; and that the assignment must be set aside.

Decision of Kekewich, J., ([1903] 1 Ch. 453; 72 L. J. Ch. 223; 51 W. R. 394; 88 L. T. 12; 19 T. L. R. 162) affirmed.

SCOTT *v.* COULSON, [1903] 2 Ch. 249; 72 L. J. [Ch. 600; 19 T. L. R. 440—C. A.

10. *Mutual Mistake—Loan of Money—Interest and Percentage of Net Profits—Audit to be Final —Auditor ignorant of this — Account.*]—A. T. advanced a loan to J. C. at a certain rate of interest and a percentage of the net profits of J. C.'s business. Both contemplated and intended that the audit of the books should be made by an accountant who knew not that as between them his audit was to be final and conclusive. Throughout the period during which audits were made by the auditor, the parties understood and believed that the auditor knew this. The auditor, however, was ignorant of it, and, had he known it, he would have audited the books somewhat differently.

HELD—that the auditor had not made the audit contemplated by the parties, and that a new account must be taken.

TEACHER *v.* CALDER, [1899] A. C. 451—H. L. [(Sc.)

11. *Tender and Acceptance—Withdrawal by Contractor on Ground of Mistake—Breach of Contract — Damages.*]— The defendants, in answer to advertisements of the plaintiffs, tendered for a supply of coal for a period of one year, and the plaintiffs duly accepted the tender in the form prescribed by the Local Government Board. On hearing of the acceptance the defendants withdrew their tender, on the ground that the price stated therein was so stated by mistake. The plaintiffs bought coal elsewhere at a higher price and sued the defendants for the difference.

HELD—that the tender and acceptance, in the form prescribed by the Local Government Board, constituted a complete contract, that the defendants were not entitled to withdraw their tender after such acceptance, and that, in the absence of evidence of *mala fides*, the plaintiffs were entitled to hold the defendants to the terms of such contract.

ISLINGTON UNION *v.* BRENTNALL AND CLELAND [(1907) 71 J. P. 407; 5 L. G. R. 1219 — Div. Ct.

MONEY AND MONEY-LENDERS.

COL.

I. CLAIMS FOR INTEREST . . . 972

II. LOANS BY MONEY-LENDERS
(*a*) Bargains with Expectant Heirs . 973
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And see titles EVIDENCE; PRACTICE AND PROCEDURE, 42, 316.

I. CLAIMS FOR INTEREST.

And see BANKRUPTCY, 163, 262, 263, 280; COMPULSORY PURCHASE, 37; INCOME TAX; LIEN IN EQUITY, 1; PRACTICE AND PROCEDURE, 232, 233; TRUSTS, 55.

1. *Arrears of Dividends — Interest thereon—Compound Interest.*]—The Court having held

Claims for Interest—*Continued.*

that certain parties were entitled to be refunded certain moneys with six years' arrears of the dividends accrued thereon, the parties claimed to be entitled to interest on the dividends so directed to be refunded.

HELD, following *Silkstone and Haigh Moor Coal Co.* v. *Edey*, [1900] 1 Ch. 167, *infra*, that it would be contrary to the practice of the Court to allow anything in the nature of compound interest, and, therefore, that the claim to interest on the dividends must be disallowed.

IN RE MAGHERAMORNE'S (LORD) ESTATE: [HOGG *r.* HOGG, [1901] W. N. 152; 36 L. J. N. C. 377; 111 L. T. Jour. 275—Byrne, J.

2. *Company in Liquidation—Sale by Liquidator to himself—Sale Set Aside—Interest on Rents and Profits.*]—Where the sale of an undertaking of a company effected by its liquidator, nominally to another company, but really to himself, had been set aside on the ground of fraud, and the re-transfer of the undertaking to the original company had been ordered:—

HELD—that the liquidator, being in a fiduciary capacity, should repay the rents and profits which had accrued, but that he was not to be charged with interest on the same.

SILKSTONE AND HAIGH MOOR COAL CO. *r.* EDEY, [1900] 1 Ch. 167; 69 L. J. Ch. 73; 48 W. R. 137—Stirling, J.

3. *Tradesman's Account — Interest — Implied Agreement by Customer to Pay.*]—During a period of ten years a tradesman had delivered to a customer, since deceased, a yearly account, in which it was stated that interest would be charged on all sums due for more than three years. The customer never objected to the charge, and had from time to time made payments on account generally.

HELD—that the reasonable inference from the facts was that the deceased dealt with the tradesman on the footing that he was to pay him interest after the lapse of three years, and that the tradesman was entitled to prove against the deceased's estate for interest on that footing.

Decision of Cozens-Hardy, J. reversed.

IN RE ANGLESEY (MARQUIS OF), WILLMOT *r.* [GARDNER, [1901] 2 Ch. 548; 70 L. J. Ch. 810; 49 W. R. 708; 85 L. T. 175—C. A.

II. LOANS BY MONEY-LENDERS.

And see titles BILLS OF SALE, No. 3; EVIDENCE.

(a) Bargains with Expectant Heirs.

4. *Doctrine of Court of Chancery with respect to Bargains with Expectant Heirs — Loan to Farmer.*]—The authorities as to the doctrine of the Court of Chancery with respect to bargains with expectant heirs have no application to a case of a loan by a money-lender to a farmer.

GORDON *r.* FOWLER, (1901) 17 T. L. R. 243—[C. A.

(b) Concealment of Identity.

5. *Loan of Money—Concealment of Identity of Lender — Materiality — Right of Borrower to repudiate.*]—The plaintiff, a money-lender, whose reputation was such that the defendant would not have dealt with him, by fraudulently concealing his identity induced the defendant to borrow money from him. On discovering the plaintiff's fraud the defendant, within a reasonable time, repudiated the contract.

HELD—that he was entitled so to do, the fraud being material to the inducement which brought about the contract.

GORDON *r.* STREET, [1899] 2 Q. B. 641; 69 L. J. [Q. B. 45; 48 W. R. 158; 81 L. T. 237; 15 T. L. R. 445—C. A.

6. *Loan of Money—Concealment of Identity of Lender—Borrower's right to Repudiate.*]—O'K. borrowed £135 from a money-lender whose real name was L., but who on the occasion of the loan described himself as carrying on business as C. O'K. passed his promissory note, payable to C. for £200, whereof £65 represented interest on the loan. The loan was repayable by four instalments of £50 each, with the condition that upon default in payment of any one instalment the entire balance then due on foot of the note was to become payable at once. O'K. made default in payment of the third instalment, whereupon an action was brought against him by L., trading as C., for £100, being the amount of the two remaining instalments. Upon motion for final judgment, it appeared that O'K. must have been aware that C. was trading under a fictitious name, although he swore that he did not know that the real lender was L. He further swore that he would not have borrowed the money if he had known that the real lender was L., whom he knew to be an exacting money-lender.

HELD—that O'K. should be at liberty to defend the action on the terms of lodging in Court within a week the balance due of the principal sum advanced with interest at 5 per cent., to abide the further order of the Court, the costs of both parties in that event to be costs in the cause, but in default of so doing the plaintiff should have judgment with costs.

Gordon v. *Street* ([1899] 2 Q. B. 641: 69 L. J. Q. B. 45; 48 W. R. 158; 81 L. T. 237; 15 T. L. R. 445—C. A., *supra*) followed.

LEVIN *r.* O'KEEFE, [1900] 2 Ir. R. 628—Q. B. [Div.

III. THE MONEY-LENDERS ACT, 1900.

(a) Scope of Act.

7. "*Business not having for its primary object the Lending of Money*"—*Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 6 (d).]—The plaintiff carried on business for many years as an art dealer, and as an incident thereof he frequently took bills from his customers in payment of the amounts due from them. In 1903 he retired from business and sold off his stock, and he took bills

The Money-lenders Act, 1900—*Continued.*

for a large portion of the purchase-money. After his retirement he carried on business as an art valuer and adviser, and he assisted two businesses in which he was largely interested by discounting bills of the customers of those businesses, or taking bills for the interest due to him on debentures in one of those businesses. He also assisted old friends and persons with whom he had been connected in business, about ten in all, by discounting bills for them.

HELD—that the plaintiff did not, either before or after his retirement from the business of an art dealer, carry on business as a "money-lender" within the meaning of sect. 6 of the Money-lenders Act, 1900.

LITCHFIELD *v.* DREYFUS, [1906] 1 K. B. 584; [75 L. J. K. B. 447; 22 T. L. R. 385—Farwell, J.

8. *Contract for Loan made Abroad—Contract intended to be performed Abroad—Jurisdiction of Court in England—Money-lenders Act* (63 & 64 Vict. *c.* 51), *s.* 1.]—Sect. 1 of the Money-lenders Act, 1900, does not apply to a contract for a loan made and intended to be performed abroad.

It does not therefore apply to a loan made in India by an Indian firm to an officer stationed there, the loan to be repaid in Bombay, even though the officer returns to England before repayment.

SHRICHAND & CO. *v.* LACON, (1906) 22 T. L. R. [245—RIDLEY, J.

9. *Relief—Construction—"Harsh and Unconscionable"—Judgment not Conclusive*—63 & 64 Vict. *c.* 51, *s.* 1.]—The Money-lenders Act, 1900, was not intended to be merely declaratory of the existing law. It enables a Court to re-open a transaction on the ground of excessive interest or charges, if the transaction is "harsh and unconscionable, or is otherwise such that a Court of Equity would give relief."

Upon the true construction of these words it is not necessary that the transaction should be of such a nature that a Court of Equity would give relief: it is sufficient, if it be "harsh and unconscionable," these words not being limited in any way by the succeeding clause.

The Bankruptcy Court can give relief under sect. 1 (3), even though the debtor has allowed judgment to go against him without asking for relief in the action.

IN RE A DEBTOR, EX PARTE THE DEBTOR, [1903] 1 K. B. 705; 72 L. J. K. B. 382; 51 W. R. 370; 88 L. T. 401; 19 T. L. R. 288; 10 Manson, 130—C. A.

(b) Registration.

10. *Carrying on other Business — Lending Money in the Course of that Business—Surveyor and Valuer* (63 & 64 Vict. *c.* 51), *ss.* 2, 6.]—The plaintiff, who carried on business as an auctioneer, surveyor, and valuer, was in the habit of advancing money upon bills of sale to any person, against whom there was no personal objection, where the security was sufficient, charging 15 per cent. interest. He did so because by that means he obtained a valuation fee in the first instance, and the business brought him into contact with a class of persons from whom he got other business. He never lent money on personal security.

HELD—that the plaintiff carried on a *bonâ fide* business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lent money within the meaning of 6 (*d*) of the Money-lenders Act, 1900, and that therefore he did not require to be registered as a money-lender.

FURBER *v.* FIELDINGS, LD., (1907) 23 T. L. R. [362—Phillimore, J.

11. *Contract without being Registered—Prohibited Act—Illegal Contract—Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *ss.* 1, 2.]—Where a statute imposes a penalty for doing or omitting to do some act, not merely for revenue purposes, but partly or wholly for the public benefit, such act or omission must be regarded as illegal.

Therefore, if a money-lender who ought to be registered under sect. 2 of the Money-lenders Act, 1900, is not registered, and yet enters into an agreement with or takes any security from a borrower, his contract is illegal and unenforceable.

In such a case the transaction cannot be reopened under the provisions of the statute.

VICTORIAN DAYLESFORD SYNDICATE *v.* DOTT, [1905] 2 Ch. 624; 74 L. J. Ch. 673; 21 T. L. R. 742; 54 W. R. 231; 93 L. T. 627—Buckley, J.

12. *Contract without being Registered—Prohibited Act—Illegal Contract —Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *ss.* 1, 2.]—Where a statute imposes a penalty for doing or omitting to do some act, not merely for revenue purposes, but partly or wholly for the public benefit, such act or omission must be regarded as illegal.

Therefore, if a money-lender who ought to be registered under sect. 2 of the Money-lenders Act, 1900, is not registered, and yet enters into an agreement with or takes any security from a borrower, his contract is illegal and unenforceable, but the borrower can recover any securities given by him

Victorian Daylesford Syndicate v. *Dott* ([1905] 2 Ch. 624; 74 L. J. Ch. 673; 21 T. L. R. 742—Buckley, J. *supra*) approved.

Decision of Kekewich, J. (53 W. R. 678; 92 L. T. 822; 21 T. L. R. 491) affirmed.

BONNARD *v.* DOTT, [1906] 1 Ch. 740; 75 L. J. [Ch. 446; 94 L. T. 656; 22 T. L. R. 399—C. A.

And see No. 16, *infra.*

13. *Money-lender not Registered—Recovery of Property by Borrower—Equitable Relief—Doing Equity—Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 2, *sub-s.* 1.]—Where a transaction of loan and security is rendered illegal by reason of the money-lender not being registered under the Act, and the borrower claims equitable relief, the Court will only order his security to be handed

The Money-lenders Act, 1900—*Continued.*

back to him upon his repaying to the money-lender the amount borrowed.

LODGE *v.* NATIONAL UNION INVESTMENT CO., [1907] 1 Ch. 300; 76 L. J. Ch. 187; 96 L. T. 301; 23 T. L. R. 187—Parker, J.

14. *Unregistered Money-lender — Action for obtaining a Loan by Fraud—Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 2, *sub-s.* 1.]—An unregistered money-lender can maintain an action to recover damages for fraudulent misrepresentations whereby he was induced to advance money on loan.

DOTT *v.* BRICKWELL, (1906) 23 T. L. R. 61—[Eady, J.

(c) Reopening Transaction.

And see BANKRUPTCY, 168.

15. *Interest or Charges Excessive—Transaction "harsh and unconscionable" — "Otherwise such that a Court of Equity would give Relief"—Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1.]—In order to make the Money-lenders Act, 1900, applicable, there must be evidence to satisfy the Court either that the interest or that the charges made are excessive; and there must be also evidence that the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief. Excessive interest or charges will not of themselves suffice; there must be, besides, something harsh or unconscionable, or such circumstances as would afford ground for a claim for relief from a Court of Equity.

Unless the borrower be of the class known as expectant heirs, the rule of equity is that assuming him to be of full capacity, relief will not be granted unless it can be shown that he has been overreached, tricked or deceived, and that the money-lender has taken an unfair and undue advantage of his weakness and necessities. Neither excess of interest nor exorbitance of charge will suffice unless the element of unfair dealing is found to have existed.

WILTON & CO. *v.* OSBORN, [1901] 2 K. B. 110; [70 L. J. K. B. 507; 84 L. T. 694; 17 T. L. R. 431—Ridley, J.

Overruled by *Samuel* v. *Newbold*, No. 23, *infra*, and probably by No. 9, *supra*.

16. "*Harsh and unconscionable*" — *Excessive Bonus—Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1.]—The defendant on several occasions lent money to the plaintiff, a company promoter, taking from him by way of bonuses and for renewals shares in various companies in which he was interested.

HELD—that although having regard to the nature of the shares it was impossible to assess their value at any given date, there was ample evidence that the transaction was harsh and unconscionable, the plaintiff being absolutely helpless for want of money and compelled to accept any terms that might be offered to him.

BONNARD *v.* DOTT, (1905) 53 W. R. 678; 92 [L. T. 822; 21 T. L. R. 491—Kekewich, J.

This case was before the C. A. on another point. *See* No. 12, *supra*.

17. "*Harsh and unconscionable*" *Transaction—Excessive Interest—Order* 14, *r.* 1—*Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1.]—Where, in an action by a money-lender to recover money lent with interest, an application is made for leave to sign final judgment under Order 14, and it appears on the face of the transaction that the interest charged is excessive, the special jurisdiction conferred by the Money-lenders Act, 1900, comes into operation, and the case is not one to which the procedure under Order 14 can be applied.

WELLS *v.* ALLOTT, [1904] 2 K. B. 842; 73 L. J. [K. B. 1023; 20 T. L. R. 799; 53 W. R. 195; 91 L. T. 749—C. A.

18. "*Harsh and unconscionable*"—*Repayment by Monthly Instalments — Default Clause — "Excessive Interest" — Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1.]—The Court has jurisdiction to reopen a transaction between a borrower and a money-lender where by reason of a term of the bargain, well understood by the lender, but not by the borrower, the rate of interest is considerably increased in the event of default in repayment of any instalment beyond that contemplated by the borrower.

LEVENE *v.* GREENWOOD, (1904) 20 T. L. R. 389 [—Channell, J.

19. "*Harsh and unconscionable*" *Transaction —Default Clause not understood by Borrower—Excessive Interest — Transaction Reopened — Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1.]—In response to an advertisement by a registered money-lender a farmer borrowed money. The advertisement made no reference to a "default clause," and spoke merely of "repayment by easy instalments."

The promissory note given by the farmer in fact contained a "default clause," the effect of which was not, as the Court believed, understood by him. The rate of interest was also excessive.

HELD, without deciding whether excessive interest alone is sufficient evidence that a transaction is harsh and unconscionable, that the insertion of the "default clause" was under the circumstances sufficient, and that the transaction must be reopened.

Levene v. *Greenwood* ((1904) 20 T. L. R. 389 —Channell, J., *supra*) followed.

WELLS *v.* JOYCE, [1905] 2 Ir. R. 134—O'Brien [L. C. J.

20. "*Harsh and unconscionable*"—"*Excessive Interest*"—*Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1.]—In determining whether a money-lender's conduct has been "harsh and unconscionable" the Court must in every case consider the various circumstances under which a loan has been effected, and the terms of the loan, *e.g.*, the rate of interest and the risk.

A widow who was being pressed by other money-lenders and had the sheriff in possession of her furniture under a *fi. fa.*, but was in a really sound financial position, having a large income from settled property and an insurable life, borrowed money from the defendant without consulting a solicitor.

The Money-lenders Act, 1900—*Continued.*

He arranged for her a loan of £1,000, charging £50 for so doing, but she allowed the scheme to fall through. He then persuaded her to agree to pay him a further sum of £100 for adjusting her affairs. Finally, he discounted for her a bill for £250, and also lent her £314 on mortgage.

HELD—that for him to charge 20 per cent. interest on the mortgage debt and £30 for discounting the bill was unconscionable, and that he ought to be allowed only 5 per cent. on his advances, especially in view of the fact that he was also getting £150 in respect of the earlier transactions, against which relief could not be given.

PONCIONE *v.* HIGGINS, (1905) 21 T. L. R. 11—[C. A.

21. "*Excessive Interest*"—"*Harsh and unconscionable*" *Transaction—Free and voluntary Agreement—Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1 (1).]—Transaction reopened under sect. 1, sub-sect. 1, of the Money-lenders Act, 1900, upon the ground that the interest charged was excessive, and the transaction was harsh and unconscionable, the borrower being at the time in such a position that his agreement to repay was no guide as to what was a reasonable rate of interest to be charged.

The transaction was reopened after payment of the amount had been made under pressure of a writ of summons in an action.

SAMUEL *v.* BELL, (1905) 22 T. L. R. 118—[Channell, J.

22. "*Harsh and unconscionable*"—"*Excessive Interest*"—*Security—Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1.]—A lady having a free income of over £600 per annum was in temporary, but as she thought urgent, need of money. Her own solicitors were negotiating for a loan at 5 per cent., but she was induced by a casual acquaintance to drop this idea. The same person persuaded her to negotiate with the defendant, against her solicitors' advice.

The defendant lent her £1,000 at 45 per cent., for six months, and gave the introducer a fee of £50. Subsequently she was able, through her solicitors, to borrow £2,500 at only 5¼ per cent. to pay off defendant's loan.

HELD—that having regard to the security obtained by the defendant and all the circumstances of the case, the defendant must be content with interest at 10 per cent., and must pay the costs of the action instituted to reopen the transaction.

Decision of Joyce, J. (93 L. T. 49; 21 T. L. R. 553) affirmed.

PART *v.* BOND, (1906) 94 L. T. 490; 22 T. L. R. [253—C. A.

23. "*Harsh and unconscionable*"—"*Otherwise such that a Court of Equity would give Relief*"—*Excessive Interest—Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1, *sub-s.* 1.]—Under sect. 1, sub-sect. 1, of the Money-lenders Act, 1900, the Court may reopen a transaction of loan if it is satisfied that the interest charged in respect of the sum lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or other charges are excessive, and that the transaction is harsh and unconscionable, even though it is not such that a Court of Equity would before the Act have given relief. The words "harsh and unconscionable" are an alternative condition distinct from the condition that the transaction must be "such that a Court of Equity would give relief."

The rate of interest charged upon a loan may be so excessive as of itself, if unexplained, to show that the transaction is harsh and unconscionable.

The fact that a money-lender's agent receives commissions from both sides, and is in effect a partner of the lender, renders the transaction liable to be impeached for fraud apart from the Act of 1900.

Wilton & Co. v. *Osborne* ([1901] 2 K. B. 110; 70 L. J. K. B. 507; 84 L. T. 684; 17 T. L. R. 431—Ridley, J., No. 15, *supra*) overruled.

In re A Debtor ([1903] 1 K. B. 795; 72 L. J. K. B. 382; 51 W. R. 370; 88 L. T. 401; 19 T. L. R. 288; 10 Manson, 130—C. A., No. 9, *supra*) approved.

Decision of C. A. (*Saunders* v. *Newbold*) ([1905] 1 Ch. 260; 74 L. J. Ch. 120; 53 W. R. 162; 92 L. T. 67; 21 T. L. R. 104) affirmed.

SAMUEL AND ANOTHER *v.* NEWBOLD, [1906] [A. C. 461; 75 L. J. Ch. 705; 95 L. T. 209; 22 T. L. R. 703—H. L. (E.).

24. "*Excessive Interest*"—"*Harsh and unconscionable*" *Transaction—Default Clause—Borrower understanding Transaction and Voluntarily Agreeing—Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1, *sub-s.* 1.]—In considering whether the interest charged on a loan is "excessive" within the meaning of sect. 1, sub-sect. 1, of the Money-lenders Act, 1900, the Court must take into consideration the risk and all the circumstances, one of the circumstances being the fact (if such be the case) that the borrower thoroughly understood the transaction, and without any misrepresentation or any pressure, other than the mere request to pay so much interest, voluntarily agreed to pay the interest; and upon that being proved the Court ought to find that the interest which the borrower so agreed to pay was reasonable and therefore not "excessive" within the meaning of the Act.

So far as the risk to the money-lender is a circumstance to be considered, the question to be considered is not what was the real risk as ascertained after the event has happened, but how the matter would present itself to the lender at the time of the loan with his experience of borrowers.

A default clause in an agreement for the loan understood by the lender, but not understood by the borrower, under which the whole sum becomes due upon default in payment of one instalment, may render the transaction harsh and unconscionable as being in the nature of a trap.

CARRINGTONS, LD. *v.* SMITH, [1906] 1 K. B. 79; [75 L. J. K. B. 49; 54 W. R. 424; 93 L. T. 779; 22 T. L. R. 109—Channell, J

The Money-Lenders Act, 1900—*Continued.*

25. "*Harsh and unconscionable*"—*Excessive Interest*—*Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1.]—Where, in consideration of an advance of £50, a promissory note for £70 was taken by a money-lender from a borrower, the £20 being for interest, and the £70 was payable by twenty-two weekly instalments, and upon default in payment of an instalment the whole sum was to become due, the Court re-opened the transaction upon the ground that the interest might turn out to be very excessive and the rate was not understood by most people.

LEVENE *v.* TITCHENER, (1907) 23 T. L. R. 508 [—Channell, J.

26. *Excessive Interest — Money-lenders Act* 1900 (63 & 64 Vict. *c.* 51), *s.* 1.]—On the facts of the particular case the Court refused to re-open a transaction, although the interest was stated to be 40 per cent.

OAKES *v.* GREEN, (1907) 23 T. L. R. 560—[Channell, J.

27. "*Harsh and unconscionable*"—"*Money-lender*"—*Jurisdiction of* "*Court*"—*Province of Jury*—*Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1.]—In an action to recover damages for trespass and conversion of the plaintiff's goods, which had been seized under a bill of sale, the question arose whether the defendants were money-lenders, and whether, if so, the interest charged and certain other charges were excessive; and whether the transaction was harsh and unconscionable. It was contended that those questions, except as to whether the defendants were money-lenders, were for the Court and not for the jury.

HELD (by Bucknill, J., 23 T. L. R. 157)—that if there was any evidence upon them, the questions must be left to the jury.

HELD (by the C. A.)—expressing no opinion on that point, that the bill of sale was void as being given for a sum under £30, and that, therefore, the lender could only recover the sum lent and interest at a reasonable rate, viz., 5 per cent.

BURTON *v.* THE COMPANIES' REGISTRATION [AGENCY, (1907) 23 T. L. R. 337—C. A.

28. "*Harsh and unconscionable*"—*Excessive Interest*—*Question for Jury*—*Money-lenders Act*, 1900 (63 & 64 Vict. *c.* 51), *s.* 1.]—In proceedings to re-open a money-lending transaction under the Act of 1900, it is a question for the jury whether the transaction is harsh and unconscionable, and whether the interest is excessive.

Burton v. *Companies' Registration Agency* ((1906) 23 T. L. R. 157—Bucknill, J. *supra*) followed.

SAMUEL *v.* PAZOLT, (1907) 23 T. L. R. 622—[Ridley, J.

MONOPOLIES.

See PATENTS.

MONTH.

See TIME.

MONUMENTS.

See CHARITIES; ECCLESIASTICAL LAW; WILLS.

MORTGAGE.

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And see BANKRUPTCY, 4; BILLS OF SALE; BUILDING SOCIETIES; EXECUTORS, 144, 147, 149, 150; INFANTS, 10; LANDLORD AND TENANT, 55, 137–146; LIMITATION OF ACTIONS, 17, 29–31, 44–52; REVENUE, 67–71; SHIPPING, 9–16; WILLS, 360–362.

I. ACCOUNTS.

1. *Evidence—Deceased Mortgagee's Account Book—Admissibility.*]—The plaintiffs were the executors of J. H., deceased, and brought an action to recover principal moneys and interest due under a mortgage granted to the deceased of the barge *Swiftsure*, of which the defendants were the registered owners. It was sought on behalf of the plaintiffs to adduce in evidence the account book of the deceased, J. H. In this book, which was in the handwriting of the deceased, were entries showing that various sums had from time to time been received by the deceased from the defendants on account of the barge. Other entries showed that the deceased had made disbursements on account of repairs to and the up-keep of the barge.

HELD—that the items showing the receipt of money from time to time were clearly against interest and were admissible; and that as there were other items in the book closely connected and related to the receipts which were against interest, then the Court might look not only at the entries which were against interest, but at the accounts of which they formed an integral and essential part.

The decision of *Taylor* v. *Witham* ((1876) 3 Ch. D. 605; 45 L. J. Ch. 798; 24 W. R. 877—Jessel, M.R.) followed.

HUDSON *v.* "SWIFTSURE" (OWNERS OF THE), [(1900) 82 L. T. 389; 16 T. L. R. 275; 9 Asp. M. C. 65—Jeune, P.

2. *Date of taking Possession—Evidence.*]—A third mortgagee in an action to enforce his charge, having obtained judgment, an inquiry was directed to ascertain the date when the first mortgagee entered into possession. The first mortgagee admitted that he had been in possession since 1892. The third mortgagee claimed that the first mortgagee must account as from the year 1881, when the transferor of the first mortgage to the present first mortgagee became entitled. There was evidence to show that the transferor, who herself took a transfer of the mortgage, went into possession in 1881, and the only evidence to rebut it was contained in the books of an absconding solicitor, who had not been heard of since 1896. The books were in the possession of the Official Receiver, the said solicitor being a bankrupt.

HELD—that the books were admissible evidence, inasmuch as the entries, which it was sought to give in evidence, were against the interest of the solicitor, whose death must be presumed.

WILLS *v.* PALMER, (1905) 53 W. R. 169—[Kekewich, J.

3. *Tenant for Life—Mortgagee of Reversion—Foreclosure—Redemption—Repairs—Loan from Tenant for Life to Mortgagor—Arrears of Interest—Set-off—Retainer—Limitation Act*, 1623 (21 Jac. 1, *c.* 16), *and Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 42.]—A tenant for life, with the duty of keeping the property in repair, became mortgagee of the reversion. After her death her executors brought an action for foreclosure. The mortgagor counter-claimed for redemption and also for damages for non-repair, and he was held entitled to them. The tenant for life had lent him a sum of money greater than the amount of such damages, but this debt was statute-barred. There were arrears of interest owing under the mortgage deed for more than six years.

HELD—that the executors of the tenant for life could not treat the mortgagor as having been repaid his damages out of the statute-barred debt.

Courtenay v. *Williams* ((1844) 3 Hare, 539; 15 L. J. Ch. 204) discussed.

HELD, also, that, in taking the accounts between mortgagor and mortgagee, all the arrears of interest must be brought in, and not merely those which had accrued within six years.

Edmunds v. *Waugh* ((1866) L. R. 1 Eq. 418; 35 L. J. Ch. 234; 14 W. R. 257; 12 Jur. (N.S.) 326; 13 L. T. (N.S.) 739) and *In re Marshfield* ((1887) 34 Ch. D. 721; 56 L. J. Ch. 599; 35 W. R. 491; 56 L. T. 694—Kay, J.) followed.

DINGLE *r.* COPPEN, [1899] 1 Ch. 726; 68 L. J. [Ch. 337; 47 W. R. 279; 79 L. T. 693—Byrne, J.

II. ASSIGNMENTS.

4. *Incorrect Statement in Deed as to Amount advanced—Right of Assignee of Mortgagee to rely on Statement—Constructive Notice—Conveyancing Acts*, 1881 (44 & 45 Vict. *c.* 41), *s.* 55, *and* 1882 (45 & 46 Vict. *c.* 39), *s.* 3, *sub-s.* 1.]—Where in a mortgage deed the mortgagor acknowledged the receipt of the consideration money, but there was no receipt indorsed thereon, an assignee of the mortgagee, who had no notice, actual or constructive, that the full amount had not been advanced, was held entitled to rely upon the statement in the deed that the full amount had been advanced, and to sue the mortgagor upon that footing.

BATEMAN AND ANOTHER *v.* HUNT AND OTHERS, [1904] 2 K. B. 530; 73 L. J. K. B. 782; 52 W. R. 609; 91 L. T. 331; 20 T. L. R. 628—C. A.

5. *Notice of Assignment of Share of Fund in Hands of Third Party—Rights of Assignee—Purchase—Intention to keep alive Incumbrance—Merger.*]—Where a person entitled to a charge

Assignments—*Continued.*

on a fund assigns his rights, and the assignee gives notice of the assignment to the person in whose hands the fund is, the fact that a payment out of the fund is afterwards improperly made to the assignor cannot affect the rights *inter se* of the parties entitled to share in the fund.

Where there is a charge on a share in a fund by way of mortgage, and the charge and the right to receive the share subject to the charge are assigned to the same person, if there is nothing on the face of the assignment or in the nature of the transaction which shows an intention that the incumbrance shall be extinguished or merged, it will be held to be kept alive.

Locking v. *Parker* (L. R. 8 Ch. 30) followed.

Toulmin v. *Steere* (3 Mer. 210) distinguished.

LIQUIDATION ESTATES PURCHASE CO., LD. *v.* [WILLOUGHBY, [1898] A. C. 321 ; 67 L. J. Ch. 251 ; 78 L. T. 329 ; 14 T. L. R. 295 ; 46 W. R. 589—H. L. (E.).

III. CONSTRUCTION AND OPERATION.

6. *General Charge—"All my real and personal Estate whatsoever and wheresoever"—Vagueness—Public Policy.*]—A charge by a man upon "all my real and personal estate whatsoever and wheresoever, and of what nature or kind soever, the same may be or consist," will not be void on the ground of vagueness or as offending against public policy, if it is possible, at the time when the charge is sought to be enforced, to construe fairly the document creating the charge, and to point to the property comprised in it.

IN RE KELCEY, TYSON *v.* KELCEY, [1899] 2 Ch. [530 ; 68 L. J. Ch. 742 ; 48 W. R. 59 ; 81 L. T. 354—Kekewich, J.

7. *Mortgage by Tenant in Tail—Proviso for Re-conveyance to Original Uses—Estate Tail barred—Effect of Proviso—Fines and Recoveries Act*, 1833 (3 & 4 Will. 4, *c.* 74), *s.* 21.]—In 1884 A. was in possession of entailed estates as life tenant ; B., the first tenant in tail, was unmarried and a lunatic ; C. was second tenant in tail in reversion.

At that date C., with A.'s consent, disentailed his interest and resettled the estates.

In 1893 B. had become tenant in tail in possession, and, acting by C. as his committee, he mortgaged the estates subject to a proviso that on redemption they should be "reconveyed by the mortgagees to the uses, upon the trusts, and with and subject to the powers and provisions" of the original settlement, dated 1831.

HELD—that in spite of the estate tail being barred, the proviso in the mortgage of 1893 was operative, and that the uses of the original settlement were revived subject to the resettlement of 1884.

IN RE OXENDEN'S ESTATE ; OXENDEN *v.* CHAP- [MAN, (1905) 74 L. J. Ch. 234—Kekewich, J.

IV. EQUITABLE MORTGAGES.

(a) General.

And see title BANKERS, 32–34, 38.

8. *Equitable Charge — Appropriation of Securities by Debtor.*]—A client deposited a sum of money for investment with a firm of solicitors, who appropriated certain securities belonging to one of the partners, as executor of a late member of the firm, as security for the debt in circumstances which were not disclosed to the client until after the bankruptcy of the firm.

HELD—that a good equitable charge had been created, and that his client was not prevented from claiming his security, although he had proved as an unsecured creditor in the bankruptcy, the proof having been made before he became aware of his rights.

IN RE PIDCOCK, PENNY *v.* PIDCOCK, (1907) 51 [Sol. Jo. 574—Joyce, J.

9. *Equitable Mortgagee — Right to receive Rents—Rents claimed and paid — Claim by Tenant for Repayment.*]—Until he has obtained an order of Court, an equitable mortgagee is not legally entitled to demand the rents of the mortgaged property, unless the mortgagor has expressly or impliedly constituted him his agent for the purpose.

But a tenant cannot claim repayment of rent paid by him to a person who has demanded it as equitable mortgagee.

FINCK *v.* TRANTER, [1905] 1 K. B. 427 ; 74 [L. J. K. B. 345 ; 92 L. T. 297—Div. Ct.

(b) By Deposit.

10. *Deposit of Shares in a Limited Company—Foreclosure—Personal Claim Statute-barred—Limitation Act*, 1623 (21 Jac. 1, *c.* 16), *s.* 3—*Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 34.]—One of two brothers (who had carried on business in partnership, and were entitled to shares in a limited company, the certificates of which were deposited with a bank to secure an overdraft on a current account) died in 1891, and the account was then closed, leaving a balance due to the bank. In 1898, no interest having in the meantime been paid, and no acknowledgment of the debt given, the bank sued the surviving brother and the executor of the deceased brother to enforce their security ; and, while the former defendant did not resist the claim, the latter objected that the debt was barred by the Statute of Limitations.

HELD—that the bank were entitled to the relief claimed, because there was no provision in any Statute of Limitations affecting the right of a mortgagee of personal property to enforce his security, and the mere fact that the personal claim could not be enforced did not deprive a mortgagee of his right to proceed against the property.

LONDON AND MIDLAND BANK *v.* MITCHELL, [1899] 2 Ch. 161 ; 68 L. J. Ch. 568 ; 47 W. R. 602 ; 81 L. T. 263 ; 15 T. L. R. 420—Stirling, J.

Equitable Mortgages—*Continued.*

11. *Deposit of Deeds—Subsequent Purchaser for Value without Notice—Omission to require Production of Deeds — Gross Negligence—Priority.*]—Gross negligence on the part of a subsequent purchaser for value without notice will disentitle him to protection against a prior incumbrancer, even though there is no question of fraud on his part.

A purchaser for value without notice of any incumbrance obtained a conveyance of the legal estate in certain houses, but did not require an abstract of title or production of the title deeds. He, by his agent, did ask where the deeds were, and was told that they were in the possession of the vendor, but would not be delivered up as they related to other property. The vendor was never asked to produce the deeds. It was subsequently discovered by the purchaser that the deeds had been deposited with a prior equitable mortgagee.

HELD—that the purchaser had acted with gross carelessness, and would not be allowed to deprive the mortgagee of her security.

Rateliffe v. *Barnard* ((1871) L. R. 6 Ch. 652; 40 L. J. Ch. 777; 19 W. R. 764) commented on.

Decision of Romer, J. affirmed.

OLIVER *v.* HINTON, [1899] 2 Ch. 264; 68 L. J. Ch. [583; 48 W. R. 3; 81 L. T. 212; 15 T. L. R. 450—C. A.

12. *Injury to Deeds — Negligence — Right to Damages pending Redemption — Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 16, *sub-s.* 1.]—G. deposited the title deeds of his premises with the bank by way of equitable mortgage, to secure advances made to him from time to time. While so deposited, the deeds were greatly damaged by the flooding, on the occasion of an exceptional rainfall, of the basement of the bank premises in which they were stored, and by reason of their injured condition G. was obliged to abandon a contemplated sale of the premises. Without offering to redeem, G. commenced an action for damages against the bank for negligence in the care and custody of the deeds.

HELD—that until redemption, G. had no right of action for damages against the bank.

There is no implied covenant on the part of a mortgagee to take reasonable care of the title deeds during the continuance of the security.

The nature of an equitable mortgage by deposit of title deeds considered: per Barton, J. *Brown* v. *Sewell* ((1853) 11 Hare, 49; 22 L. J. Ch. 1063; 17 Jur. 708) and other cases, in which indemnity and compensation have been decreed to mortgagors for loss of title deeds by mortgagees, are not founded on the hypothesis of an implied covenant by the mortgagee to take care of the deeds, but are referable to the ancient jurisdiction of Courts of Equity to give relief in cases of accident.

GILLIGAN AND NUGENT *v.* NATIONAL BANK, [[1901] 2 Ir. R. 513—Div. Ct.

13. *Shares—Deposit of Certificate as Security for Debt—Equitable Mortgage or Pledge—Foreclosure.*]—A person with whom a certificate of shares in a limited company has been deposited by way of security, without any memorandum, is entitled to a foreclosure, as such deposit amounts to an equitable mortgage, or, in other words, to an agreement to execute a transfer of the shares by way of mortgage.

HARROLD *v.* PLENTY, [1901] 2 Ch. 314; 70 [L. J. Ch. 562; 49 W. R. 646; 85 L. T. 45; 17 T. L. R. 545; 8 Mans. 304 — Cozens-Hardy, J.

14. *Agreement to deposit Irish Title Deeds—Need for Registration as an Equitable Charge—Subsequent Legal Mortgage—Priority—Registry Act* (6 Anne (Ir.), *c.* 2), *ss.* 3, 5.]—A letter to a bank in Ireland from one of its customers, in which he undertakes to deposit the title deeds of an Irish estate as security for an overdraft, is an agreement to create an equitable charge upon that estate, and ought to be registered as a conveyance under the Irish Registry Act of Anne.

If it is not registered, persons who subsequently, without notice of it, take a legal mortgage of the estate, and register their conveyance, are entitled to priority.

Decision of Irish C. A. (*In re Stevenson's Estate*, [1902] 1 Ir. R. 23) reversed.

FULLERTON AND ANOTHER *v.* PROVINCIAL [BANK OF IRELAND, [1903] A. C. 309; 72 L. J. P. C. 79; 89 L. T. 79; 52 W. R. 238—H. L. (Ir.).

V. EQUITY OF REDEMPTION.

See also Sect. XXI. REDEMPTION.

15. *Freeholds — Mortgagee in Possession — Equity of Redemption barred by Lapse of Time —Partial Intestacy of Mortgagee—Administratrix in Possession—Devolution of Property as Realty or Personalty.*]—A testator was entitled to a mortgage debt secured upon certain freehold messuages and lands by a mortgage in the form of a trust for sale, dated May 26th, 1831. He went into possession till his death, in December, 1864. By his will he devised and bequeathed his residuary real and personal estate to his wife during widowhood, subject to certain annuities. Subject to those gifts he died intestate. After his death his widow, who did not marry again, went into possession, and so remained until her death, on February 15th, 1900. The question arose whether the property was, for purposes of devolution from the testator, to be treated as realty or personalty.

HELD—that the equity of redemption had become barred; and that the property devolved upon the legal personal representative of the testator as personalty.

Flack v. *Longmate* ((1845) 8 Beav. 420) followed.

IN RE LOVERIDGE; DRAYTON *v.* LOVERIDGE, [1902] 2 Ch. 859; 71 L. J. Ch. 865; 87 L. T. 294; 51 W. R. 232—Buckley, J.

VI. FIXTURES.

See also title BILLS OF SALE.

16. *Chairs hired for Place of Entertainment—Mortgage of Premises—Right of Owner of Chairs*

Fixtures—*Continued.*

to remove them.]—The plaintiff let on hire to the occupier of certain premises a number of chairs for a public entertainment, the hirer to pay £20 a week for their use, and to have the option of purchasing them within three months for £676. The chairs were constructed on iron frames, each chair being separate, but so made as to be capable of being fastened to any other so as to form a row of seats. Each chair had two standards with holes at the feet for screws, and in accordance with the requirements of the local authority the seats were fastened by screws to the floor. The hirer, who did not exercise his option of purchase, mortgaged the premises to the defendants, together with all the fixtures.

HELD—that the chairs had never ceased to be chattels, and did not pass to mortgagees.

LYON *v.* LONDON CITY AND MIDLAND BANK, [LD., [1903] 2 K. B. 135 ; 72 L. J. K. B. 465 ; 51 W. R. 400 ; 88 L. T. 392 ; 19 T. L. R. 334 —Joyce, J.

17. *Dog Grates substituted for fixed Grates—Degree of Annexation—Object of Annexation—Improvement of Inheritance.*]—Whether a thing is a fixture must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, namely, the degree of annexation and the object of annexation.

There were in a freehold house, which was the subject of a mortgage, the ordinary fixed grates. The mortgagor, after the mortgage, removed a number of these, and substituted for them dog grates, which were of considerable weight, but were not affixed in any way to the structure of the house.

HELD—that having regard to the character of the articles and the circumstances, the dog grates were intended to be annexed to the inheritance for its improvement, and to become part of the freehold, and were therefore fixtures.

Decision of Bigham, J. ((1900) 16 T. L. R. 206) affirmed.

MONTI *v.* BARNES, [1901] 1 Q. B. 205 ; 70 [L. J. Q. B. 225 ; 47 W. R. 147 ; 83 L. T. 619 ; 17 T. L. R. 88— C. A.

18. *Power to sell Trade Fixtures separately from Land—Bills of Sale Act*, 1854 (17 & 18 Vict. *c.* 36).]—A mortgage of freehold or leasehold land, whether by demise or by conveyance of the freehold, if it contain a power to the mortgagee to sell or take possession of all or any part of the trade fixtures separately from the land, is a bill of sale as to those fixtures.

The principle was established by *Ex parte Daglish, In re Wilde*, (1873) L. R. 8 Ch. 1072 ; 42 L. J. Bk. 102 ; 21 W. R. 893 ; 29 L. T. (N.S.) 168 ; and *Ex parte Barclay, In re Joyce*, (1874) L. R. 9 Ch. 576 ; 43 L. J. Bk. 137 ; 22 W. R. 608 ; 30 L. T. (N.S.) 479.

JOHNS *v.* WARE, [1899] 1 Ch. 359 ; 68 L. J. Ch. [155 ; 47 W. R. 202 ; 80 L. T. 112 ; 6 Manson, 38—Romer, J.

19. *Trade Fixtures—Machinery—Hire Purchase Agreement—Implied Licence to remove.*]—The lessee of a factory mortgaged it, with the fixtures, machinery, and fittings erected thereon, to the defendants. Subsequently the lessee hired from the plaintiff, under a hire purchase agreement, certain carpenters' machines, which were worked by steam power, and which were fixed to the land by bolts and screws to prevent them vibrating, and which the plaintiff knew were to be fitted up and used in the factory. By the agreement the property in the machines was to remain in the plaintiff until all the hire instalments were paid, when the property was to vest in the hirer. The plaintiff was to be at liberty to determine the hiring and to retake possession of the machines on the happening of certain events. The defendants having taken possession of the premises under their mortgage, the plaintiff on the happening of an event entitling him to retake possession under the agreement, by notice in writing determined the hiring, and claimed the return of the machines, which the defendants refused.

HELD—that the machines were so annexed to the land that they became fixtures and passed with the land to the mortgagees, and that the plaintiff was not entitled to retake possession.

Hobson v. *Gorringe* ([1897] 1 Ch. 182 ; 66 L. J. Ch. 114 ; 45 W. R. 356 ; 75 L. T. 611—C. A.) approved.

Decision of C. A. ([1903] 1 K. B. 87 ; 72 L. J. K. B. 51 ; 51 W. R. 405 ; 87 L. T. 640 ; 19 T. L. R. 70) affirmed.

REYNOLDS *v.* ASHBY & SON. LD., [1904] A. C. [466 ; 73 L. J. K. B. 946 ; 20 T. L. R. 766 ; 53 W. R. 129 ; 91 L. T. 607—H. L. (E.).

VII. FORECLOSURE.

20. *Concurrent Remedies—Foreclosure Action in Chancery Division—Second Action in King's Bench Division — Staying latter Action.*] — A mortgagee brought a foreclosure action in the Chancery Division, and subsequently issued a specially indorsed writ in the King's Bench Division for principal and interest under the mortgage deed.

HELD—that, as in the first action the plaintiff could claim a personal order for payment, the second action was improper and ought to be stayed.

Poulett v. *Hill* ([1893] 1 Ch. 277 ; 62 L. J. Ch. 466 ; 41 W. R. 503 ; 68 L. T. 476—C. A.) followed.

WILLIAMS *v.* HUNT, [1905] 1 K. B. 512 ; 74 [L. J. K. B. 364 ; 92 L. T. 192—C. A.

21. *Executrix sole Defendant — Residuary Legatees made Parties—Land Transfer Act*, 1897 (60 & 61 Vict. *c.* 65), *s.* 1, *sub-s.* 1 ; *s.* 2, *sub-s.* 1 —*R. S. C., Ord.* 16, *r.* 8.]—A testator after making certain bequests, gave his wife an estate for life (determinable on her marrying again or cohabiting with another man) in the residue of his estate, with remainder over to the rector and churchwardens of a church to be administered

Foreclosure—*Continued.*

by them for the benefit of the poor of that place. The plaintiff had lent the testator, on the security of his estate, several sums amounting in the aggregate to about £30,000. The plaintiff brought an action for foreclosure. The widow of the testator entered an appearance as executrix, but delivered no defence on a motion for judgment.

HELD—that the rector and churchwardens of the church should be made parties.

WATTS *v.* LANE, (1901) 84 L. T. 144—Joyce, J.

22. *Joint Account—Payment to a Firm of which One of Two Joint Creditors was a Member — Agency — Absence of Evidence express or implied.*]—In a foreclosure action for £4,000 the defendant claimed to redeem for £3,000, contending that a payment of £1,000 to a firm of which one of his joint creditors was a member, but which firm did not appear to have been authorised to act as agent in the matter, discharged the mortgage *pro tanto*. The plaintiffs claimed an account and foreclosure.

HELD—that there was a joint debt paid to the firm of which one of the joint creditors was a member ; that the payment of a private debt due to a member of a firm to the firm of which the creditor is a member, would not support a plea of payment in the absence of evidence, express or implied, that the creditor had authorised the receipt of the money by the firm as his agents ; and that the plaintiffs were entitled to a foreclosure, the principal sum being £4,000.

Matson v. *Dennis* ((1864) 4 D. J. & S. 345 ; 10 L. T. (N.S.) 391) followed.

Steeds v. *Steeds* ((1889) 22 Q. B. D. 537 ; 58 L. J. Q. B. 302 ; 37 W. R. 378 ; 60 L. T. 318—Div. Ct.) explained.

POWELL *v.* BRODHURST, [1901] 2 Ch. 160 ; 70 [L. J. Ch. 587 ; 49 W. R. 532 ; 84 L. T. 620 ; 17 T. L. R. 501—Farwell, J.

23. *Principal not due — Covenant to pay Interest Half-yearly — Temporary Default — Redemption—Construction.*]—A mortgage made in 1900 contained (1) a covenant to pay the principal in 1914 "with interest that may then be due" ; (2) a covenant to pay meanwhile half-yearly interest on specified dates ; (3) a conveyance of the property "subject to the proviso for redemption hereinafter contained" ; (4) a proviso against calling in the principal before 1914 if the half-yearly interest were paid on the specified dates or within twenty-one days thereafter ; (5) a proviso against repayment of principal before 1914 ; (6) a proviso for reconveyance in 1914 if the mortgagor repaid the principal "with interest for the same in the meantime at the rate aforesaid that may be due and unpaid."

An instalment of interest was paid twenty-seven days after the specified day, and the mortgagee claimed to foreclose.

HELD—that he was not entitled to do so ; upon the true construction of the deed the proviso for redemption did not import a condition for payment within twenty-one days ; therefore, no condition had been broken, and the mortgagee's estate was not absolute at law.

In re Turner ((1895) 43 W. R. 153—Chitty, J.) followed.

Stanhope v. *Manners* ((1763) 2 Eden, 197) and *Edwards* v. *Martin* ((1856) 25 L. J. Ch. 284) distinguished.

WILLIAMS *v.* MORGAN, [1906] 1 Ch. 804 ; 75 [L. J. Ch. 480 ; 94 L. T. 473—Eady, J.

VIII. FRAUD.

24. *Collusion between Mortgagor and Mortgagee—False Recitals—Transfer of Mortgage—Notice — Sale — Satisfaction of Mortgage — Priority.*]—The doctrine of *Williams* v. *Sorrell* ((1799) 4 Ves. 389) and *Norrish* v. *Marshall* ((1821) 5 Madd. 475) is not applicable as against a transferee of a mortgage where there has been collusion between mortgagor and mortgagee to pay the debt to the mortgagee.

W. having purchased and mortgaged to D., his vendor (a solicitor), certain land, built houses thereon and sold the houses to the plaintiff. Prior to the sale D. transferred the mortgage to the defendant. The conveyance to the plaintiff, to which both W. and D. were parties, recited (*inter alia*) that D., being seised for an unincumbered estate in fee simple in possession, agreed to sell to W. for £100, but that no conveyance had been executed, which recital was false to the knowledge of W. The purchase-money was paid to D., who retained a sum for principal, interest and costs, but it was not shown to the satisfaction of the Court how the sum was arrived at. The plaintiff had not actual notice of the defendant's security, and W. had not had notice of the transfer given him by the defendant, and denied all knowledge of the transfer. D., who had been employed by the defendant to collect the interest on the defendant's mortgage, after paying interest on the mortgage for some years to the defendant, absconded, and nothing could be recovered from him.

HELD—that, although payment-off of the mortgage debt to the mortgagee by a mortgagor after, but without notice of a transfer, must, in the absence of collusion, be allowed to the mortgagor as against the transferee, as settled by the above-named cases, this doctrine ought not to be extended to a case where the money which was said to have been paid in satisfaction of the mortgage was part of the purchase-money procured by a false recital in the conveyance to the purchaser to the effect that there was not and never had been any mortgage ; that the case must be treated as one of collusion between W. and D. to obtain the purchase-money by means of false recitals ; and, therefore, that the retention of part of the purchase-money by D. was not equivalent to payment-off of any part of the mortgage.

DIXON *v.* WINCH, 68 L. J. Ch. 572 ; 47 W. R. [620 ; 81 L. T. 111—Cozens-Hardy, J.

Affirmed on different grounds, [1900] 1 Ch. 736 ; 69 L. J. Ch. 465 ; 48 W. R. 612 ; 82 L. T. 437 ; 16 T. L. R. 276—C. A. .

See also under Sect. XXVII. TRANSFER, 109.

Fraud—*Continued.*

25. *Constructive Notice of Fraud and Defect in Title—Purchase for Valuable Consideration—No Independent Solicitor—Purchase for Past Consideration—Mortgage to Trustees—Innocent Trustee making no Inquiries.*]—In 1892, A., who was found as a fact to be a person of limited intelligence and incapable of understanding the effect of legal instruments, was induced by the fraud of his agent F. to assign by deed all his property to F., in consideration of (*inter alia*) an annuity of £200. In the present action, brought by A.'s heiress-at-law and personal representative, this deed was set aside. It appeared that in 1896 F. had mortgaged the property to a bank, A. joining in the deed to postpone his annuity. The bank, who had no knowledge of A.'s mental condition nor that the deed of 1892 was procured by the fraud of F., but who were put upon inquiry by various circumstances, made no inquiry, and allowed A. to execute the deed without being represented by an independent solicitor.

HELD—that, as against the plaintiff, the bank could not rely on the defence of purchase for value without notice.

It further appeared that in 1901, F. had mortgaged the property to M. to secure a sum of £8,000 then due by F. to M. M. had no notice of the infirmity of F.'s title, and made no inquiry.

HELD—that M., being a purchaser for a past consideration, had no equity sufficient to prevail against the plaintiff's title.

It further appeared that in 1886, I. and R., co-trustees of F.'s marriage settlement, advanced £500 of the trust moneys to A. on a mortgage of A.'s property, thereby enabling F. to defraud A. of that sum. I. had no knowledge or notice of the state of A.'s intelligence.

HELD—that, even assuming R. to have had such knowledge, and to be guilty of a fraud, such fraud could not be imputed to I., and that the mortgage was valid as against the plaintiff.

ALDRITT *v.* MACONCHY, [1906] 1 Ir. R. 416—[Ross, J.

26. *Mortgagor's Signature obtained by his Solicitor's Fraud—Estoppel—Receipt in Body of Deed—"Solicitor's" Authority to Receive Mortgage Money—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *ss.* 54, 56.]—K., who was not a man of much education, employed E., a solicitor. K. signed a deed which E. advised him was necessary. The deed was a mortgage. E. applied the mortgage money to his own uses, paid interest on the mortgage to the mortgagees for some time, and then absconded. K. brought an action to obtain a declaration that the mortgage was void.

HELD—that K.'s recollection of the circumstances of the execution of the deed was an absolute blank; he never meant to execute a mortgage; he was never told that the true effect of the deed was a mortgage; he had absolute confidence in E., and executed any deed relating to his property that E. put before him, but K. knew that he was doing something with his property when the deed was put before him. Therefore the mortgage was a valid deed as against K. in the hands of the mortgagees.

HELD also, that K. was estopped from saying that it was not his solicitor who produced the deed and received the mortgage money.

The meaning of the word "solicitor" in sect. 56 of the Conveyancing Act, 1881, considered.

Dictum of North, J., in *Day* v. *Woolwich Equitable Building Society* ((1888) 40 Ch. D. 491; 58 L. J. Ch. 280; 37 W. R. 471; 60 L. T. 752—North, J.) questioned.

KING *v.* SMITH, [1900] 2 Ch. 425; 69 L. J. Ch. [598; 83 L. T. 815; 16 T. L. R. 410—Farwell, J.

27. *Parent and Child—Undue Influence—Mortgage of Child's Reversionary Interest—No independent Advice.*]—If there is a pecuniary transaction between parent and child just after the child attains the age of twenty-one years, and prior to what may be called "emancipation," without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child, and it is the business and the duty of the party who endeavours to maintain such a transaction to show that that presumption is adequately rebutted.

A father was in embarrassed circumstances. In 1879 his daughter, aged about twenty-two, harassed by the position of her father, was induced to mortgage her reversionary interest merely to raise money to pay her father's debts. In the transaction she had no independent advice. The mortgagees, who were trustees, acted by the same solicitors as acted for the father and the daughter. One of the mortgagees was himself one of the firm of solicitors then acting for all parties in the matter. In 1881 the daughter became of unsound mind owing to mental anxiety and domestic worries. At the suggestion of the Master in Lunacy, an action was brought by the next friend of the daughter that the mortgage was void and ought to be set aside upon the ground of undue and improper influence of the father.

HELD—that the deed must be set aside.

Archer v. *Hudson* ((1844) 7 Beav. 551; 13 L. J. Ch. 380) and *Wright* v. *Vanderplank* ((1856) 2 K. & J. 1; 8 De G. M. & G. 133; 25 L. J. Ch. 599; 2 Jur. (N.S.) 599) followed.

DE WITTE *v.* ADDISON, (1899) 80 L. T. 207—C. A.

IX. FURTHER ADVANCES.

28. *Covenant to make further Advances—Further Advances after Notice of Second Mortgage—Priorities.*]—In 1895 W. W. mortgaged his interest in personal estate under a will to the plaintiff, but the plaintiff gave no notice of the mortgage to the trustees of the will until 1897. In 1896 W. W. mortgaged his interest to X and Y., to secure a sum then advanced, and also further advances which X. and Y. covenanted to

Further Advances—*Continued.*

make. X. and Y. duly gave notice to the trustees of the will of this mortgage, but had no notice of the plaintiff's mortgage until February 15th, 1897. They made further advances pursuant to the covenant both before and after February 15th, 1897.

HELD—that the principle of *Hopkinson v. Rolt* ((1861) 9 H. L. C. 514; 34 L. J. Ch. 468; 9 W. R. 900; 5 L. T. (N.S.) 90) applied, notwithstanding that the further advances were made pursuant to a covenant, and that X. and Y. were entitled to priority over the plaintiff only in respect of such of the further advances as were made prior to the date when they received notice of the plaintiff's mortgage.

Decision of Kekewich, J. ([1898] 1 Ch. 488; 67 L. J. Ch. 213; 46 W. R. 362; 78 L. T. 147) reversed.

WEST *v.* WILLIAMS, [1899] 1 Ch. 132; 68 L. J. [Ch. 127; 47 W. R. 308; 79 L. T. 575—C. A.

29. *Second Mortgage—Tacking—Joint Tenants—Trustees.*]—In October, 1864, certain property was mortgaged to A., B. and C. (who were trustees), as joint tenants, to secure £3,000 and interest. In February, 1866, the same property was mortgaged to L. to secure £3,500 and interest. In October, 1876, a further charge was executed in favour of the first mortgagees to secure £1,000 and interest. A. died in May, 1883, and B. died in January, 1889.

The plaintiffs in the action were the present trustees of the settlement of which the first mortgagees had been trustees, and the defendants were the present owners of the second mortgage. B., who was a solicitor, had acted for all parties in carrying out the first and second mortgages and the further advance by the first mortgagees, and had actual notice of the second mortgage at the date of the creation; but he failed to communicate the fact of the second mortgage to his co-mortgagees at the time of the further advance, and they had no personal knowledge of its existence.

HELD—that the plaintiffs were not entitled to tack the amount due in respect of the further advance to the amount due on the first mortgage, and so postpone the second mortgage. In the case of a mortgage of real estate to joint tenants to secure a debt to them jointly, it cannot be said as against strangers that any one portion of the security of the debt belongs to any one of the mortgagees; each is entitled to the whole, and if notice of a second incumbrance is given to any one of them, such notice creates an equity against one in respect of the whole sufficient to prevent any tacking.

FREEMAN *v.* LAING, [1889] 2 Ch. 355; 68 L. J. [Ch. 586; 48 W. R. 9; 81 L. T. 167—Byrne, J.

X. GENERAL.

30. *Consideration—Partly Illegal—Tippling Acts—The Spirits (Ireland) (No. 2) Act*, 1815 (55 Geo. 3, *c.* 104), *s.* 15.]—The circumstance that portion of the consideration for a mortgage was for spirituous liquors supplied upon credit contrary to the provisions of the Tippling Acts vitiates the security only to the extent of the illegal consideration.

SHEEHY *v.* SHEEHY, [1901] 1 Ir. R. 239—C. A.

31. *Costs of Enforcing Mortgagee's Claim.*]—The costs incurred by a person entitled to an annuity and charge on an estate in successfully enforcing his claim against the owner, who resisted it, take the same rank as the principal sum.

IN RE BALDWIN'S ESTATE, [1900] 1 Ir. R. 15—[Ross, J.

32. *Mortgage of Real Estate subject to Trust for Conversion—Rents and Profits of Unconverted Real Estate—Payment into Court by Trustees under Trustee Act*, 1893 — *Payment Out—Application by Mortgagors—Mortgagee's Claim for Principal and Interest — Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 34 —*Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 8.]—H., who died in 1878, gave the residue of his real and personal estate to trustees upon trust to sell and convert at their discretion and to divide the proceeds among his four children in equal shares. The trustees, in exercise of their discretion, retained a certain freehold house and treated it as forming part of the testator's residuary trust estate. In 1889 two of the children mortgaged their interests in this property and "the proceeds thereof." In 1896 and 1905 the trustees paid into Court under the Trustee Act, 1893, certain sums representing the shares of the mortgagors in the rents and profits of this property. No part of the principal secured by the mortgage nor any interest thereon was ever paid, nor was any acknowledgment given by the mortgagors. On an application by the mortgagors for payment out to them of the fund:

HELD—that the mortgagors were entitled to have the fund paid out to them without satisfying the mortgagee's claim for principal and interest, because the effect of sect. 34 of the Real Property Limitation Act, 1833, was to extinguish their title to the mortgage.

In re Lloyd ([1903] 1 Ch. 385; 72 L. J. Ch. 78; 51 W. R. 177; 87 L. T. 541; 19 T. L. R. 101—C. A. *See* title LIMITATION OF ACTIONS, No. 45) explained and distinguished.

Decision of Warrington, J., [1907] 1 Ch. 219; 64 L. J. Ch. 184; 71 L. T. 55; 43 W. R. 327, reversed.

IN RE HAZELDINE'S TRUSTS, [1907] W. N. 218; [52 Sol. Jo. 29—C. A.

33. *Mortgage of two Properties—Mortgagor Trustee of one Property and Owner of the Other—Loan by Third Party on Promise of Transfer—Non-disclosure—Part Payment with Money lent—Equitable Mortgage of one Property to Third Parties—Extent of Charge of Third Party—Merger.*]—C., being entitled to two properties—namely, No. 1 as trustee for his wife, and No. 2 beneficially—with her consent mortgaged both to T. for £2,000. Afterwards C. asked M.

General—*Continued.*

to lend him £1,200 to pay off an existing mortgage on No. 1, and promised M. a transfer of the above mortgage, but did not disclose that No. 1 belonged to Mrs. C., or inform M. of the amount of, or the securities for, the first mortgage. M. advanced the £1,200, and C. applied £1,000 in paying to T. part of the £2,000 due to him. Later C. executed an equitable mortgage on No. 1 to M. to secure the £1,200.

HELD—that when M. advanced the £1,200, and the £1,000 was applied in payment to T., the charge on both the above properties to the extent of £1,000 paid to T. was kept alive in equity in favour of M., but so as not to prejudice the rights of T. and Mrs. C.

Patten v. *Bond* ((1889) 37 W. R. 373 ; 60 L. T. 583—Kay, J.) followed.

HELD, also, that M. did not lose the benefit of such charge by taking the equitable mortgage executed by C. on No. 1, the charge thereby given not operating as a release or extinguishment of the prior charge, and there being no reason for presuming merger of the securities.

There is no merger at law, even of a lower in a higher security, if the remedy given by the latter is not co-extensive with that given by the former. *Bell* v. *Banks*, (1841) 3 Man. & G. 258 ; 3 Scott (N.R.) 497.

CHETWYND *v.* ALLEN, [1899] 1 Ch. 353 ; 68 [L. J. Ch. 160 ; 47 W. R. 200 ; 80 L. T. 110—Romer, J.

34. *Relation Back—Right of Second Mortgagee to take possession at any Time—Damage to Property while Mortgagor in possession—Second Mortgagee subsequently taking possession—Right to sue.*]—The owner of certain houses mortgaged them to the plaintiff company, subject to a first mortgage to the other plaintiffs, to secure an advance. The mortgage deed gave the company the right at any time thereafter to enter into possession of the premises or any part thereof. Most of the houses were let by the mortgagor to weekly tenants, but some were unoccupied. The mortgagor remained in possession, and during that time a flood occurred which damaged the houses. The plaintiff company, the second mortgagees, thereupon entered into possession of the premises under their mortgage deed, and the present action was brought by them and the first mortgagees against the defendants to recover damages for trespass and nuisance to the houses, the plaintiffs alleging that the flood was caused by the defendants having wrongfully stopped up a natural stream which ran through their land. The defendants took the objection that the company, the second mortgagees, had no title to sue.

HELD—that the second mortgagees having, at the time of the damage, the right to enter into possession of the premises, their subsequent entry into possession related back to the time when the right accrued, and therefore at the time of the damage the second mortgagees were entitled to stand in the position of the mortgagor; and, though they had not the legal estate, yet, inasmuch as some of the houses were unoccupied, they could sue in trespass as being in possession for the damage to those houses.

Barnett v. *Guildford* ((1855) 11 Ex. 19) followed.

Quære, whether they could sue for damage to the inheritance.

THE OCEAN ACCIDENT AND GUARANTEE CORPORATION, LD. AND OTHERS *v.* THE ILFORD GAS CO., [1905] 2 K. B. 493 ; 74 L. J. K. B. 799 ; 93 L. T. 381 ; 21 T. L. R. 610—C. A.

XI. INTEREST.

35. *Covenant to pay Principal and Interest—Judgment—Merger—Rate of Interest.*]—A covenant to pay interest may be so expressed as not to merge in a judgment for the principal.

A mortgage deed contained a covenant by the mortgagors for the payment of principal and interest at 5 per cent. on a certain day, and for the payment of subsequent interest on so much of the principal as was unpaid, if the principal was not paid upon that day, and there was a proviso for redemption which was in these terms : that if the mortgagors should pay to the mortgagees "the sum of £20,000 with interest for the same after the rate at the times and in manner hereinafter covenanted and agreed for the payment thereof," then they should have back the property. The mortgagors having made default, the mortgagees recovered judgment against them for principal and interest on the covenant.

HELD—that according to the true construction of the proviso it was not a security to secure the performance of the covenant, but it entitled the mortgagees to sit upon their deeds or to hold their security until they had been paid every penny of the £20,000, together with interest measured by what was expressed in the covenant; and that the covenant to pay interest was not merged in the judgment.

Dictum of Fry, L.J., in *Ex parte Fewings* ((1883) 25 Ch. D. 338, 355 ; 53 L. J. Ch. 545 ; 32 W. R. 352 ; 50 L. T. 109—C. A.) approved.

Decision of M. R. and C. A. (Ir.), *sub nom. Usborne* v. *Limerick Market Trustees* (*No.* 2) ([1900] 1 Ir. R. 85) reversed.

ECONOMIC LIFE ASSURANCE SOCIETY *v.* [USBORNE, [1902] A. C. 147 ; 71 L. J. Ch. 34 ; 85 L. T. 587—H. L. (Ir.).

36. *Proviso for not calling in Principal Money if Interest should be "punctually" paid—Delay of Nine Days in Payment—Notice calling in Mortgage Debt—Validity.*]—Payment "punctually" means punctually on the day fixed for payment.

A mortgage deed, dated in February, 1897, to secure payment of the principal money, with interest payable half-yearly, contained a proviso that payment of the principal money should not be required by the mortgagees until the expiration of three years computed from the date of the deed, "if, in the meantime, every half-yearly payment of interest shall be punctually paid."

HELD—that the parties must be taken to have

Interest—*Continued.*

meant what they said, namely, that, if the half-year's payment of interest was paid on the day upon which it became due, the principal money should not be called in; and that, as the interest was not paid until nine days later, a notice calling in the mortgage debt was validly given.

Decision of Kekewich, J., reversed.

LEEDS AND HANLEY THEATRE OF VARIETIES [*r.* BROADBENT, [1898] 1 Ch. 343; 67 L. J. Ch. 135; 77 L. T. 665; 14 T. L. R. 157; 46 W. R. 230—C. A.

37. *Provision for Reduction of, on punctual Payment on Gale Days "in every Year"—Default in punctual Payment—Over-payment of Interest treated as Payment of Capital.*]—A proviso for reduction of interest on a mortgage debt, on payment upon the gale days therein named "in every year," or within sixty days then ensuing, and that the mortgagor should not be entitled to the benefit thereof while any interest previously accrued due should remain unpaid, only deprives the mortgagor of the benefit of reduction in each gale where the interest is not paid punctually.

Over-payments of interest are to be treated as payments of principal *pro tanto*.

IN RE CARROLL'S ESTATE, [1901] 1 Ir. R. 78—[Ross J.

38. *Payment by Person bound to pay—Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 8.]—Where there is a mortgage created, and interest has been paid upon it up to a date within the statutory period of limitation by a person who is admitted to have been the solicitor for the mortgagor and afterwards for his executors, and the payment was admittedly received by the mortgagees as and for a payment under the mortgage, the mortgagee is entitled to succeed in maintaining his mortgage.

Where a person has been in possession for many years, the onus is upon the mortgagee to show that his mortgage is still alive; yet when it is proved that there has been a continuous payment by a person, who *primâ facie* is the proper person to pay it, to persons who have received it as interest under the mortgage, the onus of proof is shifted to the person who says that the mortgage has ceased to exist, and he must show that the payments were made under such circumstances as not to be payments by the mortgagor within the meaning of sect. 8 of the Real Property Limitation Act, 1874.

Harlock v. *Ashberry* ((1882) 19 Ch. D. 539; 51 L. J. Ch. 394; 30 W. R. 327; 46 L. T. 356—C. A.) explained.

Decision of Buckley, J. ((1901) 49 W. R. 698) affirmed.

BRADSHAW *v.* WIDDRINGTON, [1902] 2 Ch. [430; 71 L. J. Ch. 627; 50 W. R. 561; 86 L. T. 726—C. A.

39. *Transfer with Concurrence of Mortgagor—Arrears of Interest paid by Transferee treated as Principal bearing Interest.*]—Transferee of a mortgage, the mortgagor joining in the transfer.

HELD—entitled to treat as principal bearing interest arrears of interest on the original debt due at the date of the transfer, and paid by him to the mortgagee.

AGNEW *v.* KING, [1902] 1 Ir. R. 471—V.-C.

XII. LEASES.

(a) General.

40. *Lease by Mortgagor in possession—Mansion House, Furniture, and Sporting Rights—Foreclosure—Lease binding on Mortgagee—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 18.]—A mortgagor while in possession granted a lease for fourteen years of the mortgaged mansion house, with the furniture therein (which was not included in the mortgage), and of the sporting rights over the whole of the mortgaged land at a single rent. The lessee spent a large sum of money on the mansion. Afterwards the mortgagees bought the furniture "subject to and with the benefit of" the lessee's lease, and served a notice to that effect on the lessee. Subsequently they foreclosed. They continued to receive rent from the lessee, and on their part to carry out the covenants to repair contained in the lease. A dispute having arisen during the term between the lessee and mortgagees, as to repairs and keeping down the rabbits, the latter notified the former that they regarded him only as a yearly tenant, and gave him notice to quit on that footing.

HELD—that nothing done by the mortgagees was sufficient to estop them from asserting that the lease did not bind them.

HELD, also, that the inclusion of chattels and sporting rights over part of the land mortgaged but not included in the demise did not prevent the lease being a good occupation lease within sect. 18 of the Conveyancing Act, 1881.

Judgment of Bigham, J. ([1900] 1 Q. B. 346; 69 L. J. Q. B. 140; 82 L. T. 264; 16 T. L. R. 131) affirmed.

BROWN *v.* PETO, [1900] 2 Q. B. 653; 69 L. J. [Q. B. 869; 83 L. T. 303; 16 T. L. R. 561; 49 W. R. 324—C. A.

41. *Lease by Mortgagor in Possession—Surrender to Mortgagor—Validity against Mortgagee—Conveyancing Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 18.]—A mortgagor in possession, who has made a lease of the mortgaged property under the powers conferred by sect. 18 of the Conveyancing Act, 1881, has no power to accept a surrender of the lease from the lessee without the consent of the mortgagee.

If he purports to do so, the mortgagee on taking possession before the expiration of the original lease can recover rent under it.

ROBBINS *v* WHYTE, [1906] 1 K. B. 125; 75 L. J. [K. B. 38; 54 W. R. 105; 94 L. T. 287; 22 T. L. R. 106—Warrington, J.

42. *Mortgage by Sub-demise—Conveyance of Fee-simple to Mortgagor—Mortgage of Fee-*

Leases—*Continued.*

simple—Intention—Non-payment of Rent—Re-entry—Real Property Act, 1845 (8 & 9 Vict. *c.* 106), *s.* 9—*Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 7 (d).]—Equitable merger depends upon the intention of the parties; and this is so as regards estates as well as charges.

Chambers v. *Kingham* ((1878) 10 Ch. D. 743; 48 L. J. Ch. 169; 27 W. R. 289; 39 L. T. 472) and *Ingle* v. *Jenkins* ([1900] 2 Ch. 368; 69 L. J. Ch. 618; 48 W. R. 684; 83 L. T. 155—Farwell, J. *See* title SETTLEMENTS, No. 10) approved.

Prior to May 20th, 1897, certain leasehold premises became vested in the defendant Rhodes for the residue of a term of ninety-nine years. On May 20th, 1897, Rhodes mortgaged his leasehold interest by sub-demise to the defendants, F. & Sons. On July 27th, 1899, the owners of the fee-simple conveyed the premises to Rhodes in fee simple "subject to but with the benefit of the said lease." On the same day Rhodes mortgaged his interest to the plaintiffs. The sum advanced on this mortgage was to enable Rhodes to complete the purchase of the fee-simple. On April 17th, 1901, Rhodes, by deed of arrangement duly registered, vested all his property in the defendant M. upon trust for the benefit of his creditors. F. & Sons entered into possession of the premises prior to June 24th, 1901, and the plaintiffs shortly after the expiration of twenty-one days from that date demanded payment of the quarter's rent under the lease from M., and F. & Sons. The plaintiffs thereupon commenced this action for foreclosure or sale, and for a declaration that the term of ninety-nine years created by the lease had not become merged in the fee-simple, and that the plaintiffs were entitled to re-enter under the proviso for re-entry for non-payment of rent in the head lease.

HELD—that there was no merger; and that the plaintiffs were entitled to re-enter, assuming the legal estate to be in them (*infra*).

—— *Land Transfer Act*, 1897 (60 & 61 Vict. *c.* 65), *s.* 20—*Land Transfer Rules* 106, 107, 110.]—Rhodes' title was not registered until after the date of the mortgage by him to the plaintiffs; it was in fact registered on the same day as a subsequent charge in their favour in the statutory form, with a grant of the property added to it.

HELD—that, when land is once registered, non-registration of a subsequent assurance does not prevent the legal estate from passing.

Per Cozens-Hardy, L.J.—The register of proprietors is not material for the purpose of finding the legal estate.

Decision of Kekewich, J. ([1902] 71 L. J. Ch. 573; 87 L. T. 17) reversed.

CAPITAL AND COUNTIES BANK *v.* RHODES AND [OTHERS, [1903] 1 Ch. 631; 72 L. J. Ch. 336; 51 W. R. 470; 88 L. T. 255; 19 T. L. R. 280—C. A.

(b) Goodwill.

43. *Public-house—Real Estate Charges Act (Locke-King's)*, 1854 (17 & 18 Vict. *c.* 113).]—In 1850 a lease of a public-house was granted to F. N. for thirty-one years. F. N. sub-let to G. W. B.

In 1871 the owners in fee conveyed the public-house to G. W. B. subject to the lease. On the next day G. W. B. mortgaged the public-house to the mortgagees in fee. The mortgage contained no reference to the goodwill of the house.

In January, 1873, F. N. surrendered the lease to G. W. B., who died on November 20th, 1873.

After G. W. B.'s death the public-house was let from time to time by the tenant for life and trustees under G. W. B.'s will, and ultimately to a tenant for a term which expired in April, 1897, when the right of the reversioner became a right in possession.

During the whole period down to April, 1897, the mortgagees had never been in possession.

After the death of the testator the mortgage debt was paid off by the trustees of the will out of the testator's estate. The lease and goodwill realised £11,500.

HELD—that as there had never been any *de facto* acquisition of the goodwill by reason of the occupation of the house by the mortgagees, the goodwill had not passed to the mortgagees; that the mortgage debt must be borne by the property comprised in the mortgage; and that the mortgage debt must be borne by the £11,500, less £2,617, the apportioned value of the goodwill.

Lewis v. *Lewis* ((1871) L. R. 13 Eq. 218; 41 L. J. Ch. 195; 20 W. R. 141; 25 L. T. (N.S.) 555) observed upon.

IN RE BENNETT, CLARKE *v.* WHITE, [1899] 1 [Ch. 316; 68 L. J. Ch. 104; 47 W. R. 406—North, J.

44. *Subsequent Incumbrances—Sale by First Mortgagee—Marshalling—Apportionment of Purchase Money.*]—A mortgagor on three different occasions mortgaged a leasehold house where he carried on a business, and included the goodwill of the business in the first and third mortgages, but not in the second mortgage. The first mortgagee sold the whole security for a sum allocated in specific proportions to the lease and the goodwill respectively.

HELD—that the goodwill of the business was something apart and different from the lease, and that the purchase-money ought to be apportioned between the lease and the goodwill.

BAGLIONI *v.* CAVALLI, (1901) 49 W. R. 236; 83 [L. T. 500—Cozens-Hardy, J.

XIII. MARRIED WOMEN.

45. "*Joint Account*" *Clause—Transfer of Mortgage—Concurrence of Husband—Separate Acknowledgment.*]—A married woman mortgagee, not being a trustee, can transfer the mortgaged property without the concurrence of her husband or acknowledgment by herself under the Fines and Recoveries Act.

In re Brooke and Fremlin's Contract ([1898] 1 Ch. 647; 67 L. J. Ch. 272; 46 W. R. 442; 78

Married Women—*Continued.*

L. T. 416—Kekewich, J., *see* HUSBAND AND WIFE, 22) followed.

And a "joint account" clause in the mortgage is not a notice of a trust so as to put a transferee on inquiry as to whether the married woman mortgagee is in fact a trustee.

Carritt v. *Real and Personal Advance Co.* ((1889) 42 Ch. D. 263; 58 L. J. Ch. 688; 37 W. R. 677; 61 L. T. 163—Chitty, J.) followed.

IN RE WEST AND HARDY'S CONTRACT, [1904] [1 Ch. 145; 73 L. J. Ch. 91; 52 W. R. 188; 89 L. T. 579—Farwell, J.

XIV. PARTNERSHIP.

46. *Mortgage of Real Estate by one Partner to secure Partnership Debt—Devise by Mortgagor of his Real Estate — Sufficiency of Partnership Assets to pay Partnership Debts—Real Estate Charges (Locke-King's Act)* (17 & 18 Vict. *c.* 113), *s.* 1.]—A testator who was a partner in a firm of shipbuilders had deposited at a bank the title-deeds of a real estate belonging to himself, to secure the partnership overdraft. By his will he specifically devised the real estate. The partnership assets were, at the testator's death, sufficient to pay the firm's debts.

HELD—that the charge only extended to the debts of the partnership, and that, as the partnership assets were sufficient to pay these, no part thereof was a charge on the real estate of the testator comprised in the memorandum of charge; and that the Real Estate Charges (Locke-King's) Act, 1854, did not apply.

Decision of Romer, J. ([1898] 1 Ch. 667; 67 L. J. Ch. 365; 46 W. R. 478; 78 L. T. 645) affirmed.

IN RE RITSON, RITSON *v.* RITSON, [1899] 1 [Ch. 128; 68 L. J. Ch. 77; 47 W. R. 213; 79 L. T. 455; 15 T. L. R. 76—C. A.

XV. PAYMENTS.

47. *Appropriation — Right to Appropriate — Creditor's Intention.*]—A. mortgaged his lands of B. to secure £500. After his death this mortgage was assigned to an insurance company. His widow was a party to the assignment, and covenanted to pay the mortgage debt and interest. Under A.'s will the lands of B. were devised in trust for sale for payment of legacies. His widow raised these legacies from the insurance company by several mortgages, and she personally covenanted to pay the principal and interest thereon. She died, and her estate, which was insolvent, was administered in the Court of Chancery. The insurance company proved for the mortgage debts, under the personal covenants, and received several dividends thereon. The lands of B. were sold in the Land Judge's Court. The insurance company claimed the right to appropriate these dividends towards the subsequent mortgages and to be paid the sum of £500 out of the proceeds of the sale of the lands.

HELD—that as they had proved in the action for the £500, they could not appropriate.

IN RE BROWNE'S ESTATE, [1903] 1 Ir. R. 245 [—Ross, J.

48. *Appropriation—Marshalling Securities—Voluntary Deed.*] — Lands were subject to incumbrances ranking in priority as follows: (*a*) mortgage for £2,000 vested in A.; (*b*) £1,500 portions for the younger children of the owner; (*c*) mortgage for £1,000 vested in A.; (*a*) and (*c*) were collateral securities for a larger mortgage debt of £4,000. The charge (*b*) was created by a voluntary post-nuptial deed which contained no covenants for title. By deed made between the owner, his eldest son, and trustees, to which A. was not a party, certain policies of insurance were assigned in trust to pay the proceeds when realised in discharge of (*a*) and (*c*), described in the deed as "£3,000 part of said sum of £4,000," so as to relieve the inheritance of the lands. The amount secured by some of the policies having been received by some of the trustees, they paid £1,000 thereout to A. on account of his demand, without any express appropriation. Six months afterwards A. appropriated this sum to payment of (*c*), which would not be reached by sale of the estate.

HELD—first, that A. was entitled to make such appropriation; and secondly, that the younger children of the owner were not entitled to marshal the securities against A.

IN RE LYSAGHT'S ESTATE, [1903] 1 Ir. R. 235 [—Ross, J.

49. *Marshalling—Legacies charged on Lands —Mortgage of Portion of Lands charged — Covenant against Incumbrances.*] — Blackacre and Whiteacre were devised to C. subject to legacies. C. mortgaged Whiteacre to a bank to secure £7,000. The mortgage contained a covenant against incumbrances. After C.'s death, in an action to administer his real and personal estate, Whiteacre was sold, and the legacies were paid out of the proceeds of the sale, thereby nearly sweeping away the fund out of which the mortgage debt was payable. Blackacre was subsequently sold.

HELD—that the mortgagees were, under the doctrine of marshalling, entitled to resort to the fund produced by the sale of Blackacre for payment of the mortgage in priority to simple contract creditors of the deceased.

Quære, whether, apart from the covenant against incumbrances contained in the mortgage, the bank would have been entitled to the proceeds of the sale of the unmortgaged lands (*I b.*).

M'CARTHY *v.* M'CARTIE (No. 2), [1904] 1 Ir. R. 100—C. A.

50. *Executors paying off Debt—Gift of part of Mortgaged Property* inter vivos—*Liability of Donee to Contribute towards paying off Debt—Paramount Charge—No Covenants for Title.*]—D. to secure an overdraft deposited with his bank the deeds of his leasehold premises and

Payments—*Continued.*

other securities executing a deed of charge and memorandum of deposit. He subsequently assigned the leasehold premises to his wife by a voluntary deed containing no reference to the charge or memorandum, and no covenants for title, express or implied.

By his will he left all his property in trust for his wife and children. His executors thereupon paid off the bank's debt, and asked the widow, as assignee of the leaseholds, to contribute.

HELD—that she was under no liability to do so, the charge being one created by her assignor and not one paramount to his own title.

Ker v. *Ker* ((1869) Ir. R. 4 Eq. 15) explained and distinguished.

In re Jones ([1893] 2 Ch. 461; 62 L. J. Ch. 996; 69 L. T. 45—North, J.) distinguished.

IN RE DARBY, RENDALL *v.* DARBY, [1907] 2 [Ch. 465; 76 L. J. Ch. 689—Warrington, J.

51. *Payment off of Mortgage—Reconveyance—Delivery up of Title Deeds—Notice of Subsequent Equitable Mortgages.*]—A legal mortgagee of an estate, who has received notice of subsequent equitable mortgages, cannot be compelled, upon being paid off his mortgage debt by the mortgagor, to hand over to him the title deeds of the estate and to execute a reconveyance to him in the ordinary form without being satisfied that the subsequent equitable mortgages, of which he has received notice, have been paid off.

CORBETT *v.* NATIONAL PROVIDENT INSTITU- [TION, (1901) 17 T. L. R. 5—Phillimore, J.

52. *Tender—Validity—Cheque—Authority of Solicitor.*] — The plaintiffs brought an action against the defendants alleging that a mortgage to them in July, 1891, of certain reversionary interests belonging to the plaintiffs as security for a loan of £350 and interest had been improperly obtained. The plaintiffs claimed to have the mortgage set aside, and an injunction to restrain an intended sale by the defendants of the mortgaged property.

In November, 1896, the plaintiffs applied *ex parte*, and obtained an order restraining the sale conditionally upon their paying into Court £400 within a short time limited by the order; but no such payment was made.

On the morning of the sale, two days later, the plaintiffs' solicitor attended by appointment at the office of the defendants' solicitor for the purpose of paying off the mortgage debt, and there saw the managing clerk of the defendants' solicitor. He stated that the amount due on the mortgage was £350 principal, £22 interest, and £33 costs, in all £405, but that there was a further amount due for auctioneers' charges in respect of the sale. Having communicated with the auctioneers through the telephone, and ascertained the amount claimed by them, he stated that the total amount due was £463 7*s.* 10*d.* The plaintiffs' solicitor had with him only £400 in cash, and he therefore proposed to give his cheque on his bankers for £63 7*s.* 10*d.* to make up the amount. The managing clerk expressed himself as willing to accept the cheque on the understanding that the payment was not to be made under protest. The plaintiffs' solicitor then drew the cheque, and tendered the cash and cheque, but did so under protest. The managing clerk declined to accept the tender because it was under protest. The sale was proceeded with the same afternoon.

The plaintiffs thereupon applied to Kekewich, J. for an interlocutory injunction to restrain the defendants from completing the sale.

It was decided by Kekewich, J. (75 T. L. R. 627) that the injunction must be refused, inasmuch as a solicitor who was authorised to accept a tender of mortgage money on behalf of his client was not at liberty to accept a cheque; and that tender of a cheque by the mortgagor to the solicitor was accordingly insufficient.

On the action subsequently coming on for trial, his Lordship dismissed it with costs on the ground of his decision on the motion.

The plaintiffs appealed.

HELD, on the facts of the case, without expressing any opinion on the question of law argued—that the appeal must be dismissed with costs.

Decision of Kekewich, J. affirmed.

BLUMBERG *v.* LIFE INTERESTS AND REVER- [SIONARY SECURITIES CORPORATION, LD., [1898] 1 Ch. 27; 67 L. J. Ch. 118; 77 L. T. 506—C. A.

XVI. POLICIES OF LIFE ASSURANCE.

53. *Power of Sale—Moneys received on Surrender of Policy by Mortgagee — Payment or Acknowledgment "in the meantime"—Real Property Limitation Act*, 1874 (37 & 38 Vict. *c.* 57), *s.* 8.] — Where a mortgagee, having received neither payment nor acknowledgment in respect of his mortgage for twenty-two years, at the end of that time surrenders to the insurance office a policy on the life of the mortgagor in order to realise part of his security, the surrender value of the policy so paid by the insurance company to the mortgagee will not operate as a payment or acknowledgment of the mortgage debt within the meaning of sect. 8 of the Real Property Limitation Act, 1874, so as to entitle the plaintiff to recover on the covenant contained in the mortgage.

In re Conlan's Estate ((1892) 29 L. R. Ir. Ch. 199) discussed.

The words "in the meantime" in the section include the period between the time of the action or suit being brought and the time when the remedy for it would otherwise have been barred.

Harty v. *Davis* ((1850) 13 Ir. L. R. 23) approved.

IN RE CLIFDEN (LORD), ANNALY *v.* AGAR- [ELLIS, [1900] 1 Ch. 774; 69 L. J. Ch. 478; 48 W. R. 428; 82 L. T. 558—Byrne, J.

54. *Prior Charge in favour of Insurance Company—Covenant by Mortgagor to do nothing whereby Policy might become Voidable or Void*

Policies of Life Assurance—*Continued.*

—Policy taken over by Company at Surrender Value—Foreclosure by Mortgagee.]—A policy subject to a charge in favour of the insurance company was mortgaged, the mortgagor covenanting to do and suffer nothing whereby the policy might become voidable or void. Under the terms of the mortgagor's agreement with the company, the company took over the policy at its surrender value upon the mortgagor's default in payment of interest to the company. Upon the mortgagee's seeking to foreclose an alleged breach of the mortgagor's covenant :—

HELD—that the mortgagee was not entitled to foreclose, inasmuch as the mortgagor had done nothing in breach of the covenant.

SAPIO *v.* HACKNEY, (1907) 51 Sol. Jo. 428—[Warrington, J.

XVII. POWER OF SALE.

And see title BANKERS AND BANKING.

55. Bonâ fide *Sale to Solicitor of Mortgagee—Voidability — Action to Redeem — Validity —* Laches.]—The executrix of a mortgagee, some months after his death, sold the property, which was reversionary, under the power of sale in the mortgage, to E., who had acted as solicitor for the mortgagee in regard to the mortgage and in regard to certain negotiations for selling the property and in proving the mortgagee's will. Notice of the sale was given to N., the owner of the equity of redemption. N. thereupon asserted that he was entitled to the property, but took no step until, more than nine years afterwards, the reversion fell into possession. He then brought an action against the executors of E. to redeem the mortgage and to have the property assigned to him on payment of what was due for principal, interest and costs.

HELD—that the sale being *bonâ fide* and a sufficient price having been paid, there was no ground for saying the transaction was null and void, and, assuming that it was voidable, there was no ground of which the plaintiff could avail himself for avoiding it.

The rules for a mortgagee exercising his power of sale laid down in *Farrar* v. *Farrars, Ld.* ((1888) 40 Ch. D. 395 ; 58 L. J. Ch. 185 ; 37 W. R. 196 ; 60 L. T. 121—C. A.) and in *Kennedy* v. *De Trafford* ([1897] A. C. 180 ; 66 L. J. Ch. 413 ; 45 W. R. 671 ; 76 L. T. 427—H. L. (E.)) applied.

NUTT *v.* EASTON, [1899] 1 Ch. 873 ; 68 L. J. Ch. [367 ; 47 W. R. 430 ; 80 L. T. 353—Cozens-Hardy, J.

Affirmed on other grounds, [1900] 1 Ch. 29 ; 69 L. J. Ch. 46 ; 81 L. T. 530—C. A.

56. *Interest in Arrear—Principal Sum together with a Lump Sum for Interest payable by Instalments—Instalment in Arrear—Conveyancing Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 20.]—By a mortgage deed, dated February 1st, 1899, after reciting that the defendant had agreed to lend to the plaintiff the sum of £100 together with £50 for interest, the whole to be repaid by 20 half-yearly instalments of £7 10*s.* each, the plaintiff covenanted for repayment on August 1st, 1899, of the sum of £150 by the half-yearly instalments, and the plaintiff assigned to the defendant two houses as security. The deed contained a proviso that, so long as the instalments were duly paid, the mortgagee should not call in the sum remaining due. One of the instalments being more than two months in arrear, the defendant proceeded to exercise the power of sale under sect. 20 of the Conveyancing Act, 1881.

HELD—as the instalments included a sum for interest, sect. 20 applied, and the defendant had the right to sell.

WALSH *v.* DERRICK, (1903) 19 T. L. R. 209—[C. A.

57. *Order* nisi *for Foreclosure, or Redemption —Power of Sale thereby Suspended—Leave of Court—Position of Purchaser without Notice.*]—In a foreclosure or redemption action the Court on pronouncing an order *nisi* becomes *dominus litis ;* and the plaintiff can no longer without leave get rid of his action, for the order of the Court is not for his benefit only, but for that of the defendant also. It follows that the mortgagee cannot after the making of the order *nisi*, and before it is made absolute, exercise his power of sale without the leave of the Court.

The order *nisi* does not, however, extinguish the power of sale ; and therefore a purchaser for value without notice would get a good title.

STEVENS *v.* THEATRES, LD., [1903] 1 Ch. 857 ; [72 L. J. Ch. 764 ; 51 W. R. 585 ; 88 L. T. 458 ; 19 T. L. R. 334—Farwell, J.

58. *Sale of Part of Land—Implied Easement over Unsold Land—Third Party Procedure—Severance of Defence—Costs—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 6, *sub-ss.* 2, 4, 5 ; *s.* 19—*R. S. C., Ord.* 16, *r.* 55.]—A conveyance by a mortgagee exercising his statutory power of sale of part of the mortgaged property will pass to the purchaser an implied easement as to light over the portion remaining unsold.

An owner of land brought an action for infringement of light and trespass against a neighbouring owner and a person engaged in building a wall for him. The builder, not being satisfied with the way in which the defence was being conducted, severed his defence, and was separately represented.

HELD—that, under the circumstances of the case, he was justified in so doing, and entitled to be paid solicitor and client costs by his co-defendant.

BORN *v.* TURNER, [1900] 2 Ch. 211 ; 69 L. J. [Ch. 593 ; 83 L. T. 148 ; 48 W. R. 697—Byrne, J.

XVIII. PRACTICE.

And see Sect. I. ACCOUNTS.

59. *Claim for Accounts and Inquiries, Foreclosure or Sale—Summons for Directions—Order made in Chambers without Objection—R. S. C., Ord.* 15, *rr.* 1, 2, *and Ord.* 30, *rr.* 1, 2, 3.]—A mortgagee by his writ claimed the usual accounts

Practice—*Continued.*

and inquiries, foreclosure or sale; by his summons for directions he asked for the usual order for accounts and inquiries, and foreclosure or sale. The usual order was made by the Master. Though no objection was raised to the order when it was made, the defendant subsequently moved the Court to discharge it.

HELD, by Romer, J.—that it was too late to raise any objection to the order.

Smith v. *Davies* ((1884) 28 Ch. D. 650; 54 L. J. Ch. 278; 33 W. R. 211; 52 L. T. 19—Chitty, J.) followed.

HELD (by C. A., upon the principle of *Dyott* v. *Neville* (1887) W. N. 35)—that Romer, J. was right.

HORTON *v.* BOSSON, (1899) 80 L. T. 435—C. A.

XIX. PRIORITIES.

(a) General.

60. *Conflicting Equities—Lien of Legatee—*Lis pendens*—Legatee bound by Executor's Negligence.*]—A testator left to B. his property X., the deeds of which were deposited at his bank to secure a loan. He also left a number of pecuniary legacies. His personalty would have been sufficient to pay these legacies; but B. and his co-executors and co-trustees paid off the bank's debt, and released the deeds of the X. property. The same day B. deposited these deeds in his own name to secure a private debt.

The legatees brought an action for a declaration that the legacies ought to be paid out of the proceeds of X., and registered the action as a *lis pendens*. B. then gave the bank a legal mortgage of X.

HELD—that the appropriation of the personalty to paying off the mortgage debt on X. gave the legatees an equitable charge on X. for a corresponding portion of their legacies under Locke King's Act; but that the bank as purchasers for value obtained by their equitable mortgage priority over the earlier equitable charge of the legatees.

IN RE BOBBETT'S ESTATE, [1904] 1 Ir. R. 461 [—Ross, J.

61. *Contributory Mortgages by Trustees and their Solicitors—Breach of Trust—Negligence by Solicitors—Subsequent Transfer.*]—By an indenture of mortgage, dated in 1864, certain freeholds were conveyed by A. to B. to secure the repayment of £6,000 and interest at 4½ per cent.

In December, 1876, this mortgage was transferred to P. and W. in consideration of the like sum stated to be advanced by them on a joint account and interest thereon at 4½ per cent. This was not the fact, but £3,000 belonged to N., P., and G., of which P. and W. were trustees; and, as to the other £3,000, it belonged to the trustees of C. N., P., and G. acted as solicitors for the trustees of C. By a memorandum of January 1st, 1877, P. and W. admitted that they were trustees for £3,000 for the C. trustees at 4 per cent., and for the residue for N., P., and G. By a guarantee of January 2nd, 1877, N., P., and G., in consideration of the difference between 4 and 4½ per cent., guaranteed to the C. trustees the goodness of the security for £3,000 and due payment of the interest and repayment on two months' notice. In 1880 N., P., and G.'s £3,000 was transferred to the D. trustees, and two similar documents were executed. They here also acted as solicitors to the D. trustees.

On December 22nd, 1891, £1,370 was paid off by N., P., and G. to the D. trustees, leaving the balance advanced by them of £1,630, and a deed of that date between P. and W., N., P., and G., and the D. trustees contained a declaration that P. and W. stood seised of the said mortgaged properties as to £3,000, and £3,000 for the parties interested *pari passu*, without any priority other than that then granted to the D. trustees by N., P., and G. for the said sum of £1,630. In 1894 N., P., and G. were adjudicated bankrupts.

In an action by the C. trustees claiming priority over the D. trustees and the trustee in N., P., and G.'s bankruptcy:—

HELD—that the sum advanced being in excess of that allowed by law, and the trust security not being taken in the names of the trustees, it constituted a breach of trust, and that, in omitting so to advise the trustees, N., P., and G. were guilty of a breach of duty; that, while they were not liable as for a breach of trust, proof was possibly admissible in the bankruptcy in respect of it; that, to hold that N., P., and G. were prevented from taking any benefit to the disadvantage of the C. trustees would be to go much further than the decided cases on the point; and that neither on the construction of the memorandum and guarantee nor in the circumstances were the plaintiffs entitled to priority.

STOKES *v.* PRANCE, [1898] 1 Ch. 212; 67 L. J. [Ch. 69; 77 L. T. 595; 46 W. R. 183—Stirling, J.

62. *Fixtures — Machinery under Hire-purchase Agreement—Subsequent Equitable Mortgage of Premises.*]—L. and H. let machinery to a company to be fixed on its premises under a hire-purchase agreement of the usual kind. Until absolute purchase the company was to be only bailee of the machinery, and L. and H. were at liberty to remove it upon failure to pay any of the monthly instalments or on breach of any of the conditions.

Subsequently the company deposited its title deeds with its bank, by way of equitable mortgage, and gave a memorandum of charge under seal with a covenant to give a legal mortgage if required. An instalment being in arrear, L. and H. claimed the machinery. A winding up order was then made, and at the time principal and some interest was due to the bank. The bank had no notice of the hire-purchase agreement.

HELD—that the equitable interest of L. and H. ranked prior to the bank's equitable interest.

Priorities—*Continued.*

Gough v. *Wood & Co.* ([1894] 1 Q. B. 712 ; 63 L. J. Q. B. 564 ; 70 L. T. 297 ; 42 W. R. 469—C. A.).

Hobson v. *Gorringe* ([1897] 1 Ch. 182 ; 66 L. J. Ch. 114 ; 45 W. R. 356 ; 75 L. T. 611—A. C.).

Reynolds v. *Ashby & Son* ([1904] A. C. 466 ; 73 L. J. K. B. 946 ; 91 L. T. 607 ; 53 W. R. 129 ; 20 T. L. R. 766—H. L., No. 19, *supra*) distinguished.

In re Allen & Sons, [1907] 1 Ch. 575 ; 76 [L. J. Ch. 362 ; 96 L. T. 660 ; 14 Manson, 144—Parker, J.

63. *Portions Charged on Real Estate—Order made to raise two out of three Portions by a Mortgage—Third Portion not raisable—Express Notice of Charge of Equal Rank in Equity and Subject to which Mortgage was Accepted.*]—A testator had covenanted that on his death two sums of £5,000 each should be paid to the trustees of D. and R., his two daughters then married ; and by his will he gave a similar portion to his other daughter E. in the event of her marriage, which in fact took place after his death. By his will he charged all three portions on his real estate. The portions of D. and R. having become raisable, an order was made in an action, brought by the life tenant in order to free the estate from the charges, that the said sums and costs should be raised by a mortgage of the real estate to S. N., who was willing to lend the same, and that such mortgage should be settled by the judge. The mortgage was settled and executed as directed by the order. The moneys lent were paid into Court and afterwards paid out to the children of both D. and of R. The plaintiff, the transferee of the mortgage, claimed that he was entitled in respect of his security to priority as against the hereditaments comprised therein over the third portion of £5,000, given to E. and her children, which was not yet raisable. The mortgage was expressly made without prejudice to any charge which might be subsisting on the real estate under the will, and it showed that the whole object of the Court in sanctioning and directing the mortgage was to give effect to the testator's directions respecting certain charges on his real estate, so far as it was then convenient to give effect to them, without ignoring whatever other charges he might have created thereon.

Held—that the Court had clearly not intended to give priority to the mortgagee, that he had acted with his eyes open, and could only claim a charge on the real estate for the two sums of £5,000 *pari passu* with the third sum of like amount.

Decision of Kekewich, J. ([1902] 2 Ch. 117 ; 17 L. J. Ch. 586 ; 86 L. T. 703) affirmed.

Nightingale *v.* Reynolds, [1903] 2 Ch. 236 ; [72 L. J. Ch. 564 ; 52 W. R. 1 ; 88 L. T. 654 – C. A.

(b) Notice.

64. *Charge on Future Property—Notice to sole Executor who Renounces Probate—Property in Court in Lunacy.*]—The priorities of incumbrancers are regulated by the Order in which notice of their respective charges is given to the legal holder of the property ; and the fact that the earlier incumbrancer in order of date has not been guilty of negligence in delaying his notice makes no difference.

But a notice given to a person who is himself the assignor (*e.g.*, a trustee mortgagor) is ineffectual ; and so is notice to a person who is not at the time (though he subsequently becomes) the legal holder of the property.

Where the property charged is "future" property, the notice must be given as soon as it comes into existence to the person first having legal dominion over it.

Semble, notice to a sole executor who subsequently renounces, is ineffectual, for he never became legal holder of the property, which vests in the administrator *cum testamento* as soon as letters are granted—and this although the property is in Court in Lunacy.

Brown v. *Savage* ((1859) 7 W. R. 571 ; 4 Drew, 635—Kindersley, V.-C.) ; *Dearle* v. *Hall* ((1826) 3 Rus. 1—Plumer, M.R.) ; and *Johntone* v. *Cox* ((1881) 19 Ch. D. 17 ; 30 W. R. 114 ; 45 L. T. 657—C. A.) followed and applied.

Decision of Buckley, J. (52 W. R. 313) affirmed.

In re Dallas, [1904] 2 Ch. 385 ; 73 L. J. Ch. [365 ; 52 W. R. 567 ; 90 L. T. 177—C. A.

65. *Equitable Mortgagees of Life Policy—Second Mortgagee giving First Notice to Company.*]—A solicitor executed a mortgage of a life policy in favour of a client, whose funds he had misappropriated ; but did not disclose the mortgage to the client, or give notice of it to the company ; he then executed another mortgage to a trustee for the benefit of other defrauded clients ; and the trustee, who knew nothing of the first mortgage, duly gave notice to the company.

Held, in the bankruptcy, which followed the discovery of the frauds—that the second mortgage must have priority : of two equitable incumbrancers the one who first gives notice will be preferred, and this doctrine prevails independently of any question of *laches*.

In re Lake, Ex parte Cavendish, [1903] 1 [K. B. 151 ; 72 L. J. K. B. 117 ; 51 W. R. 319 ; 87 L. T. 655 ; 19 T. L. R. 116 ; 10 Manson, 17—Wright, J.

66. *Equitable Sub-mortgagees of Mortgage of Land.*]—Where there were successive equitable sub-mortgagees of a mortgage of land, and the second sub-mortgagee in point of time gave notice to the original mortgagor :—

Held—that the second sub-mortgagee did not obtain priority by means of being the first to give notice to the mortgagor.

Priorities—*Continued.*

Re Richards; Humber v. *Richards* (45 Ch. D. 489) followed.

Hopkins *v.* Hemsworth, [1898] 2 Ch. 347; 67 [L. J. Ch. 536; 78 L. T. 832; 47 W. R. 26—Kekewich, J.

67. *"Interest in Land"—Trust—Notice of—Breach of Trust—Solicitor Trustee—Fraud—Relation back—Equitable Incumbrances—Notice—Legal Estate—Title-deeds — Purchaser for Value without Notice—Conveyancing and Law of Property Act*, 1882 (45 & 46 Vict. *c.* 39), *s.* 3, *sub-s.* 1 (i.) *and* (ii.).]—Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having "an interest in land," and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty. *Jones* v. *Gibbons* (1804) 9 Ves. 407, 410; 7 R. R. 247, 250.

Leaseholds are real estate for the purpose of this rule. *Wiltshire* v. *Rabbits*, (1844) 14 Sim. 76; 13 L. J. Ch. 284; *Union Bank of London* v. *Kent*, (1888) 39 Ch. D. 238; 57 L. J. Ch. 1022; 37 W. R. 364; 59 L. T. 714—C. A.

A legal mortgagee who makes an advance without notice of a prior equitable title is a purchaser for value without notice. From such a purchaser a Court of equity takes away nothing which he has honestly acquired. An equitable mortgagee, who has made an advance without notice of a prior equitable title, may gain priority by getting in a legal title, unless there are circumstances which make it inequitable for him so to do—*e.g.*, where the mortgagee has notice that the legal title, at the time when it is so got in, is held on an express trust in favour of persons who assert a claim to the property. Where the relation between the equitable incumbrancer and the person in possession of the title-deeds is not merely that of mortgagee and mortgagor, but is of a fiduciary nature (as, for example, that of *cestui que trust* and trustee, or client and solicitor), the equitable incumbrancer is not to be deprived of his priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the incumbrancer has no ground to suppose that there has been any want of good faith on the part of the custodian of the deeds.

A purchaser for value without notice is entitled to the benefit of a legal title, not merely where he has actually got it in, but where he has a better title or right to call for it.

N., on being appointed a trustee of a settlement, insisted that certain mortgages should be legally transferred to himself and T. as trustee of that settlement. T. was not merely a formal, but an actual conveying party to the instruments by which this was done.

Held—that by accepting the transfers N. gave up a right of action which he had against T., and became a purchaser for value without notice of any prior incumbrance.

Thorndike v. *Hunt* ((1859) 3 De G. & J. 563; 28 L. J. Ch. 417; 7 W. R. 246) and *Taylor* v. *Blakelock* ((1886) 32 Ch. D. 560; 55 L. T. 8; 34 W. R. 175) followed.

Taylor *v.* London and County Banking Co.; [London and County Banking Co. *v.* Nixon, [1901] 2 Ch. 231; 70 L. J. Ch. 477; 49 W. R. 451; 84 L. T. 397; 17 T. L. R. 413—C. A.

68. *Next of Kin's Share of Intestacy—Notice to Administrator—Notice before Grant.*]—As between several mortgagees of the share of one of the next of kin of an intestate priorities rank according to the dates of the notices given to the administrator after administration has been taken out. Notice given before administration has been taken out to a possible or future administrator (even if he be also the holder of a fund out of which moneys may be payable to the future administrator) are ineffectual for the purpose of obtaining priority as against other mortgagees who give notice to the administrator after he has obtained administration.

In re Kinahan's Trusts, [1907] 1 Ir. R. 321 [—Barton, J.

69. *Trustee Beneficiary—Equitable Mortgage—Legal Mortgage.*]—A testator devised real estate to K. and two others upon trust out of the rents and profits in aid of his personalty to pay debts, legacies, &c., and subject thereto in trust as to a certain house for K. Immediately after his death in 1872, K. assigned his interest under the will by way of mortgage to the plaintiff's predecessor, who gave notice to K.'s two co-trustees. K. subsequently became sole trustee. In 1890 K. deposited the title deeds and probate of the will with the defendants, and gave them a memorandum of deposit, to secure an overdraft; in 1903 he gave them a legal mortgage. They had no notice of the prior equitable charge. In 1890 all debts and legacies had been discharged except a trust legacy of £100 given to a life tenant still alive in 1903 with remainder to her issue.

Held—that the trusts of the will not having been fully executed, K.'s equitable interest had not been merged in his legal interest; that the bank, having notice that they were taking part of a trust estate from a surviving trustee, took it subject to all subsisting trusts including the mortgage to the plaintiff; and that therefore the plaintiff was entitled to priority.

Perham *v.* Kempster, [1907] 1 Ch. 373; 76 [L. J. Ch. 223; 96 L. T. 297—Joyce, J.

(c) Possession of Title Deeds.

70. *Debentures—Equitable Incumbrancers—Inquiry—Negligence—Conflicting Equities—Postponement of Prior Incumbrance—One Man Company—Debentures issued to Director to make good Private Breach of Trust by him—Investment of Trust Funds in Business—Notice to Director not Notice to Company.*]—The directors of a limited company had power under the articles of association to raise by mortgage or debenture such sums as they should think expedient, and to charge the property of the company

Priorities—*Continued.*

therewith. The company was formed to take over the business of M. M. was managing director, and practically the owner of the company, the shares never having been offered to the public, and except for the limitation of liability, the concern went on as before the formation of the company.

On April 1st, 1897, the company being indebted to its bankers, and requiring further advances, issued debentures in favour of the bank, charging the same on all the property of the company. These documents showed that there was power to issue further debentures. There was a collateral agreement by the company authorising the bank to hold the debentures as a collateral security for advances and transactions.

On April 16th, 1897, two further debentures charged on the property of the company for the sum of £11,000 were issued to M. and T., who were the trustees of the estate of B., deceased. According to affidavits in the case, £9,323, representing the B. trust estate, was (in breach of trust) invested by M. and T. in M.'s business prior to the incorporation of the company, and the company took over the liability for this debt. It was also stated in the affidavits that a further sum of £2,962, also portion of the B. trust estate, was advanced by the trustees to the company and invested in the business, and that the company had undertaken to give security for all the moneys due by the company to the trust estate.

On May 28th, 1897, M. deposited certain title deeds of the company's property with the bank as a collateral security for all moneys then due, or to become due by the company to the bank. When this charge was given, the amount due to the bank exceeded the nominal amount of the debentures issued to them on April 1st. The bank had no notice of the existence of the debentures of April 16th, and made no inquiries. The bank commenced an action to enforce its securities, and the company passed a resolution for voluntary winding-up. By the judgment of the Court the debentures issued to the bank were declared valid, and a sale was directed. An application was made on behalf of the *cestuis que trust* of the estate of B. for liberty to intervene in the action, and to have it declared that the debentures of April 16th issued to M. and T. were charged on the property of the company in priority to the equitable charge in favour of the bank by deposit of title deeds on May 28th.

HELD—on the assumption that, at the date of the issue of the two debentures for £11,000 there was money due by the company to M. and T. as trustees of the B. estate, that the bank, as having the stronger equity, were entitled to priority in respect of their equitable mortgage over these two debentures.

Subsequently it was established by oral evidence taken in Court that the trust funds had been mainly spent by M. in Stock Exchange transactions, and that so far as any had been invested by him in the business, they constituted a private debt of M., and that his liability was not taken over by the company, and that any trust moneys advanced to the company had been repaid.

HELD—that neither in fact nor in law had the company any notice of the trust, and that the debentures were issued without authority and without consideration, and did not bind the assets of the company, as against creditors.

BANK OF IRELAND *v.* COGRY SPINNING CO., [[1900] 1 Ir. R. 219—M.R.

71. *Equitable Mortgage—Subsequent Legal Mortgage—Title Deeds not Produced—Fraud of Solicitor acting for all Parties—Notice—Postponement of Legal Mortgage.*]—B. mortgaged to C., a solicitor, two houses for £2,100; C. deposited the deeds and mortgage with his bank to secure a large overdraft which existed at all material dates. The bank gave no notice to B.

Subsequently B. and C. joined in legal mortgages of the two houses to H. and W. for £650 and £550. These sums were paid to B., and expressed to be so paid in part discharge of the £2,100. B. then gave C. a second mortgage over both houses to secure the balance of £900.

In these last three mortgages C. acted as solicitor for all parties, none of whom had any knowledge of the sub-mortgage to the bank.

HELD—(1) that H. and W., not having asked for production of the title deeds, were affected with notice of the sub-mortgage; in such cases it is immaterial whether the mortgagee employs a solicitor or not, or whether, if he does so, the solicitor discloses the incumbrance or not.

(2) That, therefore, H. and W. were trustees of the legal estate for the bank.

Semble, B., when paying off part of the original debt was not bound to ask for production of the mortgage and title deeds; *semble*, also, he was not affected with notice of the sub mortgage, and was discharged from liability under the original mortgage to the extent of £1,200.

BERWICK & CO. *v.* PRICE, [1905] 1 Ch. 632; 74 [L. J. Ch. 249; 92 L. T. 110—Joyce, J.

72. *Floating Charge—Equitable Mortgage—Negligence.*]—C. & B., Ld., was a company formed in December, 1884; and in May, 1885, issued, in pursuance of its borrowing powers, debentures to the amount of £28,000, each of which purported to charge all the property of the company whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, and was indorsed with conditions, the first of which provided that such charge was to be a floating security, "but so that the company is not to be at liberty to create any mortgage or charge upon its freehold or leasehold hereditaments in priority to the said debenture."

No legal mortgage of the freehold or leasehold hereditaments was ever made to the debenture-holders, and the title deeds remained in the possession and under the control of the company. The title deeds were in 1892 deposited by the company with the Union Bank of London to meet overdrafts on an account opened by the company there. A first overdraft was paid off, but in August, 1895, the title deeds still remaining in the custody of the bank, the company was allowed a second overdraft on its giving a memorandum of equitable charge on the deeds,

Priorities—*Continued.*

and an undertaking that the company and all other necessary parties would on demand make and execute valid legal mortgages in favour of the bank.

In February, 1897, the bank was served with notice of a judgment appointing a receiver, and directing inquiries as to the charges and their priorities, in an action which had been brought by the debenture holders against the company, the interest on their debentures having fallen into arrear. The overdraft on the amount at the bank at that date amounted to some £220, and the bank stated this notice was the first they had of the company's having issued any debentures or created any charge on the property comprised in the title deeds deposited with the bank.

The company was insolvent, and was being voluntarily wound-up under the supervision of the Court.

The bank claimed to have a prior charge for £220 and interest, and to retain the deeds until their debt was paid.

HELD—that, the bank being in possession of the title deeds without any negligence on their part, and the restriction on the creation by the company of mortgages or charges in priority to the debentures being a mere private arrangement between the company and the debenture-holders, which could not be set up as against the equitable mortgage to the bank which had taken the deeds without any notice of it, the bank had the stronger equity, and was entitled to priority over the debenture-holders.

IN RE CASTELL & BROWN, LD., ROPER *v.* [CASTELL & BROWN, LD., [1898] 1 Ch. 315; 67 L. J. Ch. 169; 78 L. T. 109; 14 T. L. R. 194; 46 W. R. 248—Romer, J.

73. *Legal and Equitable Mortgages — Negligence — Deeds left with Solicitor — Subsequent Deposit of Deeds.*]—Shortly before his death, W. P. advanced money on mortgage to his solicitor; he was ill at the time and only lived for a month, and he never got the deeds. After W. P.'s death the plaintiff as his executor, applied to the solicitor for the deeds, and in answer to such application received the mortgage deed, which the plaintiff was led to believe was the only one relating to the property. The solicitor had meanwhile deposited the deeds with another mortgagee as security for money advanced without notice of the legal mortgage.

HELD—that neither the plaintiff nor his predecessor had been guilty of such negligence that their legal mortgage ought to be postponed to the subsequent equitable mortgage.

COTTEY *v.* NATIONAL PROVINCIAL BANK OF [ENGLAND, LD., AND ANOTHER, (1904) 20 T. L. R. 607—Eady, J.

74. *Legal Estate — Trustees omitting to get Title Deeds — Subsequent Equitable Interest — Negligence of Trustees—Rights of Beneficiary.*]—W. by his marriage settlement conveyed real estate to trustees. The solicitors who acted for all parties believed that they held all the title deeds: but in fact W. retained the latest deed—the conveyance to himself. W. at a later date mortgaged the property, and the mortgagee received from him this conveyance. Subsequently the mortgagee sold the property to a purchaser, who, like himself, had no notice of the settlement.

W.'s life interest under the settlement was determinable on alienation; and his wife now claimed that it had been determined and that her own life interest had taken effect.

HELD—that the trustees had been guilty of negligence, that the purchaser's equitable interest had priority over their legal estate, and that the plaintiff had no higher rights than her trustees.

Lloyd's Banking Co. v. *Jones* ((1885) 29 Ch. D. 221; 54 L. J. Ch. 931; 52 L. T. 469; 33 W. R. 781—Pearson, J.) followed.

WALKER *v.* LINOM, [1907] 2 Ch. 104; 76 L. J. [Ch. 500; 97 L. T. 92—Farwell, J.

75. *Legal Mortgage—Possession of Title Deeds by Subsequent Equitable Mortgagee.*]—The mere fact that a legal mortgagee has not got the deeds of the mortgaged property, and that they are found in the possession of a subsequent equitable mortgagee, there being no evidence or circumstance pointing to fraud or negligence on the part of the legal mortgagee, or connecting him with the fraud of the mortgagor, is not sufficient to displace the priority of the legal mortgagee.

IN RE GREER, [1907] 1 Ir. R. 57—Barton, J.

XX. RECEIVER.

76. *Receiver appointed by Court on Application of Second Mortgagees — Motion by First Mortgagees for Leave to take Possession, and to Discharge Receiver — Rents received by him between Notice of Motion and Hearing—Right to.*]—It may often be the case that a receiver holds the rents of property on behalf, not necessarily of the person who obtained his appointment, but of the person who may ultimately prove to be entitled to the property.

On the application of second mortgagees the Court (in an action) appointed a receiver of the rents and profits of the mortgaged property. Thereupon the first mortgagees gave notice of a motion for leave to take possession, and for the discharge of the receiver; before, however, the motion could come on for hearing, he received some rents.

The motion was granted.

HELD—that the first mortgagees ought to be regarded as in possession as from the date of their notice of motion, and were entitled to these rents.

In re Hoare, Hoare v. *Owen* ([1892] 3 Ch. 94; 61 L. J. Ch. 541; 41 W. R. 105; 67 L. T. 45—dictum of Stirling, J.) applied and followed.

PRESTON AND OTHERS *v.* TUNBRIDGE WELLS [OPERA HOUSE, LD., AND ANOTHER, [1903] 2 Ch. 323; 72 L. J. Ch. 774; 88 L. T. 53—Farwell, J.

Receiver—*Continued.*

77. *Receiver and Manager of Business—Extent of Agency—Part Payment of Mortgagor's Debt—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 24—*Limitations Act*, 1623 (21 Jac. 1, *c.* 16), *s.* 3.]—A receiver appointed under the terms of a power in a mortgage deed which extends the powers conferred by the Conveyancing Act, 1881, s. 24, to manage and carry on a business, is authorised to pay business debts of the mortgagor. This authority is not affected by the death of the mortgagor, and payment by the receiver of an instalment of a business debt contracted by the mortgagor operates as an acknowledgment of the whole debt by the executrix of the mortgagor, and prevents time running under the Statute of Limitations.

Decision of Byrne, J. (47 W. R. 174 ; 79 L. T. 468) affirmed.

In re Hale, Lilley *v.* Foad, [1899] 2 Ch. 107 ; [68 L. J. Ch. 517 : 47 W. R. 579 ; 80 L. T. 827 ; 15 T. L. R. 389—C. A.

78. *Receiver's Expenses—Foreclosure—Mortgagee not in Possession—Expenses incurred by Receiver in Executing Repairs—Conveyancing Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 24 (8) (iii.).]—If a receiver, appointed by a mortgagee under the Conveyancing Act, 1881, expends money in repairs to the mortgaged property, other than necessary or proper repairs directed in writing by the mortgagee, such expenses cannot be allowed in taking an account in a foreclosure action of what is due to the mortgagee.

Where the receiver had been appointed by a first mortgagee, the latter cannot charge such expenses against the subsequent mortgagees.

The fact that the receiver is the officer of a guarantee society which has guaranteed the first mortgagees against loss, and which provided the money for the repairs, is immaterial.

White *v.* Metcalf, [1903] 2 Ch. 567 ; 72 L. J. [Ch. 712 ; 89 L. T. 164 ; 52 W. R. 280—Kekewich, J.

XXI. REDEMPTION.

(a) Accounts and Costs.

And see Sects. I. Accounts ; V. Equity of Redemption.

79. *Mortgagee's Costs of Negotiating and Preparing Mortgage Deed—Implied Contract to Pay Them by Mortgagor—Cannot be Charged against Mortgaged Property.*] — When a mortgage is completed the mortgagor is liable to pay to the mortgagee the expenses incident to the mortgage transaction. The mortgagor is liable to pay over to the mortgagee what he pays to his own solicitor, but there is no common law debt or liability therefor until the transaction is completed.

A mortgagee cannot charge against the mortgaged property, by way of tacking or otherwise, the costs of preparing the mortgage deed which he is entitled to recover—having paid them—under the implied contract against the mortgagor. They form a simple contract debt between the mortgagor and mortgagee.

In January, 1901, the defendants took a first mortgage of certain freeholds. On this occasion their solicitors' costs of negotiating the loan, investigating the title, and preparing the mortgage deed—amounting to £28 8*s.*—were not, as is usual, deducted from the loan on completion of the transaction, but were subsequently paid by them to their solicitors. In May, 1901, the plaintiffs became transferees of a second mortgage on the property, and in September, 1901, received notice from the defendants of their intention to exercise their power of sale. Thereupon the plaintiffs agreed to redeem the defendants, and to take a transfer of their security. The defendants then claimed that the plaintiffs were not entitled to redeem except upon payment of the £28 8*s.* above mentioned as part of the costs of the first mortgage.

Held—that on redemption by the plaintiffs of the first mortgage, the defendants were not entitled to charge the £28 8*s.* for their costs of the first mortgage.

Wales *v.* Carr, [1902] 1 Ch. 860 ; 71 L. J. Ch. [483 ; 50 W. R. 313 ; 86 L. T. 288—Farwell, J.

80. *Mortgage of Shares—Costs of Mortgagee—What Included—Costs of Action against Surety.*]—A lady deposited certain shares with a bank as security for a loan, with a memorandum of deposit containing a power of sale. The bank afterwards obtained judgment against her in respect of the debt, and an arrangement was made under which her husband guaranteed payment by instalments of the unpaid balance.

The bank sued him on his guarantee, and obtained judgment with costs ; and although the wife's debt to them was eventually satisfied, they declined to retransfer the shares to her until these costs were paid.

In an action by her against the bank to obtain a retransfer of the shares or their value :—

Held—that the action was in effect one of redemption ; that the costs of the action against the husband were properly incurred, and the wife was bound to indemnify him against them ; and that the bank were entitled to the benefit of the indemnity and to retain the shares till payment of the costs of the action against him.

National Provincial Bank of England v. *Games* ((1886) 31 Ch. D. 582 ; 55 L. J. Ch. 576 ; 34 W. R. 600 ; 54 L. T. 696—C. A.) applied.

Sachs *v.* Ashby & Co., (1903) 88 L. T. 393—[Joyce, J.

81. *Practice—Proviso for Capitalising Interest in Arrear—Mortgagee in Possession—Whether Receipt of Rents Equivalent to Receipt of Interest.*]—Where a mortgagee is in possession under a mortgage which provides for the capitalisation of interest if in arrear for twenty-one days, and the mortgagor seeks to redeem, the mortgagee in order to charge him with compound interest must show that on the twenty-first day, after crediting rents received by him and deducting proper outgoings, he had not enough money in hand to pay the interest due to him.

Redemption—*Continued.*

Union Bank of London v. *Ingram* ((1880) 16 Ch. D. 53; 50 L. J. Ch. 74; 29 W. R. 209; 43 L. T. 659—Jessel, M.R.), *Cockburn* v. *Edwards* ((1881) 18 Ch. D. 449; 51 L. J. Ch. 46; 30 W. R. 446; 45 L. T. 500—C. A.), and *Bright* v. *Campbell* ((1889) 41 Ch. D. 388; 37 W. R. 740; 60 L. T. 731—Kay, J.) discussed and distinguished.

Decision of Warrington, J. ([1905] 1 Ch. 241; 74 L. J. Ch. 160; 53 W. R. 334; 92 L. T. 49) affirmed.

WRIGLEY *v.* GILL, [1906] 1 Ch. 165; 75 L. J. Ch. [210; 54 W. R. 274; 94 L. T. 174—C. A.

82. *Rests—Mortgagee in Possession—Sale of Part of Mortgaged Property.*]—In a redemption action against a mortgagee in possession, who has from time to time sold parts of the mortgaged property, where the decree directs the usual accounts and inquiries, but gives no direction as to rests, the mortgagor is not entitled to have rests in the account of rents and profits, although there have been sales from time to time.

Wrigley v. *Gill*, *supra*, followed.

AINSWORTH *v.* WILDING, [1905] 1 Ch. 435; 74 [L. J. Ch. 256; 53 W. R. 281; 92 L. T. 679—Joyce. J.

(b) Clogging.

83. *Collateral Agreement—Once a Mortgage always a Mortgage.*]—Where land has been mortgaged as a security for money, when the money is paid off, the land and its owner in the use of it must be as free as if it had never been mortgaged, and provisions in the mortgage deed, or collateral thereto, inconsistent with this right, cannot be enforced.

The defendant mortgaged his land to the plaintiff to secure a loan of £200 and interest thereon. The money was raised by the mortgagee by depositing the mortgage with a bank. As part of the same transaction the defendant agreed by an independent deed to sell his land within twelve months, and to give the sale thereof to the plaintiff, who was an auctioneer, and that if the said lands were sold otherwise than through the plaintiff he would pay the plaintiff 5 per cent. on the purchase money. The defendant subsequently sold the land through another auctioneer for £1,250.

HELD, by Q. B. Div. (Andrews, J., dissenting)—that the plaintiff was entitled to recover £62 10*s.* on the agreement.

HELD, by C. A., reversing the decision of Q. B. Div.—that the collateral advantage stipulated for by the mortgagee in the independent deed placed such a fetter on the equity of redemption that it vitiated the agreement.

BROWNE *v.* RYAN, [1901] 2 Ir. R. 671—C. A. [(Ir.).

84. *Construction of Mortgage Deed—Clogging Equity of Redemption.*]—What is once a mortgage remains a mortgage and may be redeemed on payment of the principal, interest, and costs, and any provision imposing on the mortgagor a liability to pay anything in excess of this is a clogging of the equity of redemption.

BOOTH *v.* SALVATION ARMY BUILDING ASSO- [CIATION, LD., (1898) 14 T. L. R. 3—Kekewich, J.

85. *Conditional Sale—Option to Lender to enter into Partnership with Mortgagor upon terms affecting the Property—Option to be Exercised within time limited for Redemption—Exercise of Option—Validity.*]—Prior to July, 1898, the plaintiffs advanced to the defendant £5,000 upon the security of a ship and other property, upon the terms of an agreement made between them on April 23rd, 1896, whereby the money was not to be called in or paid for two years, and the plaintiffs might at any time within the two years elect to enter into partnership with the defendant upon the terms of their releasing the mortgage debt, and the ship and other property becoming partnership assets. On July 9th, 1898, another agreement was entered into between the plaintiffs and the defendant. It recited the agreement of 1896; that the plaintiffs had not entered into partnership; that the plaintiffs had applied for, and the defendant was unable to pay, the £5,000, and had requested the plaintiffs to extend the term of two years for a further period of five years: and it was thereby agreed (1) that the plaintiffs might, within five years, elect to enter into partnership with the defendant; (2) that the plaintiffs should in that event release the defendant from payment of the £5,000, and transfer the mortgaged property for the purpose of the partnership; (3) that the capital of the partnership property should belong to the defendant and plaintiffs in equal shares.

In February, 1900, the plaintiffs exercised their option, and communicated to the defendant their election to enter into partnership with him, but he refused to comply, alleging that the effect of the agreement of July 9th, 1898, was to render the property irredeemable, and that it was an illegal clog on the equity of redemption. The agreement of July 9th, 1898, was not alleged to be unconscionable or unfair.

HELD—that the agreement of July 9th, 1898, was a separate and independent transaction, and not bad because the mortgagee contracted that, pending the exercise of his option to enter into partnership with the mortgagor, the mortgagee would not call in his money, or that that formed part of the consideration of the partnership agreement.

Decision of Buckley, J. ((1901) 49 W. R. 188; 83 L. T. 731; 17 T. L. R. 96) affirmed on different grounds by C. A., and decision of C. A. ([1902] 1 Ch. 53; 71 Ch. 42; 50 W. R. 231; 85 L. T. 464; 18 T. L. R. 61—C. A.) affirmed.

REEVE *v.* LISLE, [1902] A. C. 461; 71 L. J. Ch. [768; 87 L. T. 308; 18 T. L. R. 767; 51 W. R. 576—H. L. (E.).

86. *Covenant to pay Rent after Payment of Principal and Interest—Notice to pay off—Tender after Notice—Withdrawal.*]—There is no rule that a mortgagee may not stipulate for a

Redemption—*Continued.*

collateral advantage, so that such advantage be fair and reasonable, and so that it do not prevent redemption on payment of principal, interest and costs.

A provision in a mortgage which has the effect of preventing redemption on payment of principal, interest and costs, in accordance with the bargain for payment thereof, is invalid, and cannot enable the mortgagee to maintain an action, whether in equity or at law.

A covenant in a mortgage of leaseholds for years, that the mortgagor would, during the residue of the leasehold term, notwithstanding that all principal moneys and interest might have been paid, pay to the mortgagee one-third of the net profit rent, with provisions for continuing the relative positions of mortgagor and mortgagee, and for continuing the mortgage for the purpose of securing the one-third :—

HELD—not to be void as operating to prevent redemption.

Biggs v. *Hoddinott* ([1898] 2 Ch. 307 ; 67 L. J. Ch. 540 ; 47 W. R. 84 ; 79 L. T. 201—C. A., No. 96, *infra*) followed.

A mortgagee who had given the mortgagor notice to pay off the principal moneys and interest owing on the mortgage :—

HELD—not entitled to withdraw the notice without the consent of the mortgagor (per Byrne, J.).

Decision of Byrne, J. ([1899] 1 Ch. 747 ; 68 L. J. Ch. 681 ; 47 W. R. 297 ; 80 L. T. 154 ; 15 T. L. R. 190) reversed as to first point.

SANTLEY *v.* WILDE, [1899] 2 Ch. 474 ; 68 L. J. [Ch. 681 ; 48 W. R. 90 ; 81 L. T. 393 ; 15 T. L. R. 528—C. A.

87. *Independent Agreement for increase of Interest—Mortgagee appointed Rent Collector.*]—M. owed to T. £1,500, secured by mortgage at 5 per cent. ; subsequently, in consideration of a further advance of £300. M. gave his bond (which was subsequently registered as a judgment mortgage against the same lands), and executed a collateral agreement appointing T. his agent over the lands, authorising him to charge agency fees, and agreeing to pay 6 per cent. on the whole £1,800.

HELD—that such agreement, being a new contract for fresh consideration, had not the effect of fettering the equity of redemption.

Noakes v. *Rice* ([1902] A. C. 24 ; 71 L. J. Ch. 139 ; 66 J. P. 147 ; 50 W. R. 305 ; 88 L. T. 62 ; 18 T. L. R. 196—H. L., *infra*) applied.

MAXWELL *v.* TIPPING, [1903] 1 Ir. R. 499— [M.R.

88. *Leasehold—Public-house—"Tied"—"Once a Mortgage always a Mortgage"—Covenant to Purchase Liquors from Mortgagees after Redemption—Validity.*]—"Once a mortgage always a mortgage." Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void.

Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. When the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security.

Consequently, where there is a covenant in the mortgage of a leasehold public-house, collateral to the proviso for redemption, that the mortgagor should not, during the continuance of the lease, purchase his liquors of any one except the mortgagees, when in conformity with the proviso for redemption the mortgagor pays off the moneys secured by the mortgage, he is entitled to an assignment of the premises free from the covenant.

Santley v. *Wilde* ([1899] 2 Ch. 474 ; 68 L. J. Ch. 681 ; 48 W. R. 90 ; 81 L. T. 393—C. A., No. 86, *supra*) commented on.

Decision of C. A. ([1900] 2 Ch. 445 ; 69 L. J. Ch. 635 ; 48 W. R. 629 ; 82 L. T. 784 ; 16 T. L. R. 471) affirmed.

NOAKES & CO., LD. *v.* RICE, [1902] A. C. 24 ; [71 L. J. Ch. 139 ; 66 J. P. 147 ; 50 W. R. 305 ; 86 L. T. 62 ; 18 T. L. R. 196— H. L. (E.).

89. *Shares—Call on at Fixed Sum per Share in return for Loan of Money.*]—The combined effect of two documents gave the defendants, till March 31st, 1901, the right to call for 42,000 Lake View shares, deposited with them, at £11 a share in return for a loan of £450,000 by the defendants to the plaintiffs.

HELD—that in reality the right to call the shares at £11 till March 31st, 1901, was the only consideration for the loan, and the fact that two of the defendants were to receive commission was a purely collateral bargain ; that there was no clog upon any supposed equity of redemption ; that up to March 31st, 1901, there was no right to redeem ; and that it was an advance, the price paid for that advance being the right to take the shares at an agreed price.

LONDON AND GLOBE FINANCE CORPORATION, [LD. *v.* MONTGOMERY AND OTHERS, (1902) 18 T. L. R. 661—Div. Ct.

90. *Mortgage of Shares—Agreement—Preventing Mortgagor from Selling them after Redemption—Indirect Clog.*]—It is no more allowable to impose upon the equity of redemption by a stipulation, which is part of the mortgage transaction, a fetter operating indirectly, than it is to impose a fetter which operates directly.

Quære, whether any collateral agreement, part and parcel of the mortgage transaction, can ever enure to the benefit of the mortgagee after redemption.

The defendant, a shareholder holding a controlling number of shares in a tea company, transferred his shares in the company by way of mortgage to the plaintiff, as security for an advance, and in consideration thereof agreed to use his best endeavours as a shareholder to secure

Redemption—*Continued.*

that the plaintiff should always thereafter have the sale of the company's teas as broker ; and in the event of the company's teas being sold otherwise than through the plaintiff, to pay him the amount of the commission he would have earned. The plaintiff acted as broker to the company. The advance having been paid off, the shares were re-transferred to the defendant, who shortly afterwards transferred them to another person as security for an advance, and the new transferee, by means of his position as shareholder, deprived the plaintiff of his position as broker to the company. In an action by the plaintiff to recover damages for breach of contract, the defendant contended that the stipulations in the agreement were a clog upon the equity of redemption, as he would have to retain the shares after the advance was paid off to secure the plaintiff continuing as broker to the company.

HELD—that the stipulations were a clog upon the equity of redemption, and were therefore not binding.

Santley v. *Wilde* ([1899] 2 Ch. 474 ; 68 L. J. Ch. 681 ; 48 W. R. 90 ; 81 L. T. 393 ; 15 T. L. R. 474—C. A., No. 86, *supra*) commented on.

Noakes v. *Rice* ([1902] A. C. 24 ; 71 L. J. Ch. 139 ; 66 J. P. 147 ; 50 W. R. 305 ; 86 L. T. 62 ; 18 T. L. R. 196, No. 88, *supra*) followed.

Decision of C. A. ([1901] 2 K. B. 550 ; 70 L. J. K. B. 832 ; 49 W. R. 593 ; 85 L. T. 197 ; 17 T. L. R. 641) reversed, Lords Lindley and Shand dissenting.

BRADLEY AND ANOTHER *v.* CARRITT, [1903] [A. C. 253 ; 72 L. J. K. B. 471 ; 51 W. R. 636 ; 88 L. T. 633 ; 19 T. L. R. 466—H. L. (E.).

91. *Option to purchase Mortgaged Stock within a Fixed Time—Validity.*]—A mortgage must not be converted into something else, and where there is a stipulation for the benefit of the mortgagee which is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan.

A mortgagee may not at the time of the loan enter into a contract for the purchase of the mortgaged property.

The defendant advanced £5,000 to the plaintiffs, and they agreed to secure the repayment with interest by the transfer of £30,000 debenture stock. The defendant stipulated (*inter alia*) that he should have the option of purchasing the whole or any part of the debenture stock at 40 per cent. at any time within twelve months. Thirty days' notice of payment was required.

HELD—that the stipulation giving the option to purchase was a clog or fetter on the plaintiffs' right to redeem, inasmuch as it interfered with the ownership of the very property which was made the security for the loan, and was therefore void.

The rule against "clogging" an equity of redemption applies in the case of a company just as in the case of an individual.

Reere v. *Lisle* ([1902] A. C. 461 ; 71 L. J. Ch. 768 ; 87 L. T. 308 ; 18 T. L. R. 767—H. L., No. 85, *supra*) distinguished.

Decision of C. A. ([1903] 2 Ch. 1 ; 72 L. J. Ch. 262 ; 51 W. R. 439 ; 88 L. T. 106 ; 19 T. L. R. 236 ; 10 Manson, 296) affirmed.

SAMUEL *v.* JARRAH TIMBER AND WOOD PAVING [CORPORATION, LD., [1904] A. C. 323 ; 73 L. J. Ch. 526 ; 52 W. R. 673 ; 90 L. T. 731 ; 20 T. L. R. 536 ; 11 Manson, 276—H. L. (E.).

(c) Consolidation.

92. *Legal Mortgages and subsequent Equitable Mortgage between the same Parties but of different Property — Agreements to execute Legal Mortgage "with such Powers and Provisions and in such Form as" Mortgagee might require—Provision that sect. 17 of the Conveyancing and Law of Property Act,* 1881 (44 & 45 Vict. *c.* 41), *should not apply.*]—The plaintiff, a married woman, executed a legal mortgage in common form of freehold house property in favour of the defendant to secure £900. This mortgage contained no provision excluding the operation of sect. 17 of the Conveyancing Act, 1881, which prohibits the consolidation of mortgages in the absence of an expressed intention to the contrary. Subsequently she executed to the defendant an equitable mortgage of other property belonging to her, expressed to be in consideration of a sum of £100 paid to her, which provided for securing further advances to be paid to her husband by the defendant. It concluded with an agreement that she would execute to the defendant a legal mortgage "with such powers and provisions and in such form as" the defendant might require for further securing the principal moneys and interest. The plaintiff sought to redeem the first mortgage without redeeming the second mortgage.

HELD—that the defendant had no right to a mortgage in which there should be a provision that sect. 17 of the Conveyancing Act, 1881, should have no application ; and that the plaintiff was entitled to redeem and have the property comprised in the first mortgage reconveyed to her.

Whitley v. *Challis* ([1892] 1 Ch. 64 ; 61 L. J. Ch. 307 ; 40 W. R. 291 ; 65 L. T. 838—C. A.) followed.

FARMER *v.* PITT, [1902] 1 Ch. 954 ; 71 L. J. Ch. [500 ; 50 W. R. 453—Byrne, J.

93. *Right of Sole Mortgagee to consolidate Prior Mortgage vested in him jointly with another.*]—The right to consolidate two mortgages arises when the title of the mortgagees in respect to each mortgage can be shown to be vested in one and the same hand, and this fact must be established in order to bring into operation the doctrine of consolidation ; consequently, in the case of a mortgage of freehold hereditaments in which A. and another were mortgagees advancing money on a joint account, and a second mortgage of the same hereditaments and certain leasehold premises in which A. was sole mortgagee, although there is a possibility of the mortgages becoming vested in one and the same hand, namely, in A. upon his surviving his co-mortgagee, and notwithstanding the fact that A. could give a good receipt for the moneys secured

Redemption—*Continued.*

on both mortgages, the doctrine of consolidation does not apply.

RILEY *v.* HALL, (1898) 79 L. T. 244—Stirling, J.

94. *Right to Redeem — Notice of Prior Mortgage—Conveyancing Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 17,]—The defendants advanced money to a mortgagor upon a mortgage of certain property, the deed containing a provision that the mortgagor should not be entitled to redeem without paying to the defendants all moneys that might be secured to them by any other mortgage executed by the mortgagor. The mortgagor subsequently mortgaged another property to the defendants, and gave a second mortgage over this property to the plaintiff. After the mortgage to the plaintiff, of which the defendants had notice, the mortgagor mortgaged two other properties to the defendants. In an action by the plaintiff as second mortgagee to redeem:—

HELD—that there was a contrary intention expressed in the mortgage of the first property to the defendants within sect. 17 of the Conveyancing Act, 1881, and that, therefore, the plaintiff was bound to redeem that mortgage as a condition of redeeming the first mortgage on the property over which he held a second mortgage; but that as the defendants, when they subsequently took the mortgages on the other properties, had notice of the plaintiff's mortgage, they were not entitled as against him to consolidate those mortgages with the mortgage on the first property, and to compel him to redeem all the mortgages.

HUGHES *v.* BRITANNIA PERMANENT BENEFIT [BUILDING SOCIETY, [1906] 2 Ch. 607; 75 L. J. Ch. 739; 95 L. T. 327; 22 T. L. R. 806—Kekewich, J.

95. *Two Mortgages on same Property — First Mortgage reserving Right to Consolidate — Third Mortgage of the same and Additional Property — All Mortgages vested in same Person — Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 17.]—A debtor mortgaged some property for £6,000 by a deed excluding sect. 17 of the Conveyancing Act, 1881; he granted a second mortgage of the same property to another person, and a third mortgage of the same property and of some other assets of value to a third person for £1,000: after a receiving order had been made against the debtor, the second mortgagee took transfers of the other two mortgages.

HELD—that the trustee in bankruptcy, if he desired to redeem the third mortgage, must also redeem the other two.

IN RE SALMON, EX PARTE THE TRUSTEE, [1903] 1 K. B. 147; 72 L. J. K. B. 125; 51 W. R. 288; 87 L. T. 654; 10 Manson, 22—Wright, J.

XXII. RESTRICTIVE COVENANTS.

93. *Collateral Advantage to Mortgagee — Validity—Injunction.*]—There is no general rule that any provision in a mortgage deed which gives the mortgagee some collateral advantage beyond the payment of the principal, interest, and costs is void.

Such an agreement is not invalid unless it clogs the equity of redemption, or is unconscionable or oppressive.

Jennings v. *Ward* (2 Vern. 520) and *Re Edwards' Estate* (11 Ir. Ch. Rep. 367) distinguished.

A covenant contained in a mortgage of an hotel to a brewer providing that the mortgagor will during the continuance of the security deal exclusively with the mortgagee for all beer sold upon the premises can be enforced by the mortgagee.

Decision of Romer, J. affirmed.

BIGGS *v.* HODDINOTT, [1898] 2 Ch. 307: 67 [L. J. Ch. 540; 79 L. T. 201; 14 T. L. R. 504; 47 W. R. 84—C. A.

See Santley v. *Wilde*, No. 86, *supra.*

97. *Tied Public-house — Collateral Security for Mortgage—Omission of "Successors"—Assign and Sub-lessee—Notice—Superior Title.*]—J. J., the owner of a public-house, mortgaged it, subject to a prior mortgage to J. T., to M. J. and W. J., trading together as "J. Brothers" as brewers and wine merchants. By an indenture of even date with this second mortgage, J. J. covenanted with the said M. J. and W. J., "trading in copartnership as 'J. Brothers,'" and thereinafter "styled as 'J. Brothers,'" that he, the said J. J., his executors, administrators, and assigns, for so long as he or they should continue in possession of the said public-house, would purchase their beer and spirits from the said "J. Brothers." Subsequently J. J. and J. T. united in granting a sub-lease to H., who had at the time notice of the said covenant; and the business of "J. Brothers," together with the mortgage to them already mentioned, was transferred to the A. Brewery Co.

HELD—that the covenant and the mortgage to "J. Brothers" must be read together, and that H. was bound to purchase his beer from the A. Brewery Co., notwithstanding the fact that "J. Brothers" had technically ceased to exist, and that H. was not bound by the actual words of the covenant to purchase his beer from their "successors."

HELD, also, that "assign" does not necessarily exclude "sub-lessee," and that the fact that H. was not the "assign" but the "sub-lessee" of J. J. did not relieve him from liability on the covenant with notice of which he was affected.

HELD, also, that H. was bound to claim under his superior title, and that he must accordingly be considered, in the eye of the law, to derive his title, not from J. T., but from J. J., following *Roach* v. *Wadham*, (1805) 6 East, 289.

JOHN BROTHERS; ABERGARW BREWERY CO. *v.* [HOLMES, [1900] 1 Ch. 188; 69 L. J. Ch. 148; 64 J. P. 152; 48 W. R. 236; 81 L. T. 771—Kekewich, J.

XXIII. **SALE.**

See also Sect. XVII. Power of Sale.

98. *Fluctuating Security—Shares in Company—No Day fixed for Payment—Implied Power of Sale—Notice to Mortgagor demanding Payment—Lapse of reasonable Time—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *ss.* 19, 20.]—If stock or shares be made the security for money, and the day appointed for payment is passed, the mortgagee may under an implied power of sale at once proceed to sell the stock or shares, and repay himself, principal and interest, without any authority from the mortgagor, and without commencing an action of foreclosure.

When no time for payment has been originally fixed, then, before the implied power of sale can be exercised, notice demanding payment is to be given to the mortgagor, and default must be made by him in payment after such notice. The notice must give a reasonable opportunity to the mortgagor to pay what is due under the mortgage; and it is at least desirable that it should fix a day for that purpose, and also convey to the mind of the mortgagor that, if he fails to avail himself of the opportunity given to redeem, the mortgagee will be in a position to put in force his rights. Sects. 19 and 20 of the Conveyancing and Law of Property Act, 1881, do not apply where the mortgage is not by deed.

The defendants, who were stockbrokers, bought first 400 and then 300, making in all 700, shares in a company on behalf of the plaintiff, who remitted part only of the purchase-money. In pursuance of an arrangement between the plaintiff and the defendants, the shares were entered on the register in the name of the defendants, and held by them as security for the amount of the purchase-money due. The defendants made repeated applications to the plaintiff for payment of the purchase-money, but never received more than a portion of it. The company announcing a scheme of reconstruction, the defendants wrote to the plaintiff for instructions and for payment of his debt. Receiving no reply, they applied for and obtained 1,050 shares in the new company in their own names in respect of the 700 shares. They subsequently sold these shares in the *bonâ fide* belief that they were rightful owners. The plaintiff now alleged that the sale was improper and claimed redemption of the 1,050 shares, or in the alternative damages for improper conversion. It was assumed that the true relation between the parties was that of mortgagor and mortgagees of shares.

Held (Vaughan Williams, L.J. dissenting)—that the 1,050 new shares were as much subject to the mortgage as the original 700 shares; that it made no difference that the defendants sold under the belief that they were no longer mortgagees; and that the letters written to the plaintiff amounted to reasonable notice entitling the defendants to sell the shares.

Henderson v. *Astwood* ([1894] A. C. 150; 6 R. 450—P. C.) followed.

Decision of Farwell, J. ([1901] 1 Ch. 70; 70 L. J. Ch. 47; 49 W. R. 167; 83 L. T. 706; 17 T. L. R. 51) affirmed.

Deverges *v.* Sandeman, Clarke & Co., [1902] [1 Ch. 579; 71 L. J. Ch. 328; 50 W. R. 404; [86 L. T. 269; 18 T. L. R. 375—C. A.

99. *Mortgage to a Society — Purchase by Member of Investment Committee of Society—Sale at Undervalue—Sale set Aside.*]—A mortgagee is not a trustee for the sale of the mortgaged property, but he owes some obligations to the mortgagor.

The plaintiff had mortgaged some property to a society, and, as she was in arrear with her interest, the society determined to sell. Eventually, the property was sold by auction to D. for £1,475. D. was a member of the investment committee of the society, whose duty it was to superintend the realisation of mortgage securities; and it appeared that D. virtually fixed the reserve price, and gave all instructions to the auctioneer. After the sale he was able to borrow £1,475 on the same property with slight collateral security. In an action by the plaintiff to set aside the sale:—

Held—that the onus was on the defendants to prove that everything had been carried out *bonâ fide*; that there had in fact been a sale at an undervalue, and other circumstances were suspicious; and that therefore the sale must be set aside.

Farrar v. *Farrars, Ld.* ((1888) 40 Ch. D. 395; 58 L. J. Ch. 185; 37 W. R. 196; 60 L. T. 121—C. A.) and *In re Bloye's Trusts* ((1849) 1 Mac. & G. 494—Lord Cottenham) applied.

Hodson *v.* Deans, [1903] 2 Ch. 647; 72 L. J. Ch. [751; 89 L. T. 92; 19 T. L. R. 596; 52 W. R. 122—Joyce, J.

100. *Surplus—Trust of Surplus in Favour of Mortgagor, his "Heirs or Assigns"—Mortgagor a Lunatic — Whether Surplus Personalty or Realty.*]—In 1900 mortgaged property was sold under a power of sale in the deed, which provided that the surplus should be paid to the mortgagor "his heirs or assigns." The mortgagor was then, and continued to be, a lunatic not so found, and in 1906 he died intestate and a bachelor.

Held—that the surplus must be treated as personalty.

Decision of Parker, J. ([1907] 1 Ch. 313; 76 L. J. Ch. 220; 96 L. T. 359) affirmed.

In re Grange, Chadwick *v.* Grange, [1907] [2 Ch. 20; 76 L. J. Ch. 456; 96 L. T. 867—C. A.

XXIV. **SETTLED LANDS.**

101. *Mortgage by Reversioner — Marriage Settlement by Reversioner — Redemption by Settlor — Intention to keep Charge alive — Priority.*]—Where a tenant for life of a marriage settlement pays off out of his own moneys a mortgage on a reversionary interest, assigned to the trustees of the settlement subject to the

Settled Lands—*Continued.*

mortgage, and takes a conveyance which in effect makes the payment off of the mortgage enure for the benefit of the settlement, the Court will make a declaration that, notwithstanding the form of reconveyance, the tenant for life is entitled to have the charge kept alive for his own benefit, and that the sum so paid off has priority over the settlement.

GIFFORD (LORD) *v.* LORD FITZHARDINGE, [1899] 2 Ch. 32; 68 L. J. Ch. 529; 47 W. R. 618; 81 L. T. 106—North, J.

102. *Trustees Lending Trust Money to Life Tenant on Mortgage — Life Tenant conveying Equity of Redemption to Reversioner — Life Tenant releasing his Life-interest in Trust Funds in favour of such Reversioner—No Merger.*]—S. was entitled to a life-interest in certain real and personal property, to which, subject to his life-interest, his daughter was absolutely entitled. He mortgaged certain property to the trustees as security for a loan from the trust funds; and subsequently, by two deeds executed the same day, he conveyed the mortgaged property to his daughter subject to the mortgage, and released in her favour his life-interest in the trust funds. The daughter predeceased him.

HELD—that there was no merger. The daughter was absolutely entitled to the land, but not to the security until she discharged the succession duty.

IN RE SIMMONDS, DENNISON *v.* ORMAN, (1903) [87 L. T. 594—Joyce, J.

XXV. SOLICITOR MORTGAGEE.

103. *Costs—Mortgages from Client—Accounts Settled—Profit Costs—Overcharges for Interest—Reopening Accounts—Limitation Act*, 1623 (21 Jac. 1, *c.* 16).]—A solicitor since 1883 financed a client, who was a builder, advancing him money and taking mortgages upon the land acquired and built upon as security for his advances with interest and his costs. The client was not represented by any other solicitor. From time to time accounts were submitted to the client, and they were agreed to and signed by him, some of them more than six years before action. In the accounts the solicitor always charged profit costs in respect of the mortgages to himself, but no bills of costs were rendered. There were also certain instances of interest overcharged by error. The solicitor died in 1905. In an action by the executors for foreclosure of two of the mortgages the client counterclaimed to reopen the accounts on the ground of overcharges.

HELD—that, considering the relations between the parties and the character of the errors, from which it might be expected that the errors proved in some cases would appear in all, the client was entitled to the relief claimed in respect of all the accounts; that the Statute of Limitations did not apply; and that the client was entitled to have the solicitor's costs charged in such accounts taxed upon the footing that the solicitor was not entitled to charge profit costs in respect of any mortgage before the Mortgagees' Legal Costs Act, 1895, regard being had in such taxation to any agreement as to costs appearing by such accounts to have been come to between the parties.

CHEESE *v.* KEEN, (1907) 24 T. L. R. 138—[Neville, J.

104. *Foreclosure—Redemption—Profit Costs—Mortgagees' Legal Costs Act*, 1895 (58 & 59 Vict. *c.* 25), *s.* 3.]—An order for foreclosure was obtained in 1893 by a solicitor mortgagee in an action to enforce his security. In 1898 an order was made on further consideration of the action directing taxation of costs. The taxing-master allowed the mortgagee, who had himself acted, profit costs. On a summons to vary the certificate:—

HELD—that the rights of the parties were ascertained by the order of 1893, and must be determined by the law in force at that date; consequently the mortgagee was not entitled to the benefit of the Mortgagees' Legal Costs Act, 1895, s. 3.

Decision of Cozens-Hardy, J. (82 L. T. 142) affirmed.

DAY *v.* KELLAND, [1900] 2 Ch. 745; 70 L. J. Ch. [3; 49 W. R. 66; 83 L. T. 445—C. A.

105. *Statement in Deed that Money has been Lent—Money not in fact Lent—Sub-mortgage to Third Person—Estoppel—Priority.*]—A solicitor induced the plaintiff, who was a client of his, to execute a mortgage of certain property to him in order to provide a sum of £2,500 for the purpose, as he alleged, of being lent, to another client at an increased rate of interest. The mortgage deed stated that £2,500 had been lent by the solicitor to the plaintiff, but, in fact, no sum at all was lent. The solicitor then executed a sub-mortgage of the property for £1,200 in favour of the defendant, who had no notice of the fraud, and absconded. The plaintiff claimed that the mortgage and sub-mortgage were void, and that the property should be reconveyed to him:—

HELD—that as the plaintiff had executed the mortgage deed for the purpose of its being used for raising money for his own advantage, and as money was raised upon it from the defendant, the plaintiff was estopped from saying as against the defendant that he had not received the money.

Decision of Joyce, J. (97 L. T. 167; 23 T. L. R. 604) reversed.

POWELL *v.* BROWNE, (1907) 24 T. L. R. 71—[C. A.

XXVI. SURETY.

106. *Collateral Security—Judgment Creditors of Principal—Right of Surety against Security.*]—A wife mortgaged certain property to her husband's creditor as surety only. The mortgagee's transferees, who were judgment creditors of the husband, obtained equitable execution against him. The property charged by the

Surety—*Continued.*

mortgagor was sold pursuant to an order of the Court, and the transferees received the balance of the purchase-money and claimed to apply it toward their judgment debt. The wife commenced an action against them to redeem the property she had charged.

HELD—that the balance ought to go in relief of the wife's mortgage.

South v. *Bloxam* ((1865) 2 H. & M. 457 ; 11 Jur. (N.S.) 319 ; 34 L. J. Ch. 369 ; 12 L. T. (N.S.) 204—Wood, V.-C.) explained.

DIXON *v.* STEEL, [1901] 2 Ch. 602 ; 70 L. J. Ch. [794 ; 50 W. R. 132 ; 85 L. T. 404—Cozens-Hardy, J.

107. *Tacking—Collateral Security for one Mortgage—Covenant by Tenant for Life.*]—Certain property, already subject to a mortgage for £1,500, was with other property mortgaged for £2,500 : upon a transfer of the first mortgage to the holder of the second, the tenant for life of the mortgaged property covenanted with the holder to pay the £1,500, it being provided that, as between himself and the owners of the property, such covenant should be a collateral security only.

HELD, by Romer and Stirling, L.JJ. (Vaughan Williams, L.J. dissenting)—that upon the true construction of the document the covenantor was a principal debtor ; and that, therefore, as against his executors the transferee's representatives were entitled to tack the later mortgage to the earlier one, and need not reassign their securities for the £1,500 upon being paid that sum and interest.

Duncan Fox & Co. v. *North and South Wales Bank* ((1880) 6 App. Cas. 1 ; 50 L. J. Ch. 355 ; 29 W. R. 763 ; 43 L. T. 706—H. L.) followed.

HELD, by Vaughan Williams, L.J.—that the covenantor was a surety only, and that no tacking should be allowed.

Decision of Byrne, J. (89 L. T. 234) affirmed.

NICHOLAS *v.* RIDLEY, [1904] 1 Ch. 192 ; 73 [L. J. Ch. 145 ; 52 W. R. 226 ; 89 L. T. 653 —C. A.

XXVII. TRANSFER.

108. *Mortgage by Sub-demise in* 1880—*Transfer in Statutory Form in* 1893—"*Benefit of said Mortgage*"—*Whether Legal Estate passed—Intention—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *ss.* 27, 63, *Sched. III.*]—In granting, or assigning, a term of years there must, in order that the legal estate may pass, be some words implying an intention to part with possession.

A lessee mortgaged leaseholds by a sub-demise before the commencement of the Conveyancing Act, 1881 ; in 1893 his executors executed a transfer of the mortgage in statutory form which recited the mortgagee's death and will, and then purported to transfer and convey "all the benefit of the said mortgage."

HELD—that it did not pass the legal estate in the mortgaged leaseholds.

Decision of Kekewich, J. affirmed.

IN RE BEACHEY, HEATON *v.* BEACHEY, [1904] [1 Ch. 67 ; 73 L. J. Ch. 68 ; 52 W. R. 309 ; 89 L. T. 685—C. A.

109. *No Notice of Transfer to Mortgagor—Fraudulent Sale by Mortgagee and Mortgagor—Payment of Mortgage Debt to Mortgagee—Constructive Notice.*]—The plaintiff bought a property previously mortgaged by the defendant and the mortgage of which had been transferred to E. The solicitor who acted in the matter, and who was also the original mortgagee, cheated both the plaintiff and defendant. No notice was given to the defendant of the transfer of the mortgage to E. The solicitor continued to pay the interest to E. Then the defendant and the solicitor mortgagee sold and conveyed the property to the plaintiff. The defendant left everything connected with the sale to the solicitor, who inserted in the conveyance to the plaintiff a deliberately false recital suppressing the mortgage and the transfer of it, and stating that the property was unincumbered. An account was settled between the solicitor and the defendant, the former retaining the mortgage debt out of the purchase-money.

HELD (Vaughan Williams, L.J. doubting)—that the knowledge of the solicitor must be imputed to the defendant, who, therefore, could not avail himself of his actual ignorance of the transfer of the mortgage ; that the plaintiff stood in no better position than the defendant ; and that the mortgage must be treated as still subsisting, and as a security to E., and that the plaintiff must take the property subject to it.

Decision of Cozens-Hardy, J. (68 L. J. Ch. 572 ; 47 W. R. 620 ; 81 L. T. 111) affirmed on different grounds.

DIXON *v.* WINCH, [1900] 1 Ch. 736 ; 69 L. J. Ch. [465 ; 48 W. R. 612 ; 82 L. T. 437 ; 16 T. L. R. 276—C. A.

See also No. 24, *supra*.

110. *Priority of Mortgagor—State of Accounts—Payment of Principal after, but without Notice of Transfer to Agent—Appropriation by Agent—Transfer to Agent—Extinguishment of Debt—Fraud—Reconveyance.*]—Where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and mortgagee.

Payments of interest or payments on account of principal made by the mortgagor to the mortgagee after, but without notice of, a transfer, must, in the absence of collusion, be allowed to the mortgagor as against transferee.

The plaintiff, a mortgagor, put her solicitor in funds for the express purpose of paying off her mortgage. He appropriated the funds to his own use, but continued to pay the interest due under the mortgage. The mortgagor did not ask for the title deeds or a reconveyance of the legal estate. The solicitor took a transfer of the mortgage debt and security to himself, and on the following day transferred the same to the defendant, who took the transfer in good faith,

Transfer—*Continued.*

but made no inquiry as to the state of the account between mortgagor and mortgagee. The solicitor absconded, and, on the defendant applying to the plaintiff for interest, the fraud was discovered by both innocent parties.

HELD—that the transferee having taken the transfer from the solicitor without the privity of the mortgagor, the transferee could only hold it against the mortgagor subject to the state of account between the solicitor and the mortgagor; that as between the solicitor and the mortgagor the mortgage-debt was non-existent, and directly the solicitor became himself the transferee the debt was extinguished, and no transferee from him could treat the debt as a subsisting charge, and that the mortgagor was entitled to a reconveyance.

TURNER *v.* SMITH, [1901] 1 Ch. 213; 70 L. J. [Ch. 144; 49 W. R. 186; 83 L. J. 704; 17 T. L. R. 143—Byrne, J.

XXVIII. **TRUSTEES.**

111. *Chose in Action—Trust for Sale of Land—Proceeds of Sale held on Trusts—One of several Trustees Mortgagor of his Beneficial Interest—Absence of Notice to Co-Trustees—Subsequent Mortgage with Notice.*]—By virtue of an indenture of settlement freehold property was vested in three trustees, one of whom was P., upon trust for sale and to invest the proceeds and pay the income to a lady for life, and after her decease to stand possessed of the trust moneys and securities for all her children, one of whom was P. The rents and profits until sale were to be paid and applied as income. The property remained unsold. P., in September, 1892, mortgaged his interest in the reversion to the C. and C. Bank for £800, and notice of this was given to the trustees, and the plaintiffs paid this mortgage off, and were admittedly first mortgagees in respect thereof. In November, 1892, P. mortgaged his reversionary interest to G. for £800, subject to the first mortgage, and in 1893 for a further sum of £500. These securities were kept by P. in his own custody. In 1898 P. (concealing G.'s charges) mortgaged all his interest to the plaintiffs to secure his current account up to £1,800. Notice of this charge was given to F., who was then one of the trustees, and acted as solicitor for them. The bank had no notice or knowledge of G.'s charges, though they inquired as to any prior charges.

HELD—that there was sufficient evidence to show that no notice of G.'s charges was given to the trustees other than P., and the case must be dealt with on the assumption that G. could only rely upon the knowledge which P. had of his own incumbrances, which was not sufficient to protect G., and that the plaintiffs were entitled to priority over G.

HELD, also, that although the land was not sold and the securities all purported to deal with land and not money, the rule as to priority in *Dearle* v. *Hall* ((1823) 3 Russ. 1; 27 R. R. 1) applied.

Browne v. *Savage* ((1859) 4 Drew. 635) followed.

LLOYDS BANK *v.* PEARSON, [1901] 1 Ch. 865; [70 L. J. Ch. 422; 84 L. T. 314—Cozens-Hardy, J.

112. *Claim by Mortgagee to receive Whole of Fund on giving Receipt — Payment into Court—Conveyancing Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 22, *sub-s.* 1.]—Where trustees have *bonâ fide* doubts as to whether a mortgagee is entitled to be paid the whole or any part of a mortgaged fund in their hands, or have notice that there is something suspicious, or where there are any circumstances which make it reasonable for them to decline to be satisfied, they are not bound to pay over the fund on the receipt of the mortgagee under sub-sect. 1 of sect. 22 of the Conveyancing Act, 1881, but may seek the protection of the Court and pay the money into Court.

In re Bell, Jeffery v. *Sayles* ([1896] 1 Ch. 1) considered and applied.

HOCKEY *v.* WESTERN, [1898] 1 Ch. 350; 67 [L. J. Ch. 166; 78 L. T. 1; 14 T. L. R. 20; 46 W. R. 312—C. A.

MORTMAIN ACTS.

See CHARITIES; REAL PROPERTY.

MOTOR CARS.

See HIGHWAYS, No. 52; STREET TRAFFIC.

MUNICIPAL CORPORATIONS.

See LOCAL GOVERNMENT.

MUSIC HALLS.

See THEATRES, MUSIC HALLS AND SHOWS.

MUSICAL COPYRIGHT.

See COPYRIGHT AND LITERARY PROPERTY.

NAME.

See WILLS, Nos. 268–270.

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See ALIENS.

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NEGLIGENCE.

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I. CONTRACTORS AND SUB-CONTRACTORS.

1. *Independent Contractor—Intervening with Servants of—Liability of Master.*]—The defendants, who were contractors, were engaged by the occupier of a house to execute certain work thereon. At the close of the day's work, their workmen had at first placed the ladders they had been using on the lawn; but to this the occupier objected, and the workmen by—as the jury found—the permission, though not by the order of the occupier, subsequently placed them on the side path leading to the back door of the house. The plaintiff, who was delivering bread, one dark night in November, stumbled over the ladders and was injured.

HELD—that in putting the ladders on the side path the workmen were acting as servants of the defendants, and that the defendants were liable.

BENNETT *v.* CASTLE & SONS, (1898) 14 [T. L. R. 288—C. A.

2. *Principal and Agent—Jointly engaged in Performance—Work involving Danger to the Public—Precautions to be taken—Casual or Collateral Negligence.*]—The defendants were engaged in laying down wires and tubes in a trench under the pavement of a street. After the wires were laid the connections between the tubes were made by a plumber under a contract with the defendants, whereby he agreed to do the work to the satisfaction of the defendants' foreman-in-charge at a fixed sum per connection, the plumber to supply the necessary men and materials. The soldering material used for making the connections was melted in an iron pot on the foot pavement, and it was necessary, for the purposes of the work, to obtain a flare from a benzoline lamp, which was done by applying heat to the lamp. To obtain the flare the plumber's man plunged the lamp into the molten solder (this being a usual, proper and necessary operation with a lamp in good order), when, in consequence of the safety-valve being out of order, which the plumber ought to have known, the lamp exploded, and the molten solder flew up and injured the plaintiff, who was passing by. The evidence was conflicting as to whether one of the defendants' men was assisting the plumber's man in the work.

In an action in the county court to recover damages for the negligence of the plumber's man in plunging a defective lamp into the metal, the judge found that the defendants had in substance the control of and supervised the work which the plumber did, that the plumber was in the position of a servant; and that the defendants were liable.

HELD—that the judgment of the county court judge must be affirmed, because there was evidence that the work was being jointly executed by the defendants and the plumber, and that, therefore, the defendants were liable for the negligence of the plumber's man; and, further, assuming that the plumber was an independent contractor, that the defendants were executing on a highway works likely to cause danger to the public unless precautions were taken, and were, therefore, liable for the negligence of the contractor's workmen in the execution of the works, such negligence not being a casual or collateral act of negligence.

Decision of Div. Ct. ([1899] 1 Q. B. 221;

Contractors and Sub-Contractors—*Continued.*

68 L. J. Q. B. 302; 63 J. P. 133; 47 W. R. 203; 79 L. T. 593; 15 T. L. R. 73) reversed.

HOLLIDAY *v.* NATIONAL TELEPHONE CO., [1899] 2 Q. B. 392; 68 L. J. Q. B. 1016; 47 W. R. 658; 81 L. T. 252; 15 T. L. R. 483—C. A.

3. *Sewer—Laying of—Failure by Contractor to Exercise Reasonable Care.*]—The defendants having contracted with the London County Council to construct a sewer along Rockingham Street, Walworth, in the county of Surrey, opened up a long trench for that purpose in close proximity to the plaintiffs' buildings. A serious subsidence of the plaintiffs' land having taken place, and the walls and buildings belonging to the plaintiffs being greatly injured, in an action brought against the defendants for negligence :—

HELD—on the evidence, that the damage to the plaintiffs' premises had been caused by the defendants' works, that the defendants had not exercised reasonable care and skill in the execution of the works, and that the injury was occasioned to the plaintiffs' premises by the negligence of the defendants in carrying out the works.

LONDON GENERAL OMNIBUS CO., LD. *v.* [TILBURY CONTRACTING AND DREDGING CO., LD., (1907) 71 J. P. 534—Neville, J.

4. *Sewerage Works—Construction of—Damage to Gas Main—Liability of Contractor.*]—Under a contract with a district council a contractor undertook to execute certain sewage works and to lay certain sewers, and "to save the district council harmless and indemnified from all claims and actions for or in respect of any damage or injury to persons or property arising from or occasioned by the neglect, default or misconduct of the contractor or of any person employed by the contractor, or otherwise howsoever from or by the execution of the works." In laying down of the sewers in a highway, the contractor at three different places came across the gas main, the property of the gas company. The sewer trench was dug to a lower depth. The contractor was directed by the engineers of the district council to support the gas main by 9-inch brick piers in places where the gas main was met with. This was done. Subsequently, the gas main was found fractured at two of the places where it was met with. The gas company sued the district council for negligence and obtained a verdict. The district council claimed to be indemnified under their contract with the contractor. In the issue between the district council and the contractor, the jury found in favour of the contractor that the damage was not due to the mode in which the work was done.

HELD—that the third party was not liable to indemnify the district council.

ILFORD GAS CO. *v.* ILFORD URBAN DISTRICT [COUNCIL, JACKSON, THIRD PARTY, (1903) 67 J. P. 365—C. A.

5. *Work on Highway—Protection of Public—Liability of Contractor for Negligence of Sub-Contractors.*]—A town council, who were the owners of tramways worked by horse power, entered into a contract with the defendants, contractors, whereby the latter undertook to do the whole of the work of equipping the tramways for electric traction. The contractors entered into a sub-contract whereby the third parties, sub-contractors, agreed to do part of the work, namely, the erection of the iron standards along the streets, and the fixing of the wires thereto. For this purpose the sub-contractors used a tall derrick, or trolley on wheels, which was a usual structure to employ in executing work of this kind, and their workmen, on leaving off work, negligently left the derrick too close to the tram lines, whereby the plaintiff who was riding on a tramcar, was injured. In an action against the contractors to recover damages :—

HELD—that, as the work was being done on a highway, it was the contractors' duty to take reasonable precautions to protect the public, and that they could not escape from that duty by delegating the work to sub-contractors; that the act of negligence was primary and not merely casual or collateral; and that the defendants were liable.

MAXWELL *v.* BRITISH THOMSON HOUSTON [CO., LD., BLACKWELL & CO., THIRD PARTIES, (1902) 18 T. L. R. 278—C. A.

II. CONTRIBUTORY NEGLIGENCE.

6. *Both Parties held to be Negligent—Disagreement as to whether Defendant could have avoided the Accident by the Exercise of Reasonable Care—Effect of Findings.*]—If the proximate cause of a collision is the negligence of the plaintiff, as well as that of the defendant, the plaintiff cannot recover.

In a "running down" case the jury found that there was negligence on the part of the plaintiff, and also on the part of the driver of the defendants' omnibus, but they could not agree as to whether, notwithstanding the negligence of the plaintiff, the omnibus driver could have avoided the accident by the exercise of reasonable care. It was admitted that the omnibus was overtaking the plaintiff's truck, and that it was the near side hind wheel which struck the off-wheel of the truck. Applying the finding of the jury to these admitted facts, the judge came to the conclusion that the finding of negligence against the plaintiff could only mean that he had pushed his truck away from the pavement into the omnibus; and that, therefore, whatever answer the jury had given to the other question, the plaintiff could not recover, for his own negligence was as much the proximate cause of the collision, as the negligence of the driver could have been.

The Bernina ((1888) 13 A. C. 1; 57 L. J. P. D. & A. 65; 58 L. T. 423—H. L.) applied.

REYNOLDS *v.* THOMAS TILLING, LD., (1903) 19 [T. L. R. 539—Walton, J.

7. *Questions for Jury—Heaps of Stone for Road Repairing.*]—The defendants, a highway autho-

Contributory Negligence—*Continued.*

rity, in broad daylight carted a heap of stones on to a road, and before the stones were spread, the plaintiff drove into the heap and was injured. A jury found that both plaintiff and defendants had been guilty of negligence, and that the defendants could by the exercise of ordinary care have avoided the consequence of the plaintiff's negligence.

HELD—(1) that there was no evidence of negligence on the part of the defendants; and (2) that, even accepting the findings, judgment should be entered for the defendants.

The questions to be left to a jury in cases of contributory negligence discussed.

Reynolds v. *Tilling* (19 T. L. R. 539—C. A. *supra*) applied.

BUTTERBY *v.* DROGHEDA CORPORATION. [1907] [2 Ir. R. 134—C. A.

III. DANGEROUS EMPLOYMENT.

8. *Master and Servant—Special Duty—Newspaper Boy at Railway Station—Crossing Line—No Caution—Evidence for Jury.*]—The plaintiff, a boy twelve years of age, was employed by the defendants to deliver newspapers from their bookstall at a railway station to customers in the town. The bookstall was on a platform surrounded by lines of railway, there being a footbridge across the lines. The plaintiff was shown his duties by a boy of the same age as himself, but he was not warned not to cross by the metals. There was a notice warning the public not to cross the metals, but to use the foot bridge. There was evidence that the newspaper boys were in the habit of crossing by the metals, and that the man in charge of the bookstall knew that the plaintiff was in the habit of so crossing. The plaintiff, in crossing by the metals was run over by a train. In an action against the defendants for damages for negligence, the county court judge nonsuited the plaintiff.

HELD that there was evidence of negligence to go to the jury, the employment being a dangerous one in regard to which a duty was thrown upon the defendants to order the child what to do in order to keep out of the danger.

Decision of Div. Ct. ((1901) 17 T. L. R. 235) affirmed.

ROBINSON *v.* SMITH (W. H.) & SON, (1901) 17 [T. L. R. 423—C. A.

IV. DEFECTIVE PLANT, &c.

9. *Dangerous Condition of Dock—No Direct Evidence of Cause of Death—Evidence of Negligence.*]—The deceased was a bargeman and on the night of August 7th, 1897, was navigating two barges fastened together into the defendants' dock. It was his duty to moor the barges in the dock. He did not return home that night, and a day or two after his body was found in the dock, but how he got into the water there was no evidence to show. No chains or ladders were attached to the dock to assist anyone who had fallen into the water to get out again, and persons had been previously drowned there, and complaints had been made to the defendants as to the dock's dangerous condition. It was further proved that the deceased could swim.

HELD—that there was evidence to go to the jury of negligence causing the death of the deceased man.

Wakelim v. *London & South Western Ry. Co.* (12 App. Cas. 41) distinguished.

MOORE *v.* RANSOM'S DOCK COMMITTEE, (1898) [14 T. L. R. 539—C. A.

10. *Lift Accident—Personal Injury to Servant—Defect in Machinery—Knowledge of Master—Duty to give Instructions to Servant.*] — The plaintiff, a boy of sixteen years of age, whose duty it was to work a lift, met with an accident caused by his slipping on the oiled floor of the lift after setting the latter in motion, the result being that his leg, which was hanging outside the lift, was caught between the lift and the shaft, and had to be amputated. It was part of his duty to oil the floor of the lift himself, and he did so in consequence of the instructions of the defendants or their superintendent. The jury found that the lift was defective through the absence of an inner gate; that the cleaning with oil caused the lift to be dangerous, and that instructions to clean it in that manner were given by the superintendent; and that the accident was occasioned by the neglect of the defendants or their superintendent to take good care in giving the plaintiff proper instructions as the working of the lift.

Upon these findings the judge entered judgment for the plaintiff for the amount awarded by the jury.

HELD—that there was no evidence to justify these findings of the jury, or to bring the case within any principle of law which would make the masters liable.

Decision of Bruce, J. (87 L. T. 73; 18 T. L. R. 578) reversed.

LLOYD *v.* WOOLLAND BROS., (1903) 19 T. L. R. [32—C. A.

11. *Lift Accident—Lift in Hotel—No Door—Want of Light.*]—In an action arising out of the death of a man who stepped into and fell down a lift shaft, the plaintiff alleged that it was "the universal practice in all lifts to guard the entrance to them by a collapsible lattice door, which can be opened when the cage is in a position to receive passengers"; that "then the deceased on the door being opened, was entitled to rely on the cage being in position for him to step into with safety"; that the lift in question was not provided with a door which could only open when the lift was in position; that there was no light in the lift; that the entrance was badly lighted, and that the waiter when opening the door gave no warning.

HELD—that this statement of facts disclosed a cause of action, and did not show necessarily that the deceased had been guilty of contributory negligence.

GREENLEES *v.* ROYAL HOTEL, DUNDEE, LD., [(1905) 7 F. 382—Ct. of Sess.

Defective Plant, &c.—*Continued.*

12. *Shipowner and Stevedore—Shipowner supplying Rope to Stevedore—Defective Rope—Injury to Stevedore's Man—Liability of Shipowner.*]—In an action arising out of an accident caused to a stevedore's man by a defective rope, the pursuers alleged that the shipowners provided the rope for the special purpose of its being used by the stevedore's men in unloading: that they had not taken reasonable care to see that it was in a fit state for use; and that the men had no opportunity of examining or testing the ropes for themselves.

Held—that it could not be said that the allegations did not disclose a possible cause of action.

Heaven v. *Pender* ((1883) 11 Q. B. D. 503; 52 L. J. Q. B. 702) and *Caledonian Ry. Co.* v. *Mullholland* ([1898] A. C. 216; 67 L. J. P. C. 1, *see* Railways, No. 19), discussed.

Traill *v.* Actieselskabet Dalbeattie, Ld., [(1905) 6 F. 798—Ct. of Sess.

13. *Shipowner and Stevedore—Shipowner supplying Defective Sling — Stevedore Liable to Workman—Claim of Relief against Shipowner supplying Sling.*]—A firm of stevedores contracted with a shipowner to unload his vessel, and a workman employed by the stevedores was injured by the breaking of a rope sling. The workman sued the stevedores under the Employers' Liability Act, and recovered damages from them on the ground of their negligence in failing to inspect the sling. In an action by the stevedores against the shipowner to recover the amount of such damages, it was found that it was the duty of the shipowner to supply, and that he did supply, rope slings for the discharge of the cargo; that as the rope slings were not part of the permanent apparatus of the ship the shipowner's duty was not absolutely to warrant their fitness, but merely to supply slings to the satisfaction of the stevedores; that this rope sling was not fit for the purpose for which it was being used; and that its defect could have been easily ascertained on inspection.

Held—that the shipowner was not liable because (1), as his duty was merely to supply slings to the satisfaction of the stevedores, he was not liable in respect of injury caused by the breaking of the defective sling; and (2), as the sole ground on which the stevedores had been held liable was their own negligence in failing to inspect the sling, they could not recover against the shipowner for breach of contract.

Mowbray v. *Merryweather* ([1895] 2 Q. B. 640; 65 L. J. Q. B. 50; 59 J. P. 804; 44 W. R. 49; 73 L. T. 459—C. A.) considered.

Wood *v.* Mackay, (1906) 8 F. 625—Ct. of Sess.

V. LOCAL AUTHORITIES.

14. *Misfeasance — Laying Sewer in Road—Excavations filled in — Road thrown open to Public when not Safe for Traffic — Heap of Rubbish deposited upon Road by Wrong-doer—Driver Crossing Road to avoid Dangerous Part and running into Heap — Liability of Local Authority.*]—The defendants, who were both the highway and sanitary authority, dug a trench along a road under their control for the purpose of laying a sewer. When the sewer was laid they filled in the trench and opened the road for traffic. About a week after the road was thrown open the plaintiff was driven along it in a cab. The cab driver found that the part of the road where the trench had been filled in was soft: he crossed to the off-side to avoid that danger, and ran into a heap of rubbish which had been deposited by a wrong-doer upon that side of the road, with the result that the cab was overturned and plaintiff suffered injuries. The defendants knew that the heap of rubbish had been deposited upon the road. The jury found that at the time of the accident the part of the road that had been filled in was dangerous for traffic.

Held, affirming C. A.—that the defendants were liable on the ground that they were guilty of misfeasance in throwing open the road when it was not fit for traffic, and that that misfeasance was the cause of the accident.

Semble, the capacity in which the defendants were acting was immaterial.

Decision of C. A. (19 T. L. R. 61) affirmed.

Shoreditch Corporation *v.* Bull, (1904) [68 J. P. 415; 90 L. T. 210; 20 T. L. R. 254; 2 L. G. R. 756—H. L. (E.).

And see Sect. II. Contributory Negligence.

15. *Nonfeasance—County Council—Liability—Personal Injuries.*]—The plaintiff suffered personal injuries through the defendants' neglect of their duty to lop the branches of the trees in Victoria Park.

Held — that this being mere nonfeasance defendants were not liable.

Tregellas *v.* London County Council, (1898) [14 T. L. R. 55—Lord Russell of Killowen, C.J.

VI. LICENSEES AND VISITORS.

And see Sect. X. Railway Management.

16. *Carrying Licensee Gratuitously—Duty of Owner towards Licensee.*]—A greater responsibility is incurred by one who gratuitously carries another, than by one who merely allows another to traverse his premises.

The defendant, who was the contractor for the construction of an underground railway, had made a temporary line in the tunnel for the purpose of conveying by means of an engine and trucks the excavated material to a shaft, up which it was carried to the surface. For the purpose of enabling the work to be inspected, and for the workmen to get to their work, a planked footway was laid along one side of the tunnel. The higher officials, however, frequently rode upon the engine when going upon their business. The plaintiff, who was an inspector appointed by the engineer to the railway company, when on his way to inspect the works, by

Licensees and Visitors—*Continued.*

permission of the defendant's representative, rode upon the engine, and was injured by the engine colliding, owing to the negligence of the defendant's servants, with a truck which had been left standing on the line.

HELD—that, though the plaintiff was in a sense a bare licensee, yet, as the defendant had, through his representative, allowed him to ride on the engine, he was bound to use reasonable care in carrying him.

Gautret v. *Egerton* ((1867) L. R. 2 C. P. 371; 36 L. J. C. P. 191), *Corby* v. *Hill* ((1858) 4 C. B. (N.S.) 556; 27 L. J. C. P. 318), and *Lygo* v. *Newbold* ((1854) 9 Ex. 302; 23 L. J. Ex. 108) considered.

HARRIS *v.* PERRY & Co., [1903] 2 K. B. 219; [72 L. J. K. B. 725; 89 L. T. 174; 19 T. L. R. 537—C. A.

17. *Dangerous Premises—Prospective Tenant looking over House—Accident.*]—Where a house is to let, and a person obtains the key from an agent in order to look over it, he goes by invitation of the owner; and such invitation is not necessarily limited to the first inspection.

If the premises are in a dangerous condition, and an accident happens to a person inspecting the house by invitation, the landlord is responsible if he knew, or ought to have known of the danger.

WRIGHT *v.* LEFEVER, (1903) 51 W. R. 149—C. A.

18. *Liability to the Public—Race Committee—Site Let to Sub-tenant to Erect a Stand—Collapse of Stand—Liability of Committee.*]—A race committee, the lessees of a racecourse, sub-let a site on the course for the erection of a stand. Visitors, who had already paid 6*d.* for entering the course, could enter the stand on payment to the builder of an additional sum. The stand collapsed and injured the plaintiff.

HELD—that it was for the jury, upon a consideration of all the facts, to say whether the relation of the committee to the stand was such that they owed a duty to visitors to see that it was reasonably safe: the fact that the tenant built the stand was not in itself conclusive.

GLASS *v.* PAISLEY RACE COMMITTEE, (1903) 5 [F. 14—Ct. of Sess.

19. *Officer's Wife visiting him on his Ship—Gangway—Insufficient Plank.*]—A vessel owned by the defendants was in harbour. The chief officer's wife had been to see him, and was about to return. In her husband's absence a rigger, temporarily employed by the defendants, put a plank from the ship's side to the quay and she stepped on to it. The plank, which was intended to be used for certain other purposes only, was rotten, and she fell and was injured.

HELD—that the defendants were not liable for (1) the woman was only a licensee and not on board by invitation, and (2) the rigger was acting outside the scope of his employment in using the plank for the purpose of a gangway.

O'BRIEN *v.* ARBIT & Co., [1907] S. C. 975—[Ct. of Sess.

VII. LORD CAMPBELL'S ACT.

20. *Fatal Accident—Two Actions commenced in respect of the Death of the same deceased Person—Staying Proceedings—Next of Kin—Administrator—Fatal Accidents Act*, 1846 (9 & 10 Vict. *c.* 93), *and Fatal Accidents Act*, 1864 (27 & 28 Vict. *c.* 95).]—The Court will not, in the absence of bad faith, make an order staying an action under Lord Campbell's Act brought by one of the next of kin of the deceased within six months after the death, and before administration is taken out, although administration is subsequently taken out by another of the next of kin, and a second action in respect of the death of the same deceased person is instituted by the administrator.

MCCABE *v.* GREAT NORTHERN RY. CO. OF [IRELAND, [1899] 2 Ir. R. 123—Q. B.; 127—C. A.

VIII. ONUS OF PROOF.

21. *Damage by Explosion—Absence of Exact Proof*—Res ipsa loquitur.]—Where the precise cause of an accident is not known, there still may be sufficient evidence to render the defendant liable, as when an explosion occurs and the jury acting as reasonable men find under the whole circumstances that there was negligence on the defendant's part, although of the exact cause there is no evidence, or it is unascertainable.

MCARTHUR *v.* DOMINION CARTRIDGE CO., [1905] A. C. 72; 74 L. J. P. C. 30; 53 W. R. 305; 91 L. T. 698; 21 T. L. R. 47—P. C.

22. *Explosion in Street—Conduit containing Electrical Cables of Council—Non-ventilation of Conduit—Evidence of Negligence to go to Jury.*]—The plaintiff brought an action in the county court for damages for injuries received from fright or shock caused by an explosion in a street close to and in front of her. The explosion emanated from a manhole, feed-box or conduit under the control of the defendants, containing their electrical cables. An expert called by the plaintiff stated in his evidence that he had visited the scene of the explosion, and had heard the accounts of those who had witnessed it; that he should imagine the explosion was caused by a leakage of electricity causing sparks, and that there must have been some explosive mixture—gas in all probability—accumulated in the conduit. If the conduit and works had been properly ventilated the gas would not have accumulated, and the explosion would not have occurred. In cross-examination he stated that if the insulation went down for the first time, when the leakage arose, there would have been no known means of avoiding the leakage. The county court judge nonsuited the plaintiff on the ground that there was no evidence of negligence to go to the jury.

Onus of Proof—*Continued.*

HELD, on appeal—that there was evidence of negligence to go to the jury.

Semble, per Ld. Alverstone, C.J., that in such a case the mere evidence of the explosion is sufficient to place the onus of proof on the defendants.

Kearney v. *London, Brighton and South Coast Ry. Co.* ((1871) L. R. 6 Q. B. 759 ; 40 L. J. Q. B. 285 ; 20 W. R. 24 ; 24 L. T. 913—Ex. Ch.) discussed.

SOLOMONS *v.* STEPNEY BOROUGH COUNCIL, [(1905) 69 J. P. 360 ; 3 L. G. R. 912—Div. Ct.

23. *Railway Company—Passenger Crossing Line at Station—Express Train pulling up suddenly to avoid Running over Passenger—Sudden Stoppage of Train causing Injury to Passenger in Train*—Primâ facie *Evidence of Negligence—Onus on Company to show Absence of Negligence.*]—A passenger in an express train was admittedly injured by the jerk of the train pulling up suddenly to avoid running over a passenger crossing the line at a station.

HELD—that the onus then lay on the company to prove (1) that they acted reasonably in pulling up suddenly ; and (2) that the necessity for so pulling up did not arise from any negligence on their part.

HELD, also, upon the evidence, that the jury were justified in finding that they had not discharged themselves of the onus on the second point.

ANGUS *v.* LONDON, TILBURY, AND SOUTHEND [RY. CO., (1906) 22 T. L. R. 222—C. A.

24. Res ipsa loquitur—*Stone found in a Bath Bun—Warranty on Sale of Goods—Fitness for Particular Purpose—Sale of Goods Act*, 1893 (56 & 57 Vict. *c.* 71), *s.* 14.]—The plaintiff in eating a bun purchased at the defendant's restaurant, suffered injury to his teeth through the presence of a stone. He sued for damages, basing his case alternatively upon (1) breach of warranty of reasonable fitness, and (2) negligence. The jury found (1) that the bun was reasonably fit to be eaten, and (2) that the defendant and his servants had been guilty of no negligence.

HELD, upon an application for a new trial—that the first finding was unsatisfactory, but possibly not so unsatisfactory as to justify the Court in disregarding it ; that the second finding was also unsatisfactory in view of the presumption arising from the doctrine of *res ipsa loquitur* ; that this finding was probably the result of the jury misunderstanding part of the judge's summing up, which seemed to put upon the plaintiff the burden of proving a specific act of negligence, and also to suggest that negligence on one occasion was not negligence in law if the servant was ordinarily careful ; and that therefore there must be a new trial.

CHAPRONIÈRE *v.* MASON, (1905) 21 T. L. R. 633 [—C. A.

IX. PROXIMATE CAUSE.

25. *Collision—Injury to Bystander—Proximate and Effective Causes.*]—A bystander who was injured by a collision between a tram and a trap sued the tramway owners. The following questions were left to and answered by the jury :—

(1) Was the trap negligently driven ? Yes.

(2) Was the tram driver negligent ? Not agreed.

(3) If both drivers were negligent, was the real and effective cause of the collision—

(*a*) the negligence of the trap's driver ? Yes.

or (*b*) the negligence of the tram driver ? No.

HELD—that these findings were not sufficient to support a judgment for the defendants. A jury must be asked to decide whether, assuming negligence on the part of the trap, the tram driver could by reasonable skill and care have avoided the collision.

DEVLIN *v.* BELFAST CORPORATION, [1907] 2 [Ir. R. 437—C. A.

26. *Dangerous Article—Loaded Gun left by Defendant on his Own Land—Intervening Act of Third Party—Proximate Cause of Injury.*]—The defendant left a gun loaded and at full cock standing inside a fence on his land, but beside a gap from which a path led over such land from the public road to his house. The defendant's son, aged between fifteen and sixteen, coming from the road through the gap on his way home, found the gun. He went back with it to the public road, and not knowing that it was loaded, pointed it, in play, at the plaintiff, who was on the road. The gun went off and the plaintiff was injured.

HELD—that the defendant was liable in respect of the injury.

SULLIVAN *v.* CREED, [1904] 2 Ir. R. 317—C. A.

X. RAILWAY MANAGEMENT.

27. *Shunting—Evidence of Negligence.*]—In an action brought by the widow of a railway shunter against the defendants for compensation for the death of her husband, who was killed while shunting, the learned judge held that there was no evidence of negligence, and gave judgment for the plaintiff. The Court of Appeal held that the learned judge had taken too narrow a view of the defendants' duties in these shunting operations, which were very complicated, and said they were not prepared to hold that there was no evidence of negligence.

Decision of Collins, J., reversed.

GRANT *v.* GREAT WESTERN RY. CO., (1898) 14 [T. L. R. 174—C. A.

28. *Shutting Carriage Doors without Warning.*]—In the case of a passenger who is seated in a railway carriage in the course of the journey, not in the act either of entering the train or alighting from it, there is no evidence of negligence against the railway company because the

Railway Management—*Continued.*

shutting of the carriage door by a servant on the platform jambs the passenger's finger, and no warning of the shutting of the carriage door was given to passengers seated inside the carriage, and not in the act of getting in or out.

Drury *v.* North Eastern Ry., [1901] 2 K. B. [322; 70 L. J. K. B. 830; 84 L. T. 658—Div. Ct.

29. *Shutting Carriage Doors—Train in Motion—Door Shut Without Notice—Injury to Hand of Passenger.*]—The plaintiff, a boy, was a passenger in a train which was a few minutes late. At a stopping-place some people got in, and as he was putting some luggage into the rack the train moved off. He had his hand on the doorway at the moment, and the station-master banged the door to on his fingers.

Held—no evidence of negligence.

Per Ld. Alverstone, C.J.—The fact that a train is started too quickly or under circumstances which embarrass passengers, might be evidence of negligence, if an accident happens. . . . But there is no duty to warn people to take their hands out of the way before shutting the doors.

Per Wills, J.—Starting a train before the doors are all shut is not negligence or evidence of it.

Benson *v.* Furness Ry. Co., (1903) 88 L. T. 268 [—Div. Ct.

30. *Invitation to Alight—Train too long for Platform — Passenger Alighting from Train without Looking—Implied Invitation to Alight.*]—The plaintiff was a lady of 59 years of age, and was a passenger by one of the defendants' trains to Shoeburyness, which is a terminus, and with which she was familiar. The train stopped in such a position that the plaintiff's carriage had gone beyond the level part of the platform, and was opposite a sloping part or ramp. The plaintiff did not notice this, and seeing passengers alight she got out, supposing that she would alight on the platform in the ordinary way, but the result was she was thrown down and injured. The plaintiff admitted that she did not look where she was stepping to. The train was too long for the platform, and the officials at Shoeburyness knew this, and they gave no warning to the plaintiff not to alight. The jury found that the defendants were guilty of negligence, and that it was not negligent for the plaintiff to step down without looking, although had she looked down she would have avoided the accident.

Held, affirming the C. A., that the question was entirely one of fact; that there was evidence of negligence on the part of the defendants' servants to go to the jury; that there was evidence of an implied invitation to alight; that the plaintiff might reasonably assume that the condition of the platform where her carriage stopped was normal; that there was evidence upon which the jury were entitled to say that the plaintiff was not guilty of contributory negligence; and that the accident was caused by the acts of the defendants' servants, and not by any want of care on the part of the plaintiff.

Decision of C. A. (18 T. L. R. 295) affirmed.

Glasscock *v.* London, Tilbury, and South-[end Ry. Co., (1903) 19 T. L. R. 305—H. L. (E.)

31. *Invitation to Alight on Platform—Distance from Carriage to Platform—Evidence as to Other Stations—Admissibility.*]—The plaintiff, who was a passenger on the defendants' railway, when alighting from the train at a station, injured herself. The height of the footboard of the carriage in which the plaintiff was travelling above the platform of the station was 22 inches, and the plaintiff alleged that this was an unreasonable height, and that the defendants were negligent in not providing reasonably fit and safe facilities for her to alight. In an action to recover damages the defendants tendered evidence that the platforms at a large number of their other stations in the district were as low as the one in question, and that no accident had happened. The judge admitted the evidence, and the jury found a verdict for the defendants.

Held—that the evidence was admissible.

Manning *v.* London & North Western Ry. [Co., (1907) 23 T. L. R. 222—C. A.

32. *Invitation to Alight—Train Stopping at Terminal Station—Restarting with Jerk—Injury to Passenger Preparing to Alight.*]—A train stopped in a terminal station, and then moved on a little, and the jerk threw down a passenger who had risen to get his hand bag from the rack. He sued the company in respect of his injuries, but alleged no "invitation to alight."

Held—that his pleading disclosed no cause of action, since trains must stop and restart, and the company had given him no reason to believe when he stood up that the train had come to its final resting place.

Goldberg *v.* Glasgow and South-Western [Ry. Co., [1907] S. C. 1035—Ct. of Sess.

33. *Intoxicated Passenger—Duty Towards.*]—If a passenger alights from a train in an intoxicated condition, the company are not liable to him in damages if they do not escort him safely off the platform, and he there meets with an accident.

M'Cormick *v.* Caledonian Ry. Co., (1904) 6 [F. 362—Ct. of Sess.

XI. TRESPASSERS.

34. *Liability of Owners to Trespassers—Traps.*]—If the public enter upon private ground without invitation they take the risk of injury; but if there is a hole or pit near a public road there may be a duty on the owner or occupier to fence it.

Devlin *v.* Jeffray's Trustees, (1903) 5 F. [130—Ct. of Sess.

35. *Machinery on Waste Land — Unfenced from Highway — Child Playing thereon and*

Trespassers—*Continued.*

Injured—No Cause of Action.]—The defendants had on a piece of waste and unfenced land a wheel used in connection with the hauling gear of their colliery. A wire rope passed round the wheel, which was set in motion periodically without any warning from the pit head, some eighty yards off.

A child playing near the wheel was injured by it being suddenly set in motion.

HELD—that the child was a trespasser and had no cause of action.

CUMMINGS *v.* DARNGAVIL COAL CO., LD., (1903) [5 F. 513—Ct. of Sess.

36. *Tidal River—Oyster Beds laid down by Trespasser—Grounding of Ship without Negligence—Damages to the Oysters.*]—The plaintiff had laid down some oyster beds in the Newry river, but he had no title to any part of the bed and soil of the river, and, in the opinion of the Court of Appeal, on the evidence, he was not even lawfully in possession of the site of the oyster beds.

A screw steamer, the property of the defendants, while proceeding down the Newry river, accidentally went ashore at the place where the plaintiff had laid down his oysters, and the plaintiff's oysters were damaged by the vessel in taking the ground, and still more so by the efforts to get her off.

HELD—that there being no sufficient evidence of recklessness or gross negligence on the part of the captain, the plaintiff was not entitled to recover damages for the injuries to the oysters. The standard of care and caution by the owner of a ship lawfully using the water way of a navigable river towards a trespasser thereon considered, and the analogous authorities upon negligence discussed.

PETRIE *v.* OWNERS OF SS. ROSTREVOR, [1898] 2 Ir. R. 556—C. A.

XII. VEHICLES—OWNERS AND DRIVERS.

37. *Passenger on Omnibus — Projection — Injury to Passengers — Liability of Owner of Omnibus.*]—The plaintiff was a passenger on the top of one of the defendants' omnibuses. The driver of the omnibus, in turning out of one street into another, drove the omnibus close to the kerb to avoid an electric tramcar which was going in the same direction, and while passing an electric light standard, which was on the pavement, the jolt of the omnibus grating round the kerb caused the plaintiff's arm to come in contact with a fire alarm finger-post fixed to and standing out from the electric standard. The plaintiff's arm was at the time projecting from the omnibus; the fire alarm finger-post did not project over but came flush with the kerb. In an action to recover damages for negligence there was no evidence that the driver either saw or knew of the fire alarm finger-post.

HELD—that, as it was not shown that there was an obstruction of such a nature that with reasonable care the driver ought to have seen it and ought to have realised the fact that it would or might hit a passenger on the omnibus, there was no evidence of negligence.

SIMON *v.* THE LONDON GENERAL OMNIBUS [CO., LD., (1907) 23 T. L. R. 463—Div. Ct.

38. *Passenger on Omnibus — Projection — Injury to Passenger — Liability of Owner of Omnibus.*]—The plaintiff was a passenger on the top of one of the defendants' omnibuses. In consequence of the road along which the omnibus usually travelled being closed, the driver of the omnibus had to pass through side streets, and in turning the corner of one of the side streets the omnibus was driven close to the kerb, so that the top of the omnibus, owing to the camber of the road, projected over the foot pavement. A street lamp stood at the corner with a small iron arm projecting from it, but not sufficiently far to extend over the roadway. While the omnibus was being driven round the corner the iron arm struck the plaintiff on the chest and injured him. There was no traffic which prevented the omnibus from being driven further away from the kerb. In an action in the county court to recover damages for negligence, the judge found that the driver did not see the projecting arm, and that he was not guilty of negligence in not having seen it and in having driven close to the kerb, and he gave judgment for the defendants.

HELD—that there was evidence to support the finding of the county court judge, which was a finding of fact, and therefore the Court could not interfere.

HASE *v.* LONDON GENERAL OMNIBUS CO., LD., [(1907) 23 T. L. R. 616—Div. Ct.

39. *Traveller—Hire of Brougham, Horse and Driver—Brougham used by Hirer's Traveller—Theft of Goods from Brougham left unattended by Driver—Obligations of Driver—Negligence of Driver — Theft of Jewels — Liability of Jobmaster.*]—The plaintiff, who was a manufacturer of jewellery, hired from the defendant, who was a jobmaster, a brougham and horse with a coachman at £3 a week, the brougham to be used by the plaintiff's traveller for taking out his goods. While the brougham was out one day with the plaintiff's traveller, the latter left it standing outside an hotel when he went in to have his dinner. The coachman thereupon went away to have his dinner. While so unattended the brougham was driven away, and the contents, to the value of £460, were stolen. In an action to recover the value of the goods lost owing to the negligent act of the coachman in leaving the brougham unattended:—

HELD—that it must be taken that the defendant knew that the plaintiff's traveller would not be in the brougham during the whole of his rounds, but would necessarily have to leave it at intervals and by inference an obligation was cast on the defendant to see that the brougham was taken care of during the intervals when the traveller was obliged to leave it; that there was an obligation on the defendant to supply a driver who would use ordinary care in safeguarding its contents during such intervals; and that the loss

Vehicles—Owners and Drivers—*Continued.*

was a direct consequence of the failure of the obligation to prevent intrusion :—

Judgment of Ridley, J. ((1901) 49 W. R. 653 ; 85 L. T. 237 ; 17 T. L. R. 557) reversed.

ABRAHAMS *v.* BULLOCK, (1902) 50 W. R. 626 ; [86 L. T. 796 ; 18 T. L. R. 701—C. A.

XIII. **MISCELLANEOUS.**

40. *Exposing Another's Property — Loss by Theft—Liability for Loss.*]—Where one negligently exposes the property of another to the depredations of a thief, he is liable in damages for the resulting loss.

MARSHALL *v.* CALEDONIAN RY. CO., [1899] 36 [S. L. R. 845.

41. *Personal Injuries to Workman—Removal of Barrels from Lorry to Railway Platform—Common Knowledge and Experience of Mankind.*] — In cases where a labourer sues a railway company for personal injuries the Court is entitled to proceed on the common knowledge and experience of mankind. It is therefore vain to suggest that the movement of barrels from a lorry on to a table or platform of about the same height as the lorry is an operation requiring the use of levers or spraggs, or grappling irons, as that is contrary to common knowledge and observation.

LOUGHNEY *v.* CALEDONIAN RY. CO., (1902) [4 F. 401.

42. *Harbour Commissioners—Defective Ring to Buoy—Failure to apply adequate Test.*]—While moored in Kingston Harbour, the plaintiff's ship, during a gale, parted from her moorings and was damaged. It was proved that the cause of this accident was the fact that the ring to which the ship's cable was attached was improperly welded to the buoy ; that there was no contributory negligence on the part of the plaintiff ; that the buoy had been purchased by the Harbour Commissioners from a well-known manufacturer ; and that neither by inspection or by hammering would the defect have been shown, and that it was not the practice of manufacturers to test these rings unless required to do so by the specification ; but if they were so required (which was frequently the case) they were tested by a *public department*, in a well recognised manner. The Harbour Commissioners had not taken this precaution, and the Court held that the omission to apply such a test was negligence on their part for which they were liable.

BURRELL *v.* TUHOHY, [1898] 2 Ir. R. 271— [Q. B. Div. (Ir.).

NEGOTIABLE INSTRUMENTS.

See BILLS OF EXCHANGE, &c

NEWFOUNDLAND.

See DEPENDENCIES AND COLONIES.

NEW SOUTH WALES.

See DEPENDENCIES AND COLONIES.

NEWSPAPERS.

See CRIMINAL LAW ; LIBEL ; PRESS AND PRINTING.

NEW ZEALAND.

See DEPENDENCIES AND COLONIES.

NEXT OF KIN.

See DESCENT AND DISTRIBUTION.

NON COMPOS PERSON.

See LUNATICS.

NOTARIES.

1. *Appointment of Notaries Public—Colonies—Questions to be Considered—Legal Training—Number of Notaries Practising.*] — Notaries public in the Colonies are appointed in the absolute discretion of the Master of the Faculties under 25 Hen. 8, c. 21, which does not prescribe any definite qualifications.

Some legal training is desirable, but there is no hard-and-fast rule against appointing none but solicitors. In the present case a chartered accountant, the official assignee of insolvent estates in Victoria and a commissioner for taking affidavits, was appointed.

The number of notaries already practising in a town must be considered, for, as notaries incur considerable preliminary expense, unnecessary competition amongst them is not to be encouraged ; but at the same time the first and controlling consideration must be the public convenience. Thirty-six notaries is not too large a number for the State of Victoria, which has a population of 1,200,000, Melbourne alone having 500,000 inhabitants, although in 1859 the then Master considered twenty to be sufficient, the numbers at that date being 400,000 and 50,000 inhabitants.

BAILLEAU *v.* VICTORIAN SOCIETY OF NOTARIES, [1904] P. 180 ; 20 T. L. R. 251—Ct. of Faculties.

2. *Appointment of Notaries Public—Limited Number — Appointment where One ceases to Practise—District Notaries Act*, 1833 (3 & 4 Will. 4, *c.* 70.]—In 1902 the Master of the Faculties increased the number of notaries entitled to practise in Birmingham and vicinity from six to eight. Subsequently another had been appointed to practise there. One of the nine, however, had ceased to practise. On August 5th, 1903, three solicitors, of whom applicant was one, applied to be appointed and admitted. The application was opposed by C. E. Matthews, one of the notaries already practising.

HELD—that the applicant might be appointed as one of the nine had ceased to practise.

CLARKE *v.* MATTHEWS AND OTHERS, [1903] [W. N. 158—Ct. of Faculties.

3. *Appointment of Notaries Public—Evidence Necessary where Number of Notaries alleged Insufficient—District Notaries Act*, 1833 (3 & 4 Will. 4, *c.* 70).]—An application to the Court of Faculties by the registrar of the Archdeaconry Court of Norwich to be appointed a notary public under the District Notaries Act, 1833, was supported by a memorial signed by influential persons in the locality that there was need for another notary.

HELD—that while in this instance the evidence was sufficient, specific evidence that there was need for another notary.

EATON *v.* WATSON, [1904] W. N. 24—Ct. of [Faculties.

4. *Striking Name off Roll — Jurisdiction*—25 Hen. 8, *c.* 21, *s.* 2—*Public Notaries Acts*, 1801 (41 Geo. 3, *c.* 79), *s.* 10; 1833 (3 & 4 Will. 4, *c.* 70). *s.* 4; *and* 1843 (6 & 7 Vict. *c.* 90), *s.* 9.]—The Master of the Faculties possesses inherent power to deal with the roll of faculties, of which he is the custodian; and therefore for proper cause he can remove the name of a notary from the roll.

In the exercise of this power a notary, who had been struck off the roll of solicitors for professional misconduct in administering an estate, was struck off the roll of notaries.

IN RE CHAMPION, [1906] P. 86; 75 L. J. P. 45; [22 T. L. R. 264—Ct. of Faculties.

NOTICE OF DISHONOUR.

See BILLS OF EXCHANGE.

NOTICE TO QUIT.

See LANDLORD AND TENANT.

NOVATION.

See CONTRACT.

NUISANCE.

COL.
I. WHAT AMOUNTS TO 1056
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(*a*) Indictment 1060
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(*d*) Injunction 1063

And see GAS; HIGHWAYS; METROPOLIS; PUBLIC HEALTH, Nos. 43, 51, 52; SEWERS AND DRAINS.

I. WHAT AMOUNTS TO.

1. *Collection of Crowd—Injury to Neighbour's Property.*]—The defendants employed a large number of navvies to construct the foundations of a building to be erected upon land adjoining that of the plaintiffs. Sleeping accommodation for the men was not provided by the defendants upon their own land, and although a road had been provided for the men to enter and leave the works, such road was not effectually fenced off from the plaintiff's land. The men committed various acts of trespass upon the plaintiff's property.

HELD—that there was no case for an interlocutory injunction against the defendants.

CHASE *v.* LONDON COUNTY COUNCIL, (1898) [62 J. P. 184; 14 T. L. R. 177—Stirling, J.

2. *Defective Fence adjoining Highway—Injury to Child climbing on Fence—Cause of Injury.*]—The defendant was the owner of a piece of waste land adjoining the highway, and of a fence separating the land from the highway, which fence was in a rotten condition. Children were accustomed to play upon the waste land, and the plaintiff, a child of four years of age, climbed on the fence for the purpose of looking at the children at play. The fence fell upon the plaintiff through his standing upon it and injured him.

HELD—that the fence was a nuisance to the highway, that the injury to the plaintiff was caused by that nuisance, and that the defendant was liable.

HARROLD *v.* WATNEY, [1898] 2 Q. B. 320; 67 [L. J. Q. B. 771; 78 L. T. 788; 14 T. L. R. 486; 46 W. R. 642—C. A.

3. *Noise—Comfort and Business interfered with.*]—A noise which materially disturbs the comfort of the plaintiff's dwelling-house and prevents people from sleeping at night, and still more, if it does really and seriously interfere with the plaintiff's trade, constitutes an actionable nuisance.

HOWLAND *v.* DOVER HARBOUR BOARD, (1898) [14 T. L. R. 355—C. A.

4. *Noise — Printing Machinery — District where Printing is carried on—Injunction.*]—In considering whether a nuisance has been caused to the plaintiff through interference with his comfort and that of his family in the occupation

What amounts to—*Continued.*

of his house, according to ordinary notions prevalent among reasonable men and women, by reason of noise from the working of the defendants' machine, regard must not be had to the defendants' operations in the abstract and by themselves, but in connection with all the circumstances of the locality, and in particular in reference to the nature of the trades usually carried on there, and the noises and disturbance existing prior to the commencement of the defendants' operations; and if after taking these circumstances into consideration there is a serious and not merely a slight additional interference with the plaintiff's comfort as above defined, it is the duty of the Court to interfere.

The plaintiff had for many years carried on business as a dairyman and resided with his family in a part of the city of London which was almost entirely devoted to the printing trade. There was no appreciable disturbance at night caused by the printing works. In 1904 the defendants took the house next door to the plaintiff's house, and erected a printing machine of modern improved type in the basement, which was worked, when necessary, at night. In an action for an injunction, Warrington, J. held upon the evidence, that the working of the machine at night caused a serious additional disturbance to the plaintiff and his family, so as to constitute a nuisance, and that the plaintiff was entitled to an injunction.

HELD—by C. A., the learned judge having applied the right principle of law, the Court would not interfere with his finding upon the facts.

Decision of Warrington, J. (21 T. L. R. 183) affirmed.

RUSHMERE *v.* POLSUE & ALFIERI, LD., [1906] [1 Ch. 234; 75 L. J. Ch. 79; 54 W. R. 161; 93 L. T. 823; 22 T. L. R. 139—C. A.

5. *Noise—Trade District—Noisy Neighbourhood—Printing Machinery—Increase of Noise.*]—In considering whether an increase of noise on adjoining premises in a locality given up to such trades as printing gives to a householder a right to an injunction, it is proper to consider pre-existing noises and the circumstances of the neighbourhood.

Decision of C. A., *supra*, affirmed.

POLSUE & ALFIERI, LD. *v.* RUSHMER, [1907] [A. C. 121; 76 L. J. Ch. 365; 96 L. T. 510; 23 T. L. R. 362—H. L. (E.).

6. *Noise—Vibration — Landlord and Tenant — Purposes for which both Parties intended Land to be Used.*]—The plaintiffs were the owners of an hotel which adjoined premises on which the defendants carried on business as printers and newspaper publishers. The plaintiffs desired to have additional bedrooms for their hotel, and an architect prepared plans whereby the printing premises should be rebuilt and the defendants' printing business should be carried on in the lower floor, and the defendants should grant a lease of the upper floors to the plaintiffs for bedrooms for the hotel for a term of years at a rent, a communication being made for that purpose between the two buildings, Each party entertained doubts as to the wisdom of combining the printing machinery and the bedrooms in the same building, but these doubts were so far removed by the representation of the architect as to his ability to neutralise such risk that each party signed the agreement in the belief that the noise and vibration would not cause any inconvenience. After the erection of the building the plaintiffs complained of the noise and vibration and refused to take possession or to execute a lease, but they subsequently signed a lease and took possession subject to a memorandum that their doing so should not prejudice their rights or remedies in respect of noise or vibration. The lease contained the ordinary covenant for quiet enjoyment. The noise and vibration caused inconvenience and consequent loss to the plaintiffs. The building was properly constructed and the defendants' machinery was properly worked. The plaintiffs claimed an injunction and damages.

HELD—that, as both parties intended that the building should be used for the purpose and in the way in which it was used, the plaintiffs could not complain, and were, therefore, not entitled to an injunction or damages.

Decision of C. A. of New Zealand (25 N. Z. L. R. 746) reversed.

THE LYTTLETON TIMES CO., LD. *v.* WARNERS, [LD., [1907] A. C. 476; 76 L. J. P. C. 100; 97 L. T. 496; 23 T. L. R. 751—P. C.

7. *Noise — Vibration — Smell — Generating Station for Electrical Power—Reasonable user of Land—Injunction.*]—The plaintiff carried on at Ryde a ladies' school, close to which the defendants had erected large works for generating electricity. The plaintiff complained of the noise, vibration and smell caused by the engines.

HELD, on the facts, that the defendants had seriously interfered with the ordinary comfort of the plaintiff and the inmates of her house, and that the annoyances were not trivial or such as might be expected to arise from an ordinary and reasonable user of the land: and that an injunction should be granted.

Harrison v. *Southwark and Vauxhall Water Co.* ([1891] 2 Ch. 409; 60 L. J. Ch. 630; 64 L. T. 864—Vaughan Williams, J.) distinguished, on the ground that the annoyance was not temporary and caused only by the construction of the works.

Bamford v. *Turnley* ((1862) 3 B. & S.—Bramwell, B.) followed.

KNIGHT *v.* ISLE OF WIGHT ELECTRIC LIGHT [AND POWER CO., LD., (1904) 73 L. J. Ch. 299; 68 J. P. 266; 90 L. T. 410; 20 T. L. R. 173; 2 L. G. R. 390—Joyce, J.

8. *Reasonable Use of Property—Heat, Smell and Noise — Occupiers of Flats — Residential Occupier and Restaurant Keeper.*]—It is relevant in nuisance cases to inquire whether the defendant was making a reasonable use of his premises in doing the acts complained of.

What amounts to—*Continued.*

Dictum of Kekewich, J., in *Reinhardt* v. *Mentasti* ((1889) 42 Ch. D. 685 at p. 690 ; 58 L. J. Ch. 787 at p. 789 ; 38 W. R. 10 ; 61 L. T. 328), dissented from.

Different flats in one building were let to the plaintiff for residential purposes and to A., a restaurant keeper, for the purpose of his business. When the plaintiff took her flat there were only private residences in the building. The plaintiff brought an action against the common landlord and A., to restrain nuisance by heat, smell and noise arising from A.'s use of his premises. The action was discontinued as against the landlord on his making certain structural alterations to abate the nuisance by heat, but A. denied liability, and contested the whole action.

Held—that the defendant A. was entitled to make a reasonable use of his premises for the purpose of his business, but not to make an unreasonable use of them, and, on the facts, that he had made an unreasonable use of his premises, which substantially interfered with the plaintiff's enjoyment of her flat ; and therefore that the plaintiff was entitled to an injunction.

Rule in *Ball* v. *Ray* ((1873) L. R. 8 Ch. 467 at p. 469 ; 21 W. R. 282 ; 28 L. T. (N.S.) 346) applied.

Sanders-Clark *v.* Grosvenor Mansions Co. [and D'Alessandri, [1900] 2 Ch. 373 ; 69 L. J. Ch. 579 ; 48 W. R. 570 ; 82 L. T. 758 ; 16 T. L. R. 428—Buckley, J.

9. *Reasonable Use of Property—Noxious Gases—Lawful Trade—Fat-smelter—Injunction.*]—If a man commits a nuisance, it cannot be said that he is acting reasonably.

The defendant was carrying on a lawful trade, reasonably carrying it on in a place which might fairly be devoted to that particular class of trade—fat-smelter, and carrying it on in such a way that no man could say that he was guilty of extravagance in the manner in which he was conducting his business. The evidence established that a public nuisance was created by the defendant.

Held—that an injunction must be granted.

Bamford v. *Turnley* ((1860) 3 B. & S. 62 ; 31 L. J. Q. B. 286 ; 9 Jur. (N.S.) 377) considered.

Ball v. *Ray* ((1873) L. R. 8 Ch. 467 ; 37 J. P. 500 ; 21 W. R. 282 ; 28 L. T. (N.S.) 346) applied.

Reinhardt v. *Mentasti* ((1889) 42 Ch. D. 685, 690 ; 58 L. J. Ch. 787 ; 38 W. R. 10 ; 61 L. T. 328—Kekewich, J.) explained.

Attorney-General *v.* Cole & Son, [1901] 1 [Ch. 205 ; 70 L. J. Ch. 148 ; 65 J. P. 88 ; 83 L. T. 725—Kekewich, J.

10. *Residential Locality—Racecourse—Sunday Racing—Disturbance of adjoining Inhabitants—Interruption of Divine Service—Obstruction of Public Thoroughfare—Injunction.*]—Injunction granted to restrain horse races from being held on Sunday on a racecourse adjoining a residential locality, it being shown to the satisfaction of the Court that the quiet and comfortable enjoyment of their houses by the inhabitants in the neighbourhood was interfered with, and the services in churches in the locality interrupted, by the shouting and cheering of the crowds collected on the course and the cries of the bookmakers, and also that the public thoroughfares leading to the racecourse were obstructed by vehicles conveying persons to and from the races, and by vehicles drawn up near the racecourse waiting for fares.

Dewar and Others *v.* City and Suburban [Racecourse Co., [1899] 1 Ir. R. 345—V.-C.

II. REMEDIES.

(a) Indictment.

11. *Common Nuisance — Indictment for — Allegation of Nuisance to Certain Persons Dwelling in Private Dwelling-house.*]—J. B. was indicted in two counts for omitting and neglecting to bury certain bodies whereby decomposition set in and "the air was greatly infected and corrupted and was rendered and became for several days offensive, unwholesome, injurious and dangerous to health to the great damage and common nuisance of such of the liege subjects of our lord the King as inhabited in the said house . . . to the evil example of all others in the like case offending and against the peace," &c.

Counsel for the defence, before the prisoner was called upon to plead, contended that the two counts, as drawn, were bad, as they did not allege a nuisance to the public, but only a private nuisance.

Held—that the count was bad.

Rex *v.* Byers, (1907) 71 J. P 205—Kennedy, J.

(b) When Action Lies.

12. *Overhanging Trees—Damage to Crops—Right of Action.*]—If a man's crops are damaged by overhanging branches of his neighbour's trees he may maintain an action for damages, and need not himself go to the expense of removing the branches.

Smith *v.* Giddy, [1904] 2 K. B. 448 ; 73 L. J. [K. B. 894 ; 91 L. T. 296 ; 20 T. L. R. 596 ; 53 W. R. 207—Div. Ct.

13. *Pollution of Atmosphere—Lapse of Forty Years without Complaint—Plaintiff's Land now put to a New Purpose.*] Where a person has for forty years been committing a nuisance, and polluting the atmosphere so as to injure his neighbour's property, the neighbour, having made no complaint during the forty years, cannot sustain an action unless the nuisance is substantially increased.

It makes no difference that his own land has been used during the forty years for manufacturing purposes, and is now for the first time being used for residential purposes.

Harvie *v.* Robertson, (1903) 5 F. 338—[Ct. of Sess.

Remedies—*Continued.*

14. *Smallpox Hospital — Public Health — Balance of Convenience* — Quia timet *Action — Scientific Evidence.*] — Objection was taken by residents to the erection by a municipality of a smallpox hospital on the ground that a smallpox hospital is *per se* a danger to health, and is both a public and private nuisance. Scientific evidence was offered as to the aerial convection of this disease for a considerable distance. It appeared that the hospital was well managed and the site carefully selected.

HELD—that to justify an injunction it was necessary not merely to show that the hospital would abridge liberty or create anxiety, but that it would prove an actionable nuisance, and that the plaintiffs having failed to show this, the action must be dismissed.

Quære, whether in actions of this nature evidence as to other similar hospitals is admissible.

ATTORNEY-GENERAL *v.* NOTTINGHAM COR- [PORATION, [1904] 1 Ch. 673; 73 L. J. Ch. 512; 68 J. P. 125; 52 W. R. 281; 90 L. T. 308; 20 T. L. R. 257; 2 L. G. R. 698—Farwell, J.

15. *Smallpox Hospital—Residential District.*] —The defendants, a joint hospital board, had commenced to erect a smallpox hospital. Within a quarter of a mile of the building there were 137 houses with about 753 inhabitants, and within half a mile there were 422 houses with about 2,321 inhabitants and four public institutions with about 361 residents. There was nothing to show that the defendants were precluded from selecting a site outside their respective districts, if necessary, or that they had attempted to do so. There was conflicting expert evidence as to the suitability of the site selected, and as to the risk of the spread of smallpox from a smallpox hospital by reason of the possibility of the disease being carried, without actual contact, through the air for a considerable distance.

HELD—that an injunction to restrain the erection of a smallpox hospital should not be granted.

ATTORNEY-GENERAL *v.* RATHMINES AND PEM- [BROKE HOSPITAL BOARD, [1904] 1 Ir. R. 161—C. A.

16. *Statutory Powers—Construction.*]—A company obtained exclusive power under a lighting order to supply electricity within a certain area for all purposes, public and private, and to use the same for the purposes of any undertaking. On the same day they obtained for the same area a tramway licence, authorising them to make and operate tramways and to generate and supply electricity for the purpose.

The lighting order imposed as a condition that the company should be liable for any nuisance caused by them. The tramway licence did not repeat this condition.

HELD—that the condition applied also to operations under the tramway licence.

DEMERARA ELECTRIC CO., LD. *v.* WHITE, [1907] [A. C. 330; 76 L. J. P. C. 54; 96 L. T. 752—P. C.

17. *Statutory Powers—Unreasonable Exercise —Cause of Action—Injunction—Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. *c.* 18), *s.* 68.] —A company acting under statutory powers is treated as a private individual acting within his own rights. If it does an act which it is authorised by law to do, and does it in a proper way, though the act works a special injury to a particular individual, such individual cannot maintain an action, and is without remedy unless one is provided by statute.

Mayor, &c., of East Fremantle v. *Annois* ([1902] A. C. 213; 71 L. J. P. C. 39; 85 L. T. 732; 18 T. L. R. 199, *see* DEPENDENCIES, No. 63) followed.

If, however, such a company does an authorised act in a negligent or unreasonable way, it will be liable to an action for damages, and, in a proper case, for an injunction; and the fact that a right to compensation is given by statute does not exclude the restraining jurisdiction of the Court.

Coats v. *Clarence Ry. Co.* ((1830) 1 R. & M 181; 32 R. R. 183) applied.

A railway company were carrying on work by night as well as by day on the site of a proposed station, and the plaintiff alleged that his house was thereby rendered uninhabitable; he claimed damages and an injunction.

HELD—that, assuming it to be unreasonable to work at night, there was a good cause of action.

ROBERTS *v.* CHARING CROSS, EUSTON AND [HAMPSTEAD RY. CO., (1903) 87 L. T. 732; 19 T. L. R. 160—Farwell, J.

18. *Statutory Powers—Reasonable Care to do no Unnecessary Damage—Nuisance before Statutory Powers in Force.*]—Where work is being done under statutory powers, "the only obligation on the defendants is to use reasonable care to do no unnecessary damage to the plaintiffs." See *East Fremantle Corporation* v. *Annois* ([1902] A. C. 213).

Householders in London brought an action against a "tube" railway company, their chief complaint being that work, with its resulting noise, went on by night as well as by day.

HELD—that on the facts, the defendants were acting reasonably in working by night, and were taking all reasonable means to reduce the noise; and that therefore they were protected by their statutory powers; but, that they were liable in respect of a particular admitted nuisance committed while they were in possession and working by private agreement only in anticipation of their statutory powers.

ASH AND ANOTHER *v.* GREAT NORTHERN, [PICCADILLY AND BROMPTON RY. CO., (1903) 67 J. P. 417; 19 T. L. R. 639—Kekewich, J

Remedies—*Continued.*

(c) Damages.

19. *Injunction—Damages—General Damages.*]—A plaintiff in a nuisance action in respect of noise and vibration succeeded in his claim for an injunction. He had claimed no special damages.

HELD—that under his claim for general damages he was entitled only to 40*s.*, not as compensation, but as an acknowledgment of the wrong done to him.

LIPMAN *v.* PULMAN & SONS, (1904) 91 L. T. 132 [—Kekewich, J.

(d) Injunction.

20. *Cesser of Nuisance before Trial—Discretion of Court.*]—The fact that a company which, by its works, caused a nuisance to the plaintiff, has gone into liquidation and that the works have stopped before the trial, is not of itself sufficient to disentitle the plaintiff to an injunction.

Dunning v. *Grosvenor Dairies, Ld.* ([1900] W. N. 265, Joyce, J., *see* BARRISTERS, No. 14) not followed.

DEAN AND CHAPTER OF CHESTER AND OTHERS [*v.* SMELTING CORPORATION, LD., (1901) 85 L. T. 67; 18 T. L. R. 743—Farwell, J.

21. *Pig-keeping—Abatement after Action—Injunction refused—Costs.*]—In an action by the Attorney-General on the relation of a rural district council against pig-keepers, who kept 500 pigs on premises adjoining a village street, the judge found as facts that at the date of writ a public nuisance existed, but that it had been subsequently abated.

HELD—that no injunction ought to be granted, and that there should be no order as to costs.

ATTORNEY-GENERAL *v.* SQUIRE, (1907) 5 [L. G. R. 99—Eady, J.

22. *Temporary Nuisances—Electric Lighting Act—Provisional Order.*]—The Court will grant an injunction to restrain a nuisance from noise and vibration caused by a local authority working under a provisional order, notwithstanding the fact that by experiment and alteration the nuisance may be abated by improvements in the machinery.

The principle referred to by Vaughan Williams, J., in *Harrison* v. *Southwark and Vauxhall Water Co.* ([1891] 2 Ch. 409; 60 L. J. Ch. 630; 64 L. T. 864) is not applicable where property is shaken and thereby physically damaged.

Bamford v. *Turnley* ((1862) 3 B. & S. 62) discussed.

COLWELL AND OTHERS *v.* ST. PANCRAS [BOROUGH COUNCIL, [1904] 1 Ch. 707; 73 L. J. Ch. 275; 68 J. P. 286; 52 W. R. 523; 90 L. T. 153; 20 T. L. R. 236; 2 L. G. R. 518 —Joyce, J.

NULLITY OF MARRIAGE.

See HUSBAND AND WIFE.

OATHS AND AFFIRMATIONS.

See CRIMINAL LAW; EVIDENCE; PRACTICE AND PROCEDURE.

OBSCENE BOOKS.

See CRIMINAL LAW AND PROCEDURE.

OBSTRUCTING JUSTICE.

See CRIMINAL LAW AND PROCEDURE.

OFFICIAL SECRETS ACT, 1889.

See CRIMINAL LAW AND PROCEDURE.

OMNIBUSES.

See NEGLIGENCE; STREET TRAFFIC.

ONTARIO.

See DEPENDENCIES AND COLONIES.

OPEN SPACES AND RECREATION GROUNDS.

And see BURIAL AND CREMATION; EASEMENTS.

1. *Children—Dangerous to Children—Pond in Public Park—Duty of Local Authority.*]—A child was drowned in an artificial pond in a public park, and its parent sued the authority who owned the park, complaining of the dangerous nature of the pond, and the non-provision of an attendant to protect children.

HELD—no cause of action.

HASTIE *v.* EDINBURGH MAGISTRATES, [1907] [S. C. 1102—Ct. of Sess.

2. *Playing Games—Open Spaces—Recreation Ground—Personal Injuries—Obvious Danger.*]—A cricketer, while playing that game on an

open space, vested in and controlled by the London County Council, ran upon an iron indicator provided by the council in order to show the number of the pitch, there being about a hundred cricket pitches on the ground. His eye was destroyed by the accident.

HELD—that the council were not liable for negligence, because if a grown man chooses to go, for purposes of recreation, upon a ground upon which there is an open and obvious danger, the owner of the ground cannot be liable for injuries resulting from that danger.

GILES *v.* LONDON COUNTY COUNCIL, (1904) 68 [J. P. 10 ; 2 L. G. R. 326—Kennedy, J.

OVERSEERS.

See POOR LAW.

OYSTERS.

See FISHERIES.

PARENT AND CHILD.

See BASTARDY ; INFANTS.

PARISH.

See ECCLESIASTICAL LAW ; LOCAL GOVERNMENT.

PARISH COUNCILS.

See LOCAL GOVERNMENT.

PARKS.

See OPEN SPACES.

PARLIAMENT.

1. *Parliamentary Deposit—Return of Deposit—Bill not proceeded with—Railway Deposits Act*, 1846 (9 Vict. *c.* 20), *s.* 5.]—Where the promoters of a Bill in Parliament have deposited a sum of stock and cash in Court by way of deposit, and have obtained the leave of both Houses to suspend proceedings until the next session, they may, by virtue of the Railway Deposits Act, 1846, s. 5, with the sanction of both Houses and of the Court, obtain a return of the stock and cash.

RE CENTRAL LONDON RAILWAY BILL, [1901] [W. N. 177—Byrne, J.

2. *Parliamentary Deposit — Light Railway Order—Advance of Deposit—Covenant by Company—Breach.*]—By a Light Railway Order, a company was empowered to construct a light railway within a certain time, and was required to deposit £3,000, which was advanced to the company by the plaintiff. The company covenanted that they would not, without the plaintiff's consent, serve any notice to treat or enter into any contract or incur any liability which might in any way directly or indirectly charge or incumber the deposit. The plaintiff's time for completion had been once extended, but the plaintiff alleged that in breach of the covenant above referred to, the company had obtained a further extension of time, which he said would enable them to incur further liabilities. They had also issued certain debentures. He now moved for judgment in default of appearance, and asked for an injunction in terms of the covenant.

HELD—that while the Court would sanction nothing which would prevent the proper application of the fund, as it would be against public policy in this case, having regard to the covenant, the plaintiff was entitled to protection.

BEECHAM *v.* LASTINGHAM AND ROSEDALE [LIGHT RY. CO., [1907] W. N. 101 — Kekewich, J.

PARTICULARS.

See AUCTIONS ; COUNTY COURTS ; PRACTICE AND PROCEDURE ; SALE OF LAND.

PARTITION.

1. *Claim for Sale of Real Estate by Infant as Sole Plaintiff—Order for Sale—Conversion—Partition Act*, 1876 (39 & 40 Vict. *c.* 17), *s.* 6.] —An infant's share in realty will not be converted by a sale of such interest in a partition action in which the infant was plaintiff, where the judgment directed a sale, if (as was found to be the fact) the defendants were entitled to a moiety, although the infant has, in his pleadings, requested a sale ; the form of the judgment precluding the view that the sale was made at the request of the infant.

Howard v. *Jalland* (W. N. (1891) 211) approved.

Dicta of Jessel, M.R., in *Wallace* v. *Greenwood* ((1880) 16 Ch. D. 362 ; 50 L. J. Ch. 289 ; 43 L. T. 720) considered.

IN RE NORTON, NORTON *v.* NORTON, [1900] 1 [Ch. 101 ; 69 L. J. Ch. 31 ; 48 W. R. 140 ; 81 L. T. 724—Byrne, J.

2. *Conversion—Money received on Sale—Distribution—"Persons becoming absolutely Entitled"—Partition Act*, 1868 (31 & 32 Vict. *c.* 40), *s.* 8—*Leases and Sales of Settled Estates Act*,

1856 (19 & 20 Vict. *c.* 120), *s.* 23.]—Land was sold under the Partition Act, 1868, and by an order of Court a testator's share of the proceeds was paid out to the trustees of his will, and invested otherwise than in land, in accordance with the trusts of the will. One of the beneficiaries of the said trust fund died intestate.

HELD—that his share of the fund so invested devolved on his legal personal representative, and not on his heir-at-law.

In re Hobson's Trusts ((1878) 7 Ch. D. 708; 47 L. J. Ch. 310; 26 W. R. 470; 38 L. T. (N.S.) 365—C. A.) was not overruled by

In re Smith ((1888) 40 Ch. D. 386; 58 L. J. Ch. 108; 37 W. R. 199; 60 L. T. 77—C. A.).

IN RE MORGAN, SMITH *v.* MAY, [1900] 2 Ch. [471; 69 L. J. Ch. 735; 48 W. R. 670—Stirling, J.

3. *Costs—Discretion of Court—Partition Act*, 1868 (31 & 32 Vict. *c.* 40), *s.* 10, *Ord.* 65, *r.* 14B.]—Since the passing of the Partition Act the usual practice has been to give the costs of all parties out of the proceeds of sale. That practice ought not to be departed from except for special reasons. The Court has a discretion as to costs, and will not allow costs to be accumulated in such a way as to do injustice between the parties. It is to be remembered that the sale of an estate held in shares in its entirety is a great advantage to everybody, that the sale of such an estate in entirety produces a larger sum than could be got by the owner of an undivided share, and is more beneficial to the whole. If, therefore, no injustice will be done, the ordinary practice will not be departed from, and costs will be directed to be paid out of the estate.

GRAHAM *v.* LORD CLINTON, (1900) 81 L. T. 717 [—Stirling, J.

4. *Proceeds of Sale—Costs—General Rule as to Separate Sets of Costs.*]—As a general rule, without limiting the judicial discretion, only one set of costs will be allowed out of the entire proceeds of sale of real property in a partition action in respect of each share of the property which those proceeds represent.

Catton v. *Banks* ([1893] 2 Ch. 221; 62 L. J. Ch. 600; 41 W. R. 429; 68 L. T. 245—Kekewich, J.) followed.

IN RE VASE, LANGRISH *v.* VASE, [1901] W. N. [121; 84 L. T. 761—Cozens-Hardy, J.

5. *Permanent Improvements—Form of Minutes of Judgment.*]—Form of minutes of judgment approved by the Court as to expenditure on permanent improvements.

WILLIAMS *v.* WILLIAMS, [1899] 68 L. J. Ch. [528; 81 L. T. 163—Kekewich, J.

6. *Permanent Improvements — Allowance — Form of Judgment.*]—A tenant in common, claiming partition, is entitled whether charged with occupation rent or not, to have in the judgment for partition an inquiry as to expenditure properly made in permanent improvements to the property, during the co-ownership, and the inquiry should be reciprocal.

Williams v. *Williams* (68 L. J. Ch. 528; 81 L. T. 163—Kekewich, J., *supra*) approved.

KENRICK *v.* MOUNTSTEVEN, (1899) 48 W. R. [141—Cozens-Hardy, J.

7. *Sale not asked for—Defendants objecting to Partition—Costs—Incidence of—Costs up to date of Hearing—Partition Act*, 1868 (31 & 32 Vict. *c.* 40), *s.* 10.]—Where partition is asked for, but no advantage is taken of the Partition Act, 1868, by asking for a sale, the practice still is to allow no costs up to the hearing.

The owners of five equal undivided shares in certain freeholds brought an action asking for partition only against the other seven owners who did not desire a partition.

HELD—that there should be no order as to costs prior to the hearing: the subsequent costs to be borne rateably by all the owners.

Richardson v. *Feary* ((1888) 39 Ch. 45; 57 L. J. Ch. 1049; 36 W. R. 807; 59 L. T. 165—North, J.) followed.

HILLS *v.* ARCHER, (1904) 91 L. T. 166—[Farwell, J.

8. *Sale or Valuation—Right to ask for Sale—Discretion of Court—Partition Act*, 1868 (30 & 31 Vict. *c.* 40), *ss.* 3, 4, 5.]—Plaintiff and defendant were each entitled to an undivided moiety of a house and garden. The plaintiff asked for a sale of the property and the defendant offered to purchase his interest at a valuation. The county court judge made an order that a firm of estate agents should value the property and the plaintiff should convey his estate to the defendant and receive half the valuation.

HELD—that the county court judge could not force the plaintiff to lose his right to a sale through the defendant offering to buy; and that the order for valuation and sale should be discharged; and that an order should be made that there should be a sale with leave to both parties to bid, the plaintiff to have the costs of the appeal.

Pitt v. *Jones* ((1880) 5 App. Cas. 651; 49 L. J. Ch. 795; 29 W. R. 33; 43 L. T. 385—H. L. (E.)) followed.

MORANT *v.* GODDEN, (1902) 18 T. L. R. 421—[Div. Ct.

9. *Shares in Mortgage—Mortgagor in Possession of Entirety without payment of Rent—Occupation Rent—Whether chargeable as against Mortgagee*—4 Anne, *c.* 3, *s.* 27.]—In a partition action it appeared that an owner of a share of certain premises, who had mortgaged his interest, had been in occupation of the entirety for some time, and in answer to an inquiry the chief clerk had found the sum of £325 due from him by way of occupation rent. A sale having taken place an application was made asking whether this sum could be set off against the share of the mortgagor to the prejudice of the mortgagee.

HELD—that the mortgagor, not having been tenant or bailiff of his co-owners, nothing could have been recovered from him at law, and that the statute 4 Anne, c. 3, did not apply. That the practice was to direct an inquiry such as that in this case, but that it could not extend to a fund that did not belong to the mortgagor. That a legal mortgagee was in a similar position to a purchaser, and therefore as against him such sum could not be set off.

Graham v. *Cole* ((Seton, p. 1541); *Heckles* v. *Heckles* [1892] W. N. 188) doubted.

HILL *v.* HICKIN, [1897] 2 Ch. 579; 66 L. J. [Ch. 717; 77 L. T. 127; 46 W. R. 137—Stirling, J.

10. *Tenant of Undivided Moiety — Partition Act*, 1868 (31 & 32 Vict. *c.* 40), *ss.* 4, 9.]—An order for sale in lieu of partition can be made under the Partition Acts where the plaintiffs are the owners of one undivided moiety of the premises and the sole defendant is the lessee of the other undivided moiety under a lease for seven years granted by the owner of that moiety.

MASON *v.* KEAYS, (1898) C. A.; 78 L. T. 33—[C. A.

PARTNERSHIP.

COLS.

I. CONSTITUTION OF PARTNERSHIP . 1069

II. RIGHTS AND LIABILITIES OF PARTNERS.
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And see ARBITRATION, Nos. 35, 41, 43; BANKRUPTCY; CONFLICT OF LAWS; CONTRACTS; MORTGAGES, No. 46; PRACTICE AND PROCEDURE; RECEIVERS.

I. CONSTITUTION OF PARTNERSHIP.

1. *Dissolution — Continuance of Business— Pre-emption—Partnership at Will—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *s.* 27.]—Articles of partnership declared that if the partnership were determined by notice or by effluxion of time, the plaintiff might buy out the defendant at a valuation.

HELD—that a pre-emption contract such as this was not inconsistent with the existence of a partnership at will.

Cox v. *Willoughby* ((1880) 13 Ch. D. 863; 49 L. J. Ch. 237; 28 W. R. 503; 42 L. T. 125—Fry, J.) followed.

BROOKS *v.* BROOKS, (1901) 85 L. T. 453—[Farwell, J.

2. *Landlord of Business Premises advancing Money for Fixtures, also for Business generally —Control of Business—Proviso not to be deemed a Partner.*]—B. let business premises to A., and advanced a large sum for fitting them up, the fittings, &c., to become his property at the end of the lease unless the loan was first repaid. By a contemporaneous agreement B. agreed to advance further sums, the total amount of the advances to be credited to him in the books as loan capital carrying interest at 7½ per cent. A. was to have a salary as manager and to take half profits; B. to take the other half as "extra interest." B.'s consent was necessary for the appointment of assistants, and in certain events he might appoint a cashier to be paid by A.; the latter was to devote his whole time to the business.

HELD—that B. was liable for the debts of the business as a partner, and that a proviso in the agreement that he should not be deemed a partner could not prevent this result.

STEWART *v.* BUCHANAN, (1904) 6 F. 15—Ct. of [Sess.

3. *Loan of Money to Firm at rate of Interest varying with Profits of Business—Dissolution— Subsequent Agreement to continue Loan—Postponement—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *s.* 2, *sub-s.* (3) (d); *s.* 3.]—In 1893 a creditor advanced various sums of money to a firm of B. & M. under an agreement to take a share of profits in lieu of interest. In 1895 the firm dissolved partnership, and M. took over the business and liabilities, entering into a fresh agreement with the creditor to pay 5 per cent. interest on the money advanced. M. became bankrupt in 1896, and the creditor proved for the monies advanced.

HELD—that the money must be considered to have been advanced under the agreement of 1893, and not under that of 1895, and that the proof could not be admitted until all the other creditors should have been paid in full.

IN RE MASON, EX PARTE BING *v.* CRAIG, [1899] [1 Q. B. 810; 68 L. J. Q. B. 466; 47 W. R. 270; 80 L. T. 92; 6 Manson, 169—Wright, J.

4. *Partnership Articles — Power for any Partner to Introduce another Person or a Successor — Consent of continuing Partners— Nominee's Rights — Equitable Relief—Specific Performance.*]—If partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not; nor why, having so agreed, they should not be bound by the agreement. Persons who enter into such an agreement consent prospectively and once for all to admit into partnership any person who is willing to take advantage of their agreement, and to observe those stipulations, if any, which may be made conditions of his admission. Those who form such partnerships, and those who join them after they are formed, assent to become partners with any one who is willing to comply with certain conditions.

To make a person a partner with two others,

Constitution of Partnership—*Continued.*

their consent must clearly be had, but there is no particular mode or time required of giving that consent; and if three enter into partnership by a contract which provides that, on one retiring, one of the remaining two, or even a fourth person who is no partner at all, shall name the successor to take the share of the one retiring, it is clear that this would be a valid contract which the Court must perform, and that the new partner would come in as entirely by the consent of the other two as if they had adopted him by name.

The person so introduced becomes entitled to such relief as the courts of equity are in the habit of granting to persons who stand in the relationship of partners. Such relief does not include, as a rule, specific performance of an agreement to become partners.

Loregrove v. *Nelson* ((1834) 41 R. R. 1; 3 My. & K. 26; 3 L. J. Ch. 108) and *Page* v. *Cox* ((1851) 10 Hare, 163) considered.

Byrne *v.* Reid, [1902] 2 Ch. 735; 71 L. J. Ch. [830; 51 W. R. 52; 87 L. T. 507—C. A.

5. *Sale of Business—An Annuity Part Consideration—Bankruptcy of Purchaser—Valuation of Annuity—Postponement—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *ss.* 2 (3) (c), 3.] —S. assigned a business to G. and W. The payments, including an annuity, were all made out of profits, no other fund being in fact contemplated out of which they could be made. G. became bankrupt, and S. claimed to prove for the capitalised value of the annuity.

Held—the claim in respect of the annuity should not, if provable, have been based on a merely arithmetical calculation of the value of the annuity. It should have been valued by the trustee, who was entitled to take into consideration the precarious nature of the business out of the proceeds of which the payments were to be made, and also the provisions for redemption and reversion—Wright, J.

Held (reversing Wright, J.)—that the annuity was not a share of the profits within sect. 3 of the Partnership Act, 1890.

In re Gieve, Ex parte Shaw *v.* Mason, [(1899) 47 W. R. 616; 80 L. T. 737; 6 Manson, 249—C. A.

II. RIGHTS AND LIABILITIES OF PARTNERS.

(a) Accounts.

6. *Ascertaining deceased Partner's Share—To be based on Annual Account—Whether Goodwill to be valued.*]—Articles of partnership provided for annual accounts and valuations of all the partnership effects, mentioning specifically capital, stock in trade, credits, &c., but not the goodwill. The share due to the estate of any partner dying was to be based on the preceding account.

Held—that the executors of a deceased partner were not entitled to have a sum for the goodwill of the business included in the valuation.

Stewart v. *Gladstone* ((1879) 10 Ch. D. 626; 27 W. R. 512; 40 L. T. 145—C. A.) followed.

Scott *v.* Scott, (1904) 89 L. T. 582—Joyce, J.

7. *Mortgage of Share—Dissolution—Sale of Share Mortgaged to Co-partner—Right of Mortgagee to an Account from Date of Dissolution—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *s.* 31.]—Articles of partnership were entered into between the defendants W. S. W. and D. D. The plaintiff (the defendant, W. S. W.'s father) advanced the consideration monies on his son's behalf. To secure this advance W. S. W. mortgaged his partnership interest in the business and his share of profits to the plaintiff. D. D. received notice of this mortgage security. The defendants agreed to dissolve partnership, and the defendant, W. S. W., without the consent of the plaintiff, agreed to sell to the defendant, D. D., his share of the partnership for £500 and to accept £40 for profits. The plaintiff claimed a charge on the defendant W. S. W.'s share and all proper and necessary accounts.

Held—that the agreement to sell was not binding on the plaintiff; that so long as the partnership lasted, the plaintiff could not, in the absence of fraud, impeach the partnership accounts; that the dissolution determined the rights of the parties, and the plaintiff was entitled to receive the share of the partnership assets to which W. S. W. was entitled as between himself and D. D., and for the purpose of ascertaining that share, to an account as from the date of the dissolution and to have the value of the goodwill ascertained, and that account he was entitled to under sect. 31 of the Partnership Act, 1890.

Appeal from decision of Farwell, J. ((1900) 48 W. R. 521; 82 L. T. 255; 16 T. L. R. 277) dismissed.

Watts *v.* Driscoll, [1901] 1 Ch. 294; 70 [L. J. Ch. 157; 49 W. R. 146; 84 L. T. 97; 17 T. L. R. 101—C. A.

8. "*Profits*"—*Mode of Ascertaining Profits in the Absence of Special Agreement.*]—The plaintiff and defendant, solicitors, agreed to enter into partnership by an agreement dated July 22nd, 1880, whereby the defendant was to receive £300 per annum up to the end of the year 1880, £350 per annum for the following two years. From January 1st, 1885 (in lieu thereof), the defendant was to receive one-fourth of the profits (if the business should have realised a net profit of not less than £1,600 per annum in the meantime) for the next five years, and after that one-third of the profits. This partnership was dissolved in 1899. No division of the profits had ever been made, and in taking the partnership accounts the question arose how the profits were to be ascertained.

Held—that the partnership commenced with the written agreement; that in the absence of special agreement the profits of the year must necessarily be the receipts of that given year after the expenditure and whatever else in the

Rights and Liabilities of Partners—*Continued.*

way of depreciation fund and so on applicable to the particular case is set against it; and that it must be ascertained what cash has been received and what cash has been expended in each year only for the purpose of ascertaining the profits of that year.

BADHAM *v.* WILLIAMS, (1902) 86 L. T. 191—[Kekewich, J.

9. *Right of Partner to Appoint Agent to examine and copy Books or take Extracts—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *s.* 24, *sub-s.* 9.]—The plaintiffs were sleeping partners in a brewery business, which was carried on by the defendants as the managing partners. The plaintiffs had a considerable interest in the business. One of them, a clergyman, resided in Canada. Some of the other plaintiffs were ladies, and all of them were persons of no technical experience in such a business. One of the articles of partnership (No. 16) provided that "Proper books of account shall be kept by the managing partners for the time being in which all transactions relating to the partnership business shall be duly entered," and that "each of the partners shall have free access to and liberty to examine and copy or take extracts from any of the books and writings of the partnership at all reasonable times."

HELD—that the sleeping partners had a right, conferred by article of partnership and also by sub-sect. 9 of sect. 24 of the Partnership Act, 1890, to claim inspection by some person (other than themselves) to whom the defendants could have no reasonable objection provided that the purpose for which they sought to use the right of inspection was one consistent with the main purposes and well-being of the whole partnership.

Decision of Joyce, J. ([1901] 1 Ch. 724; 84 L. T. 299; 17 T. L. R. 333) reversed.

BEVAN *v.* WEBB, [1901] 2 Ch. 59; 70 L. J. Ch. [536; 49 W. R. 548; 84 L. T. 609; 17 T. L. R. 440—C. A.

(b) Authority.

And see title AUCTIONS, No. 18.

10. *Assignment of same Debt by Each of Two Partners at different Times—Priority.*]—A firm supplied goods to another firm and were paid each month for the goods supplied in the previous month. On December 21st one of the partners assigned to the defendants the money to become due on January 11th, and the defendants gave notice to the debtors on January 11th of that assignment. On January 4th the other partner assigned to the plaintiff the same debt, and the plaintiff gave notice of it to the debtors on the same day.

HELD—that the plaintiff's assignment was good and took priority.

MARCHANT *v.* MORTON, DOWN & Co., [1901] [2 K. B. 829; 70 L. J. K. B. 820; 85 L. T. 169; 17 T. L. R. 640—Channell, J.

11. *Authority of Partner—Trading Firm—Auctioneers—Bill of Exchange.*]—The Divisional Court having held that auctioneers do not carry on a "trade" so as to make one partner liable upon a bill of exchange accepted in the firm name by his co-partner without the knowledge or authority of the former:—

HELD—by C. A., that (whether this was or was not so as a general rule) on the construction of the particular partnership deed, one partner could bind the firm by accepting bills.

Decision of Div. Ct. ([1906] 2 K. B. 321; 75 L. J. K. B. 627; 54 W. R. 537; 95 L. T. 96; 22 T. L. R. 591) reversed on a new point.

WHEATLEY *v.* SMITHERS, [1907] 2 K. B. 684; [76 L. J. K. B. 900; 97 L. T. 418; 23 T. L. R. 585—C. A.

12. *Book Debts—Assignment by Deed—One Partner's Signature Forged—Effect of—Bankruptcy of Firm—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *s.* 6.]—One of two partners in a firm assigned by deed the firm's book debts as security for a firm debt, signing his own name to the deed, and forging his partner's. In the firm's bankruptcy:—

HELD—that the deed, whether valid or invalid as a deed, operated as a good equitable assignment, being an instrument or act relating to the firm's business and done in a manner intended to bind the firm by one who had authority to bind it.

IN RE BRIGGS & Co., EX PARTE WRIGHT, [1906] [2 K. B. 209; 75 L. J. K. B. 591; 95 L. T. 61—Bigham, J.

13. *Scope of Business—Transaction by Partner outside Scope of Partnership—Secret Benefit—Right of other Partner to Share Profits—Alleged Breach of Good Faith.*]—Apart from any provision in the partnership articles, if one of two partners enters privately into a transaction entirely outside the scope of the partnership and unconnected with it, and not in rivalry with it, the other partner has no equitable claim to share in the profits of such transaction.

Three persons under a partnership arrangement bought certain building properties and also shares in a company owning other building properties in the same locality. Two of the partners then bought other property from the company.

HELD—that they were not bound to account to the third partner for their profits.

Cassels v. *Stewart* ((1881) 6 App. Cas. 64; 29 W. R. 636—H. L. (Sc.)) applied and followed.

TRIMBLE AND ANOTHER *v.* GOLDBERG, [1906] [A. C. 494; 75 L. J. P. C. 92; 22 T. L. R. 717—P. C.

14. *Wrongful Act of Managing Partner—Acting in the Ordinary Course of the Business—General Scope of Authority—The Firm held liable for his Tort—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *s.* 10.]—One of the partners of a firm, whose business it was to obtain by legitimate means information about the business contracts, &c. of competitors, bribed the clerk of a rival to break his contract of service by betraying his master's secrets. The bribe came out of the

Rights and Liabilities of Partners—*Continued.*

firm's money, and the profits went into their assets.

HELD—that, the partner having done illegitimately that which it was part of his business to do legitimately, the case fell within sect. 10 of the Partnership Act, 1890; and that the firm was liable for his tortious act.

Decision of Kennedy, J. ((1902) 51 W. R. 99; 18 T. L. R. 631) affirmed.

HAMLYN *v.* HOUSTON & Co., [1903] 1 K. B. 81; [72 L. J. K. B. 72; 87 L. T. 500; 19 T. L. R. 66—C. A.

(c) Expulsion.

15. *Expulsion Clause—"Scandalous conduct detrimental to Partnership Business"—"Breach of Duty as a Partner"—Conviction for dishonesty—Interim Injunction.*]—A partnership deed provided that if a junior partner were "addicted to scandalous conduct detrimental to the partnership business," or guilty of "any flagrant breach of the duties of a partner," the senior partner might give him notice of expulsion.

The junior partner was convicted and fined the maximum penalty for travelling on a railway without a ticket and with intent to defraud, and thereupon the senior partner served him with notice of expulsion. The junior partner commenced an action claiming that the notice was invalid; and he now asked for an interim injunction until trial to restrain the senior partner from excluding him from the partnership or publishing notice of the dissolution.

HELD—that, as the plaintiff had admittedly been convicted of dishonesty, the Court ought not to grant an interim injunction, and, *semble*, his conduct would be held at the trial to justify the expulsion.

N.B.—The parties eventually came to terms before the trial.

CARMICHAEL *v.* EVANS, [1904] 1 Ch. 486; 73 [L. J. Ch. 329; 90 L. T. 573; 20 T. L. R. 267—Byrne, J.

16. *Notice of Expulsion—Arbitration—Quasi judicial position of Co-partners.*]—Partners, in exercising the power of giving notice of expulsion to a co-partner for breach of partnership articles, must do so in a quasi-judicial manner, and give the person complained of a hearing. Disputes between partners involving questions of law, or where a *primâ facie* case of fraud is set up, should not as a rule be referred to arbitration.

BARNES *v.* YOUNGS, [1898] 1 Ch. 414; 67 L. J. [Ch. 263; 46 W. R. 332—Romer, J.

(d) Retiring Partner.

17. *Articles of Partnership—Interpretation—Retirement—Agreement not to see remaining Partner's Patients—Retiring Partners' own Patients exclusively not precluded.*]—The plaintiff practised as a dentist in partnership with the defendants. By the articles of partnership, in the event of the death or retirement of any of the partners, the partnership should continue between the surviving and remaining partners. By a subsequent agreement the plaintiff agreed to retire from the firm, the defendants taking over the management and control of the practice; and the plaintiff agreed not to, during the term of the late partnership, see any patients of the defendants' professionally without the latters' consent.

HELD—that this did not preclude the plaintiff from attending on those persons who had been his own patients exclusively while he was a partner.

HARRIS *v.* MANSBRIDGE, (1901) 17 T. L. R. 21 [—Farwell, J.

18. *Liability of Retiring Partner—Retirement Contrary to Terms of Deed—Assignment by Partner of his Share—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *ss.* 26, 32, 46.]—An agreement between three persons for a partnership at will contained a clause that "in the event of any partner . . . desiring to retire, he shall give one calendar month's notice to allow his shares to be purchased by the remaining partners. . . ."

The defendant, who was one of the partners, without giving notice as provided by the above clause, sold his share to one of the partners without the knowledge of the other, who only heard of it subsequently. A creditor who did work for the firm after the sale, sued the defendant as a partner.

HELD—that, as the defendant had not complied with the above clause in the partnership agreement, he remained a partner, the mere assignment of his share to one of his co-partners not operating as a dissolution of the partnership.

STURGEON BROTHERS *v.* SALMON, (1906) 22 [T. L. R. 584—Div. Ct.

(e) Surviving Partner.

19. *Carrying on Business Alone—Power to Sell and Mortgage Partnership Property—Lien of Deceased Partner's Executor — Priority—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *s.* 39.]—A surviving partner, for the purpose of winding up the partnership business, can sell or mortgage the real estate of the partnership for partnership purposes. In the absence of notice of intended misapplication, the purchaser or mortgagee is not concerned to see to the application of the money.

In re Langmead's Trusts ((1856) 7 D. M. & G. 353) applied.

If a surviving partner who carries on the business alone in the partnership name deposits title deeds of the partnership real estate to secure an overdraft on the partnership banking account, the equitable mortgagee (in the absence of notice) has priority over the lien of a deceased partner's executors in respect of their share of the assets.

In re Valletort Steam Laundry Co., La. ([1903] 2 Ch. 654; 72 L. J. Ch. 674; 89 L. T. 60; 19 T. L. R. 593—Eady, J., *see* BAILMENTS, No. 30) followed.

Rights and Liabilities of Partners—*Continued.*

Decision of Farwell, J. ([1906] 1 Ch. 113 ; 75 L. J. Ch. 36 ; 54 W. R. 154) affirmed.

In re Bourne, Bourne *v.* Bourne, [1906] 2 [Ch. 427 ; 75 L. J. Ch. 779 ; 54 W. R. 559 ; 95 L. T. 131—C. A.

(f) In General.

20. *Agreement—Action for Breach of Contract—Part Performance—Statute of Frauds* (29 Chas. 2, *c.* 3).]—An agreement was entered into between C. and O'S., whereby O'S. was to acquire certain premises, with stock-in-trade and book debts in B., wherein business was to be carried on in partnership between them for a period of not less than three years. In pursuance of this agreement, the purchase was effected by O'S. with his own money, and thereupon C. and O'S. entered into possession under the style of O'B. & Co. They opened a bank account in that name, and carried on business as partners for a period of seven months. The heads of the agreement were drawn up, but were never signed, and a deed draft of co-partnership passed from one to the other during the seven months, undergoing revision of its details. Finally O'S. refused to execute the deed when called upon by C. to do so, whereupon C. instituted an action at common law for damages, and recovered a verdict for £700.

Held—that the agreement being one of which a Court of Equity would have had jurisdiction to enforce specific performance, the doctrine of part performance applied to take the case out of the Statute of Frauds ; the parol evidence upon which the verdict was founded was properly admitted, and the verdict should be upheld.

Crowley *v.* O'Sullivan, [1900] 2 Ir. R. 478—[Q. B. Div.

21. *Evidence—Statute of Frauds* (29 Chas. 2, *c.* 3), *s.* 4.]—If a partnership is proved to exist, it may be shown by parol evidence that its property consists of land, but before evidence can be admitted as to a contract of an alleged partnership in land, it must be shown that there actually was a partnership. To show that a partnership existed is a necessary antecedent to parol evidence.

Carrick v. *Skidmore* ((1858) 2 De G. & J. 52 ; 27 L. J. Ch. 153) followed.

Isaacs *v.* Evans, (1900) 16 T. L. R. 113—[Farwell, J.

22. *One Partner Purchasing other Partner's Share*—Uberrima fides—*Assets of Firm concealed by Purchaser—Action for Damages for Non-disclosure—Action settled—Subsequent discovery of further concealed Assets—Finality of earlier Settlement.*]—The active partner of a business purchased the share of the other partner. It was subsequently discovered that the purchaser had concealed from the vendor certain assets of the firm, the existence of which largely increased the value of the business ; and thereupon the vendor commenced an action, claiming damages on the ground that his partner had failed to perform his duty of making full disclosure. This action was compromised at a time when the vendor had reason to suspect that there were still some other assets undisclosed. Further concealed assets having been subsequently discovered, the vendor commenced a second action, claiming a rescission of the sale.

Held—(1) that one partner purchasing from another whom he knows to be less familiar with the firm's accounts owes a duty to make full disclosure : *Maddeford* v. *Austwick* ((1826) 1 Sim. 89) approved ; but (2) that the other partner, though entitled to rescind, may elect to waive his rights ; and that in the present case the vendor must be held to have deliberately elected to compromise all his claims in respect of assets discovered or expected to exist.

Decision of Kekewich, J. (20 T. L. R. 295) affirmed.

Law *v.* Law, [1905] 1 Ch. 140 ; 74 L. J. Ch. [169 ; 53 W. R. 227 ; 92 L. T. 1 ; 21 T. L. R. 102—C. A.

23. *Salaries—Payment of Salaries to Partners—Assignment by Partner of his Share—Right of Assignee to Object to Payment of Salaries—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *ss.* 24, 31.]—Under sect. 24 (6) of the Partnership Act, 1890, a partner, except by agreement, is not entitled to remuneration for acting in the partnership business. But a *bonâ fide* arrangement that one, or all, of the partners shall do special work, and receive a salary for doing it, is a matter of "management or administration" within sect. 31 ; and, therefore, if a partner assigns his share of profits, the assignee cannot interfere, and object to the partners making such a *bonâ fide* arrangement, on the ground that the share of the profits assigned to him will be diminished by the payment of the salaries.

In re Garwood's Trusts, Garwood *v.* [Paynter, [1903] 1 Ch. 236 ; 72 L. J. Ch. 208 ; 51 W. R. 185—Buckley, J.

24. *Sale of Share — Purchaser Bound to Indemnify Vendor—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *s.* 31.]—The purchaser of a share in a partnership business is as *cestui que trust* of the vendor personally bound to indemnify the vendor from the liabilities of the partnership.

Dodson *v.* Downey, [1901] 2 Ch. 620 ; 70 L. J. [Ch. 854 ; 50 W. R. 57—Farwell, J.

III. CONTRACTS WITH PARTNERS.

25. *Contract with an Individual Prior to his Partnership—Election to Abide by Original Contract after his Partnership—Adopting New Firm—Novation—Liability of New Partner for Fraud of Individual.*]—The plaintiffs appointed A., a solicitor, who carried on business as A. and A., the local solicitor for a certain district and they then knew that he had no partner. In September, 1900, they instructed him to act for them in the matter of a mortgage. On December 31st, 1901, the defendant entered into

Contracts with Partners—*Continued.*

partnership with A. as from December 1st, 1900, and the partnership business was carried on under the style or firm of A. and P. On February 5th, 1901, A. gave notice in writing to the plaintiffs that he had taken defendant into partnership and that the business would in future be carried on under the name of A. and P. The plaintiffs took no notice of A.'s notice, and continued to correspond with A. under the name of A. and A. as theretofore. On February 28th, 1901, the plaintiffs sent the money for completion of the mortgage by a cheque drawn to A. and A. or order. A. misappropriated the money and absconded. On March 15th, 1901, P. the defendant, first heard of the transaction. On March 23rd, 1901, the partnership was dissolved, and on May 14th, 1901, the plaintiffs sued the defendant for the amount of the cheque as money had and received.

HELD—that the plaintiffs before action elected to abide by their original contract with A.; that they could not elect to adopt the new firm as their solicitors by the issue of the writ; and that the plaintiffs' action failed.

BRITISH HOMES ASSURANCE CORPORATION, LD. [*v.* PATERSON, [1902] 2 Ch. 404; 71 L. J. Ch. 872; 50 W. R. 612; 86 L. T. 826; 18 T. L. R. 676—Farwell, J.

26. *Death of Partner—Liability of his Estate—Goods ordered before his Death—Delivered after his Death—Action for Goods sold and delivered—"Debts and Obligations" of the Firm—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39). *s.* 9.]—Where a firm orders goods, and one of the partners dies before they are delivered, the firm has "incurred an obligation while he is a partner" within the meaning of sect. 9 of the Partnership Act, 1890, but not for "goods sold and delivered"; and an action for "goods sold and delivered" will not lie against the deceased partner's personal representative.

BAGEL *v.* MILLER, [1903] 2 K. B. 212; 72 [L. J. K. B. 495; 88 L. T. 769; 8 Com. Cas. 218—Div. Ct.

27. *Death of a Partner—"Unforeseen Calamity"—Sale by Mortgagees—Determination of Contract—Reliance on* personnel *of Partners.*]—If a contract is one which has relation to the personal conduct of the contracting party, the death of that party puts an end to that contract; if it has no such relation, such death has not that effect.

The plaintiffs, a troupe of four music-hall artists, in the year 1897 entered into a contract with the Alhambra Palace Company of Hull to give two series of performances at the Alhambra Palace, one in August, 1898, and the other in October, 1899. It was not known to the plaintiffs that the contracting parties, who were described in the contract as a company, the person who signed the contract on their behalf being described as the managing director, were in fact a partnership consisting of three persons. In December, 1897, one of the partners died. In August, 1898, the plaintiffs, without notice of that fact, performed at the Alhambra Palace in accordance with their contract, and were paid by the surviving partners, the present defendants. In July, 1899, the mortgagees of the Alhambra Palace sold it under their power of sale, and from that time the defendants ceased to have anything to do with it. The question was whether they were liable under their contract for not employing the plaintiffs in October, 1899. It was provided by the contract that "in the event of any unforeseen calamity by which the business may be suspended or stopped, all engagements will terminate immediately."

HELD—that the interference by the mortgagees in the exercise of their power of sale could not be regarded as an "unforeseen calamity" of the kind contemplated by the provision of the contract.

HELD, also, that the plaintiffs did not rely on the *personnel* of the partners, who were unknown to them, and that the death of the partner did not put an end to the contract.

PHILLIPS *v.* ALHAMBRA PALACE CO., [1901] [1 Q. B. 59; 70 L. J. Q. B. 26; 49 W. R. 223; 83 L. T. 431; 17 T. L. R. 40—Div. Ct.

28. *Misdescription of Purchaser—Name—Partnership — Evidence of Identity — Legal Estate.*]—Prior to 1885, when he died, William Wray carried on business at L. House, North Hill, Highgate, under his own name but in partnership with two sons and a stranger. On his death, his wife became a partner, and the business was still carried on at the same place and under the same name, *i.e.*, "William Wray," without any addition.

In 1890 the partners bought a house and paid for it out of the business assets. The parties to the conveyance were the vendor and "William Wray, of L. House, Highgate," and the house was conveyed to "William Wray" in fee.

HELD—that by the conveyance the house passed to the four partners as joint tenants.

Maugham v. *Sharpe* ((1864) 17 C. B. (N.S.) 443) followed.

WRAY *v.* WRAY, [1905] 2 Ch. 349; 74 L. J. Ch. [687; 54 W. R. 136; 93 L. T. 304—Warrington, J.

IV. DISSOLUTION.

And see title BANKRUPTCY, Nos. 51, 226.

29. *Business only "carried on at a Loss"—Repayment of Premium — Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *ss.* 35 (e), 40.]—In order to bring in the ground for dissolution—that the business of the partnership can only be carried on at a loss—mentioned in sect. 35 (c) of the Partnership Act, 1890, practical impossibility must be proved. If there are special circumstances to which loss could be attributed and the loss cannot be traced to any inherent defect in the business, then the Court cannot infer impossibility of profit.

Where the plaintiff claimed the repayment of the premium under sect. 40 of the Partnership Act, 1890, and no misconduct was pleaded, the Court did not order such repayment, as the

Dissolution—*Continued.*

partnership had been dissolved by an agreement, contained in the articles of partnership themselves, containing an implied provision that the premium should not be returnable.

HANDYSIDE *v.* CAMPBELL, (1901) 17 T. L. R. [623—Farwell, J.

30. *Deficiency of Capital — Adjustment of Accounts—Partnership Act*, 1890 (53 & 54 Vict. *c.* 39), *ss.* 24 (1), 44.]—Upon the dissolution of a partnership it appeared, after paying debts and advances by partners, that the remaining assets were insufficient to repay to the partners the capital originally contributed by them.

HELD—that as the three partners, though contributing varying amounts of capital, had agreed to share profits equally, they must each contribute one third of the deficiency; and that, as one partner was insolvent and could pay nothing, the assets must be applied in paying to each partner rateably what was due to him in respect of capital, taking into account his final contribution.

GARNER *v.* MURRAY, [1904] 1 Ch. 57; 73 [L. J. Ch. 66; 52 W. R. 208; 89 L. T. 665 —Joyce, J.

31. *Effects of—Restraint.*]—In an action by certain members of a firm of dentists, which had been dissolved, to restrain another member of the late firm from (*inter alia*) attending the patients of the firm at his private house:—

HELD—that the Court would not grant an interim injunction, the defendant undertaking to keep an account.

CLIFFORD *v.* PHILLIPS, (1907) 51 Sol. Jo. 748— [Pickford, J.

32. *More than Two Members—One Member Assigning his Share to Another—Effect of.*]—*Quære*, whether, where a partnership consists of more than two members, it is dissolved by one partner assigning his share therein to another.

EMANUEL AND OTHERS *v.* SYMON, [1907] 1 [K. B. 235; 76 L. J. K. B. 147; 96 L. T. 231; 23 T. L. R. 94—Channell, J.

V. GOODWILL.

And see title SALE OF GOODS, Nos. 65–68.

33. *Death of Partner—Sale of Business to Survivor—"Effects and Securities"—Valuation—Inclusion of Goodwill—Solicitation of Old Customers—Style of Old Firm.*]—Co-partners carried on business under the style of L. & D. until 1876, when L. died. D. then entered into a partnership with M. under articles which, *inter alia*, provided that the business should be carried on under the old style of L. & D., and that in the event of the decease of either partner the survivor might purchase the whole business, and for such purpose a general account of the firm's property should be made, including all the "effects and securities," and the value thereof should be calculated as at the date of such decease.

Upon the death of D. the parties interested appointed the same person to be arbitrator and appraiser, and this person stated a special case to the Court under sect. 19 of the Arbitration Act, 1889, for a decision as to whether he ought to include the goodwill of the firm in his valuation, and, if so, what was the proper footing on which to value it.

HELD—that the goodwill ought to be included in the valuation, and that it ought to be valued on the footing that, if it were sold, the surviving partner would be at liberty to carry on a rival business, but would not have the right to solicit customers of the old firm, or carry on business under the style of the old firm.

The law with regard to the disposal of goodwill on the dissolution of a partnership, and as to surviving or continuing partner's right to set up a rival business, discussed and explained.

IN RE DAVID AND MATTHEWS, [1899] 1 Ch. [378; 68 L. J. Ch. 185; 47 W. R. 313; 80 L. T. 75—Romer, J.

34. *Dissolution—Right to use Name—Confusion and Damage caused by use of Name.*]—By a dissolution agreement for the assignment of the plaintiff's goodwill, which included the right to the name, E. & C. were definitely entitled to the use of the name F. R. & Co., while the assignor was given the right to use that title as soon as E. & C. should cease to trade under it. E. & C. assigned the goodwill to the defendant.

HELD—that the title F. R. & Co. belonged to the assignees of the goodwill from E. & C. equally with the plaintiff, and that the defendant had a right to use it legitimately in such a way as to cause confusion and delay and consequent damage to the plaintiff.

ROSHER *v.* YOUNG, (1901) 17 T. L. R. 347— [Farwell, J.

35. *Dissolution—Sale by One Partner to the Other, the Purchaser retaining the "Assets"—Vendor commencing the like Business and canvassing Customers of the Old Firm—Injunction.*]—A. & B. had been partners. By an agreement made in compromise of an action for dissolution it was agreed that judgment should be entered for A. for £1,200. he to retain the assets.

Subsequently B. issued a circular to the old customers to the effect that he intended to commence the like business and asking for their support.

Upon motion in an action brought by A. claiming an injunction to restrain B. from so doing:—

HELD, on the authority of *Trego* v. *Hunt* (73 L. T. 514)—that where goodwill was assigned and the relationship of vendor and purchaser existed between the parties as in this case, the vendor might be restrained from canvassing the old customers; that the liberty to carry on the like business which was usually given to the vendor in such cases was subject to the ordinary obligations of a vendor: and that, therefore, an injunction ought to be granted in the form given in *Trego* v. *Hunt*.

Goodwill—*Continued.*

Gray v. *Smith* (61 L. T. 481) and *Pearson* v. *Pearson* (51 L. T. 311) considered.

Jennings *v.* Jennings, [1898] 1 Ch. 378; 67 [L. J. Ch. 190; 77 L. T. 786; 14 T. L. R. 198; 46 W. R. 344—Stirling, J.

36. *Dissolution—Sale of Goodwill and Assets—Soliciting Customers of Old Firm.*]—On the expiration of the partnership between the plaintiff and the defendant, the former purchased from the latter the goodwill and assets of the partnership, under a clause in the partnership articles, which also provided "that nothing herein contained shall prevent either partner from starting a similar business in the neighbourhood after the expiration of the partnership." The defendant solicited the customers of the old firm.

Held—that the defendant could not lawfully solicit the customers of the old firm, and that the proviso only expressed that which would have been implied if it had not been expressed.

Trego v. *Hunt* ([1896] A. C. 7; 65 L. J. Ch. 1; 44 W. R. 225; 73 L. T. 514—H. L. (E.)) followed.

Gillingham *v.* Beddow, [1900] 2 Ch. 242; 69 [L. J. Ch. 527; 64 J. P. 617; 82 L. T. 791—Cozens-Hardy, J.

37. *Dissolution — Use of Old Firm Name—Partner's Name—Solicitors' Business.*]—Apart from some express stipulation, a man has no right to hold out his late partner, or indeed any one else, as his partner in business. On the dissolution of a partnership, where no provision is made about the use of the firm name, but the goodwill, apart from the benefit of the firm name, is not to be sold, but is to be divided between the partners, each partner is at liberty to use the firm name so long as he does not thereby hold out his late partner as his partner in business.

A man does not necessarily hold out his late partner as his partner in business by using the old firm name, even though the old firm name is the name of his late partner.

Gray v. *Smith* ((1889) 43 Ch. D. 208; 59 L. J. Ch. 145; 38 W. R. 310; 62 L. T. 335—C. A.) distinguished.

The case of *Banks* v. *Gibson* ((1865) 34 Beav. 566; 34 L. J. Ch. 591) must be read subject to the qualification that the use of the old name must not expose the other partners to liability.

Decision of Byrne, J. (16 T. L. R. 171) affirmed.

Burchell *v.* Wilde, [1900] 1 Ch. 551; 69 L. J. [Ch. 314; 48 W. R. 491; 82 L. T. 576; 16 T. L. R. 257—C. A.

38. *Sale of Goodwill—Benefit of Restriction against Trading—Firm Name—Limitation of User—Sale of Shop with Name carved thereon—Removal of Name.*]—A covenant in partnership articles provided that the plaintiff, whether he should have withdrawn from the partnership by notice, or the same should have been determined by effluxion of time, or by death, or in any other manner, should not during a period of 21 years from the commencement of the partnership (unless he should purchase the share of the defendant) carry on the businesses specified within a certain distance. The business was sold to a company and was afterwards sold to the plaintiff by the company.

Held—that the benefit of the covenant passed to the company as an incident to the goodwill, and was conveyed by them to the plaintiff.

Jacoby v. *Whitmore* ((1883) 32 W. R. 18: 49 L. T. 335) applied.

Held, also, that the Court qualifies the right which is given under an assignment of goodwill, when the actual use of the name of the firm is not specified, by limiting the user of the name to which the goodwill is annexed, so as not to impose a personal liability upon the assignors.

A man is not held out as a partner by the use of a name which is not his own.

Burchell v. *Wilde* ([1900] 1 Ch. 551; 69 L. J. Ch. 314; 48 W. R. 491; 82 L. T. 576; 16 T. L. R. 257—C. A., No. 37, *supra*) applied.

If a man sell a shop with his name carved thereon, and takes no covenant from the purchaser to alter the building in that respect, there is no equity which will afterwards enable him to compel the purchaser to do so.

Townsend *v.* Jarman, [1900] 2 Ch. 698; 69 [L. J. Ch. 823; 83 L. T. 366; 49 W. R. 158—Farwell, J.

PARTY WALLS.

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I. SPECIFICATION.

(1) Amendment and Disclaimer.

1. *Action for Infringement — Revocation — "Correction or Explanation" — Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *ss.* 18, 19, 20.]—Where an action for infringement, or proceeding for the revocation, of a patent is pending, the patentee may not, under sect. 19 of the Patents, Designs and Trade Marks Act, 1883, apply for leave to amend the patent by way of correction or explanation, except so far as such correction or explanation is incidental to a disclaimer strictly so called.

In re Owen's Patent, [1899] 1 Ch. 157; 68 [L. J. Ch. 63; 47 W. R. 180; 79 L. T. 458; 15 R. P. C. 755—Stirling, J.

2. *Action for Infringement—Terms Imposed—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 19.]—Where the plaintiffs in an infringement action apply at the Patent Office for leave to amend their specification by way of disclaimer, they will be allowed to do so on the usual terms as to costs, if they undertake not to threaten until after the question of amendment is disposed of.

Chatwood's Patent Safe and Lock Co., Ld. [*v.* Ratner Safe Co., Ld., (1899) 16 R. P. C. 449—Byrne, J.

3. *Framing of Specification.*]—There is a power of requiring amendments as a condition of granting a patent, and in suitable cases that power will be exercised by the Comptroller or by the law officer; but it must not be supposed that the exercise of that power is anything like a matter of course.

A specification cannot be framed so as to include a number of things, devolving upon the law officer the task of eliminating what might properly be the subject-matter of a patent.

It is the duty of the applicant to frame his specification in such a way that a patent may properly be granted.

It is not at all a matter of course that if the specification is presented in such a form that the patent cannot be granted without amendment, the necessary amendment will be made.

In the matter of Thomas and Prevost's Application for a Patent, (1899) 16 R. P. C. [69—The Solicitor-General.

4. *Action for Infringement—Second Application for Leave to Disclaim—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 19.] —There is nothing in sect. 19 of the Patents, Designs and Trade Marks Act, 1883, to point to there being only one application to file a disclaimer. So that an application to disclaim which would have succeeded if there had been no previous application ought not to fail because there has been a previous one.

Chatwood's Patent Safe and Lock Co. *v.* [Mercantile Bank of Lancashire, Ld., (1900) 17 R. P. C. 23—North, J.

5. *Striking out Words from Claim — New Claim—Sealing Patent.*]—Where, after striking out words from a claim, nothing whatever remains of the claim as originally framed, it would be a gross abuse of the powers of amendment and of the opportunities afforded by notice of opposition under the Act if the occasion could be availed of by the applicants for framing a claim to an invention which was not in the least the distinctive subject-matter which they had in view when they filed their complete specification.

Even under these circumstances, if the Court found something substantially new and clearly the object of the inventor, it might order the patent to be sealed with an entirely different claim.

Re Harrild and Parkins' Application for [a Patent, (1900) 17 R. P. C. 617—Sir E. Carson, S.-G.

6. *Action for Infringement—Denial of Infringement and Petition for Revocation—Terms.*] —The plaintiffs, after the defendants had put in a defence denying infringement, and had presented a petition for revocation of the patent, applied for liberty to amend their specification by way of disclaimer. No objection raised to the proposed amendment, but the Comptroller-General was asked to impose terms. The Comptroller-General allowed the amendment without imposing terms. On appeal:—

Held—that there must be special circumstances for the imposition of terms, and none had been shown in this case.

In re Pitt's Patent, (1901) 18 R. P. C. [478—Sir E. Carson, S.-G.

7. *Action for Infringement—Admission—Form of Order—Appeal from Discretion of Court—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *ss.* 18, 19, 20.]—The Court of Appeal, when a case comes before it, must exercise the right that it has to make the order

Specification—*Continued.*

that ought to have been made by the Court below. When dealing with a question of a discretionary power exercised as applicable to the particular circumstances of each case, though it is within the jurisdiction of the Appellate Court to alter it, yet it requires a very strong case to show that the judges invested with that discretion have either exceeded the limits of the discretion given to them or have exercised it upon some principle which is inconsistent with the general law.

A patentee who asked for leave to amend his specification by way of disclaimer, admitted that his patent, as it stood, was bad. In giving him that indulgence and the means of putting his specification right, the Appeal Court put him upon terms not to bring any actions or maintain any actions on the footing of the bad specification up to the date of the application, following *Deeley* v. *Perkes*, [1896] A. C. 496 ; 65 L. J. Ch. 912 ; 75 L. T. 233 ; 13 R. P. C. 581—H. L. (E.). The plaintiffs appealed.

HELD—that as the patent was preserved from entire destruction by two claims out of twenty-two, the Court was right in dealing somewhat severely in respect of the right that had accrued during the period that the plaintiffs unlawfully held the ground and prevented other people from manufacturing, and therefore that the order of the Court of Appeal was right, but that the case of *Deeley* v. *Perkes* (*supra*) did not apply to a question of mere infringement, and the order there was made under special circumstances.

The decision of C. A. ([1900] 1 Ch. 508 ; 69 L. J. Ch. 321 ; 48 W. R. 505 ; 82 L. T. 173 ; 17 R. P. C. 25) affirmed.

LUDINGTON CIGARETTE MACHINE CO., LD. *v.* [BARON CIGARETTE MACHINE CO., LD. ; IN RE PITT'S PATENT, (1901) 17 R. P. C. 745 —H. L. (E.).

8. *Anticipation—Main Claim——Minimum of Invention—Master Patent—Disclaimer by reference to the Patent by Name.*]—In cases where the main claim is shown to have been anticipated, and the very minimum of invention is left, every precaution should be taken to limit the letters patent to so much of the claim as is in reality an invention, and the position of a master patent is not to be discussed in any narrow spirit.

Where the main claim of an applicant was, on the hearing before the Comptroller, disallowed on the ground of anticipation, and the claim was restricted to the very minor invention, and the Comptroller also ordered the applicant to insert a disclaimer in reference to certain inventions which might otherwise be covered by the specification :—

HELD—that, in addition to the disclaimer as framed, a reference to the patent by name should be inserted.

IN RE SACHSE'S APPLICATION FOR A PATENT, [(1901) 17 R. P. C. 221—Sir E. Carson, S.-G.

9. *Application for Patent — Opposition — Anticipation—Amendment with view of meeting Opposition.*]—Where an applicant has ascertained that his process, as really claimed, has been anticipated, and he finds that he has something else that he can fall back upon, which may or may not be useful, but which may distinguish it at all events from the previous patent which is alleged to anticipate his, he will not be allowed to amend his specification with a view to meeting the grounds of opposition.

IN RE MILLS' APPLICATION FOR A PATENT, [(1901) 18 R. P. C. 322—Sir E. Carson, S.-G.

10. *Action for Infringement—Plaintiff aware of Alleged Infringement Nine Years before—Terms on which Leave Granted to Disclaim—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *ss.* 19, 20.]—Where a plaintiff had known of the alleged infringement for nine years before action brought, leave was given him to apply to amend his specification by disclaimer only upon terms that he should not claim against the defendants in respect of anything done before the amendment.

CORRIGALL *v.* ARMSTRONG, WHITWORTH & [CO., (1903) 20 R. P. C. 523—Eady, J.

11. *Limits to Amendment.*] — Amendments must not be considered as a matter of course. They must be amendments in the real meaning of the word, and not the practical re-writing of the whole specification, and the formulation of some new claim.

IN RE CRIST'S APPLICATION FOR A PATENT, [(1903) 20 R. P. C. 475—Sir E. Carson, S.-G.

12. *Subsequent Petition for Revocation—Powers of Comptroller to Amend without Leave of Court—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *ss.* 18, 19—*Patents, Designs and Trade Marks Act*, 1888 (51 & 52 Vict. *c.* 50), *s.* 5.]—The proper construction of sect. 18 (10) of the Patents, Designs and Trade Marks Act, 1883, is that an application for leave to amend a specification once made, that is to say, made before any action for infringement is commenced by the patentee, or before any petition for revocation is presented by an opponent, can without leave of the Court under sect. 19 go on properly, and be dealt with by the comptroller—be adjudicated upon—notwithstanding that, before the comptroller gives his decision, a petition for revocation of the patent is presented.

Decision of Kekewich, J. (51 W. R. 121 : 87 L. T. 95 ; 18 T. L. R. 708 ; 19 R. P. C. 425) affirmed.

WOOLFE *v.* AUTOMATIC PICTURE GALLERY. [LD., [1903] 1 Ch. 18 ; 72 L. J. Ch. 34 ; 87 L. T. 539 ; 19 T. L. R. 94 ; 20 R. P. C. 177— C. A.

13. *Action for Infringement—Plaintiff asking leave to amend Specification—Terms—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *ss.* 18, 19, 20.]— Where the plaintiff in an infringement action after delivery of defence asked for leave to apply to amend his specification :—

Specification—*Continued.*

HELD—that leave should be granted upon the terms of the order in *Ludington Cigarette (Machine) Co., Ld.* v. *Baron Cigarette Machine Co., Ld.* (17 R. P. C. 745), including a term that no action should be brought for infringement in respect of any goods made prior to the date of the order.

JANDUS ARC LAMP CO. *v.* ARC LAMP CO., [(1904) 21 R. P. C. 115—Kekewich, J.

And see Nos. 18 and 94, *infra.*

14. *Action for Infringement—Specification found to be Bad—Application to amend by way of Disclaimer—Discretion of Court—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 19.]—Where plaintiffs in an action for infringement admit after the close of the pleadings that their specification is bad, and apply for leave to amend it by way of disclaimer under sect. 19, and for leave to amend their claim accordingly, it is entirely a matter for the discretion of the Court whether such application shall be granted.

NEW CONVEYOR CO., LD. *v.* EDINBURGH AND [LEITH GAS COMMISSIONERS, (1904) 21 R. P. C. 1, 147—Ct. of Sess.

15. *Pending Litigation—Amendment without Leave of Court—Invalidity—Patents, Designs and Trade Marks Acts*, 1883 (46 & 47 Vict. *c.* 57), *ss.* 18, 19, *and* 1888 (51 & 52 Vict. *c.* 50), *s.* 5.]—Sects. 18 and 19 of the Patents Act, 1883, must be read together: Sect. 18 says what an applicant may do in the way of amending his specification when there is not pending any action for infringement, or petition for the revocation of his patent. Whilst engaged in litigation he can only amend under sect. 19 by leave of the Court, and any amendment made under sect. 18 by leave of the Comptroller will be invalid.

In 1897 the plaintiffs issued a writ against L.; in 1899 a settlement was agreed upon. Subsequently the settlement was mutually cancelled but the action was allowed to sleep; in 1901 the plaintiff's specification was amended under sect. 19 by leave of the Comptroller; in 1902 the action was formally discontinued upon L. moving to restore it to the list. In 1903 the plaintiffs commenced the present action, based upon the amended specification against the L. Co. and L. himself.

HELD—that the amendment made in 1901 was invalid, and that the patent must be treated as unamended; but the action was ordered to stand over in case the plaintiffs should wish to apply for leave to amend.

J. B. BROOKS & CO., LD. *v.* LYCETT'S SADDLE [AND MOTOR ACCESSORY CO., LD., AND LYCETT, [1904] 1 Ch. 512; 73 L. J. Ch. 319; 21 R. P. C. 651—Farwell, J.

16. *"Substantially different" from the Invention claimed — Application refused — Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 18.]—A patentee in his specification claimed two inventions: finding one to invalid he amended by striking it out. He now asked to restore this invention, and claim for a combination of the two.

HELD—that such an amendment would make the invention "substantially larger than the invention as claimed," and could not be allowed.

Kelly v. *Heathman* ((1889) 45 Ch. D. 256; 7 R. P. C. 343—North J.) distinguished.

IN RE HATTERSLEY AND JACKSON'S PATENT, [(1901) 21 R. P. C. 233—Sol.-Gen.

18. *Original Claim framed in Good Faith and with Reasonable Skill and Knowledge—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 20.]—Where, in an action for infringement of their patent, patentees have amended the original specification by way of disclaimer under sect. 19 of the Patents, Designs, and Trade Marks Act, 1883, and established at the trial their claim for an infringement of the amended specification as it stands, the Court will not, for the purpose of certifying under sect. 20 that the original specification was framed in good faith and with reasonable skill and knowledge, read the erased portions of the specification; to do so would be in effect to allow the plaintiffs to raise a fresh issue after judgment.

JANDUS ARC LAMP AND ELECTRIC CO., LD. *v.* [ARC LAMPS, LD., (1905) 92 L. T. 447—Kekewich, J.

And see No. 13, *supra.*

19. *Application for Leave — Correction or Disclaimer—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 19.]—Upon an application to the Court by a patentee for leave to apply at the Patent Office, under sect. 19 of the Patents, &c., Act, 1883, to amend his specification by way of disclaimer, it is not necessary to satisfy the Court that what is desired will be amendment by way of disclaimer and not correction.

Where the Court feels uncertain whether the proposed amendment is by way of disclaimer, it will not refuse to send the matter to the proper tribunal—viz., the Patent Office—to decide that question; it will only refuse to do so when mere perusal of the specification shows clearly that what is proposed is not such an amendment.

IN RE ALSOP'S PATENT, [1906] 1 Ch. 85; 75 [L. J. Ch. 134; 54 W. R. 323; 94 L. T. 39; 22 T. L. R. 157; 23 R. P. C. 65—C. A.

See also No. 270, *infra.*

(2) Construction.

21. *Subject-matter — Anticipation.*]—This was an action for infringement of a patent for a watering pot. The specification described a watering pot of a canister shape with a carrying handle and a tipping handle, and claimed (1) the canister shape; (2) the make, shape, and position of the tipping handle; (3) the introduction of the particular carrying handle. The defendants denied infringement; and set up want of subject-matter, utility, and novelty in the invention,

Specification—*Continued.*

and anticipation. The plaintiff, at the trial, asserted that his real invention was the combination of the three things claimed, and that his specification ought to be so construed.

HELD—that the plaintiff had not proved that the combination as a whole was useful; and, further, that the alleged invention was only the adaptation of old things to a watering pot: that the patent was invalid; and judgment was given for the defendants.

The plaintiff appealed.

HELD—that even if the plaintiff did claim the combination, he also claimed for the separate elements, and that the appeal should be dismissed.

HAWS *v.* HARDING & SONS, (1898) 14 R. P. C. [931; 14 T. L. R. 73—C. A.

22. *Validity—Anticipation.*]—In 1893, letters patent were granted to A. for "An improvement in water-closets or water-closet basins," and in 1897 A. commenced an action for infringement of the patent against P. and others. The defendants denied infringement, and alleged anticipation (*inter alia*) by the specification of F.'s patent of 1886.

HELD—that the essential part of the plaintiff's invention was an inclined pipe which the alleged infringement did not possess, and that therefore the defendants had not infringed; also that A.'s patent was anticipated by F.'s specification.

ALLEN *v.* PYATT & CO., (1898) 15 R. P. C. 723—[Bigham, J.

23. *Infringement—Mechanical Equivalents.*]—This action was for the infringement of a patent relating to the separation of cream from milk. The claim was for "in centrifugal separators or creamers the combination of the conical plates c^1 with the rotating drum or bowl *a* substantially as described." The defendants denied infringement and alleged the invalidity of the patent on the grounds of want of novelty and subject-matter and anticipation; but, at the trial, these issues were abandoned, and the only question was infringement. The defendants' apparatus had not conical plates, but a cylindrical block with inclined radial passages drilled therein.

HELD—that the plaintiffs' invention was for dividing the milk into layers by separate conical plates, and that the defendants did not infringe by mechanical equivalents. The plaintiffs appealed.

HELD—that according to the true construction of the specification, the claim was not for separate conical plates simply, but for separate conical plates fastened rigidly by screws or otherwise into one solid mass or block; that the defendants had infringed; and that the plaintiffs were entitled to relief.

AKTIEBOLAGET SEPARATOR *v.* DAIRY OUTFIT [CO., LD., (1898) 15 R. P. C. 327—C. A.

24. *Validity — Infringement.*]—In 1899, a patent was granted to M. for "improvements in the manufacture of explosive compounds." The complete specification, after describing the effects of the improvements, stated that "in the manufacture of explosive compounds according to my present invention, I mix dissolved guncotton or pyroxyline with nitro-glycerine, nitro-gelatine, or similar material, and with oil, preferably castor-oil. I have discovered that the addition of castor-oil or other suitable oil to compounds of dissolved guncotton and nitro-glycerine, nitro-gelatine, or the like, increases the toughness of the product and modifies the explosive properties thereof, whilst greatly diminishing its liability to deterioration by exposure to the atmosphere." The reasons for the preference for castor-oil were then stated to be—(1) solubility by means of the solvents employed for dissolving guncotton and nitro-glycerine or nitro-gelatine; (2) the fact of its combining with either of these substances; (3) the fact of its containing oxygen; moreover, that it made the compound tough, easy to be cut and pressed, and prevented its deterioration. The specification then continued: "I produce an explosive compound which is advantageous for various purposes by mixing the guncotton, the nitro-glycerine, the nitro-gelatine, or similar substance, and the castor-oil in, or about in, the following proportions, viz.: from 2 or 5 per cent. of the castor-oil, from 10 to 16 per cent. of the nitro-glycerine or the like, and the remainder of guncotton." Methods of manufacture were then stated, and the claims were as follows:—"First. An explosive compound consisting essentially of guncotton or pyroxyline mixed with nitro-glycerine, nitro-gelatine, or similar material, and with castor-oil or other suitable oil for the purpose above specified. Second. The manufacture of an explosive compound by first dissolving guncotton by means of acetone or other solvent, and then incorporating with the dissolved guncotton, nitro-glycerine, nitro-gelatine, or similar material, and castor-oil or other suitable oil substantially as hereinbefore described. Third. The manufacture of an explosive compound by dissolving, first, castor-oil or other suitable oil and then guncotton by means of acetone or other solvent, and incorporating therewith nitro-glycerine, nitro-gelatine, or similar material, substantially as hereinbefore described. Fourth. The manufacture of an explosive compound by first mixing nitro-glycerine, nitro-gelatine, or similar material, and castor-oil or other suitable oil with a small quantity of acetone or similar solvent, treating dried guncotton with this mixture in a rotary cylinder or chamber, and then subjecting the product, in a cylinder or chamber from which air is exhausted, to the action of vaporised acetone or other solvent, and then to pressure, substantially as hereinbefore described."

A., who is Director-General of H.M. Ordnance Factories, manufactured "cordite," a powder composed of 58 per cent. of nitro-glycerine, 37 per cent. of guncotton, and 5 per cent. of vaseline. M. and the M. company who claimed under him, commenced an action for infringement of his patent against A. The defendant denied infringement, and raised the following objections to the validity of the patent:—(1) That M. was not the true and first inventor; (2) want of subject-matter; (3) want of utility;

Specification—*Continued.*

(4) that the specification did not sufficiently describe the nature of the invention, inasmuch as if the proportions mentioned were departed from, the directions for manufacture were insufficient; (5) that the specification did not sufficiently distinguish what was claimed to be new from what was not so claimed; (6) that the invention had been anticipated by several prior publications. At the trial it was held that the patent was valid, but that the defendant had not infringed.

On appeal it was held that M.'s patent must be limited to a powder in which the proportions were those, or about those, mentioned in the specification; that, otherwise, it would be invalid as claiming proportions many of which would be useless, and as requiring experiment to ascertain the limits of the practical proportions; and that the patent being thus limited in these respects was good, but the defendant did not infringe it.

It was also held by the majority of the Court (affirming Wright, J.) that the expression "castor-oil or other suitable oil" did not, having regard to the rest of the specification, include the mineral oils, and did not include vaseline, and that, therefore, on this ground also the defendant did not infringe. The appeal was dismissed with costs. The plaintiffs appealed to the House of Lords.

HELD—that on the true construction of the specification the claim was limited to an explosive compound, the main ingredient of which is guncotton and which possesses or contains in proportion only a limited amount of nitroglycerine, and as on that construction there was admittedly no infringement, the appeal was dismissed.

MAXIM-NORDENFELT GUNS AND AMMUNITION CO. *v.* ANDERSON, (1898) 15 R. P. C. 421; 14 T. L. R. 487—H. L. (E.).

25. *Action for Infringement of two Patents—Case abandoned as to one in Course of Trial—Validity—Infringement—Costs—Appeal.*]—The B. Company, as owners of two patents for the manufacture and production of dye-stuffs, brought an action for infringement thereof against the C. Company and W., claiming the usual relief. The defendants did not dispute the validity of the first patent, but they denied infringement thereof, and also of the second patent, and they denied the validity of this patent on various grounds set forth in their Particulars of Objections, one being that it was anticipated by the previous specification of M. (the subject of the case of *Monnet* v. *Beck*). In the course of the trial they were allowed to amend their particulars by introducing a fresh objection—that one of the processes described in the specification, by way of example, was insufficiently described. In the course of the trial the plaintiffs abandoned their case on the first patent.

HELD, at the trial, that the plaintiffs' second patent was not anticipated by M.'s patent, but that it was invalid on the ground of insufficiency of the description of one of the processes given by way of example in the specification. Judgment was given for the defendants in respect of the first patent and on the issue as to the validity of the second patent, and for the plaintiffs on the issue of infringement of the second patent. A special order was made as to costs. The plaintiffs appealed on the finding of insufficiency of description.

HELD—that the finding was right, and the appeal was dismissed with costs.

BADISCHE ANILIN UND SODA FABRIK *v.* [SOCIÉTÉ CHIMIQUE DES USINES DU RHONE, (1898) 15 R. P. C. 359—C. A.

26. *Existing State of Knowledge.*]—In order to ascertain whether a patent is valid, it is necessary not only to construe the specification, but also to ascertain what was the existing state of knowledge.

Rule laid down by Lord Westbury in *Hills* v. *Evans* ((1862) 4 De G. F. & J. 288; 31 L. J. Ch. 457; 8 Jur. (N.S.) 525; 6 L. T. (N.S.) 90) followed.

DICK *v.* ELLAM'S DUPLICATOR CO., (1899) 16 [R. P. C. 414—Cozens-Hardy, J.

27. *Chemical Patent—Disclosure—Interpretation according to State of Chemical Knowledge at Date of Patent.*]—A chemical patent is addressed to skilled chemists. It is not good unless the directions given, if fairly followed by a competent chemist, produce the promised result. He must not be left in the dark and forced to make fresh experiments to discover what is the real invention. The patentee must honestly disclose everything necessary for the easy and certain procurement of the commodity for which the patent is granted. The patent must be interpreted according to the state of knowledge at its date, and not according to the state of chemical knowledge when the validity of the patent is litigated.

IN RE TIEMANN'S PATENT, (1899) 16 R. P. C. [561—Cozens-Hardy, J.

28. *Action for Infringement — No Claim in Specification — Mentioned in Final Specification.*]—Plaintiff mentioned a hinged frame to support the seat of a nursery chair in dispute in his final specification, but did not mention it in the provisional specification or the drawing, and the plaintiff stated that he had not thought of it then. The defendant used a hinged frame in his nursery chair similar to the plaintiff's.

HELD—that the frame was not, in fact, the invention the plaintiff intended to patent. He might probably have protected himself in the final specification, but in order to do that he must have claimed it, not necessarily in the actual words of the claiming part of the specification, but it must have been done in a way to show clearly that he did claim that part somewhere or other in his specification as a portion of his patented invention; and this being so, the defendants had not, in fact, infringed any part of the plaintiff's claimed invention.

DAVIES *v.* TOWNSEND & CO., LD., (1899) 16 [R. P. C. 497—Phillimore, J.

Specification—*Continued.*

29. *Action for Infringement — Plea of Non-infringement only—Expert Evidence as to Patent —Reasonable Limitation of Claim.*]—The plaintiffs were the owners of a patent for an invention of "an improvement in fly-catchers," consisting of a perforated reel-shaped containing vessel containing a glutinous adhesive paste. To this containing vessel string or vegetable fibre was so affixed and arranged that it should be drawn through the perforation in the containing vessel for the purpose of receiving the coating of fly-catching paste. The plaintiffs brought an action for infringement. The only thing that the defendants pleaded was that they had not infringed.

Held—that the Court was bound to assume that there was good subject-matter, but that it must understand what the patent was, and have expert evidence on the point; that it was perfectly impossible to construe the specification of the plaintiffs so widely as to cover that made by the defendants, and that the defendants had not infringed.

Marshalls, Ld. *v.* Chameleon Patents [Manufacturing Co., Ld., (1900) 17 R. P. C. 523—Kekewich, J.

30. *Action for Infringement—Previous State of Knowledge.*]—In patent cases the line of thought that leads to the right result in the speediest way is, first assuming you understand the alphabet of the science or art, to clearly understand what was the previous state of knowledge. Having got, either by agreement or deduction from the evidence, a clear view as to what was the previous state of knowledge, you must then construe the specification with reference to that, disregarding issues of novelty or subject-matter which may arise in the particular case, and you then have to consider whether or not the infringement comes within the fair meaning of the claims—not anything else, but the claims read in the light of the previous state of knowledge, and without altering the'r words unduly in favour of the patentee or the infringer. Be it a combination claim or be it not, you are only allowed to follow the words of the claim, but you are not to permit mere mechanical equivalents or mere colourable alterations to prevent a thing being an infringement, having regard to what the meaning of the claim is—per Lord Alverstone, L.C.J.

In 1893 a patent was granted for "Improvements in or connected with cases or covers for the chains or gear of velocipedes." The owners of the patent brought an action against the defendants for infringement of the same. It was admitted that detachable cases were perfectly well known; that dividing cases into two parts, transversely or longitudinally, was also perfectly well known; and that putting the edges of the one part so that they might fit into the other was perfectly well known. It was not admitted that dividing the case into two parts, one part of which became a fixed and attached part of the frame, and the other a movable part which fitted into the fixed part was known.

Held—that although the appearance was greatly different between the plaintiffs' and the defendants' whole gear case, yet by adopting a fixed part and a movable part, and by providing that the movable portion when it has been put into position did, as it must to some extent, though not to a large extent, slide upon the fixed portion, the defendants had only taken mechanical equivalents for what was pointed out as the plaintiff's invention, and therefore they infringed, and the appeal ought to be dismissed.

The decision of Farwell, J. ((1900) 17 R. P. C. 218) affirmed.

Presto Gear Case and Components Co., Ld. [*v.* Orme, Evans & Co., Ld., (1901) 18 R. P. C. 17—C. A.

32. *Action for Infringement — Claim.*]—The owners of a patent for a method of starting a gas motor engine, by introducing into the cylinder gas or explosive mixture, allowing a portion of the contents of the cylinder to escape through an igniting nozzle, and "after external ignition takes place, causing the velocity of outflow to fall short of the velocity of propagation of flame so that ignition passed back to the cylinder and exploded its contents to propel the piston," brought an action for infringement against the defendants. The question was whether the words "causing the velocity of outflow to fall short of the velocity of propagation of flame" would, having regard to the context, cover and include a device suggested in the body of the specification, whereby the same result, namely, the striking back of the flame, was secured automatically.

Held—that the words "after external ignition takes place causing," &c., pointed rather to the employment of some mechanical means, such as the turning of a cock, at a certain point of the process, than to the automatic result of prearranged adjustment; that the patentee had thought it more prudent not to claim, and had not claimed, as part of his invention, the alternative means adumbrated in his specification; and that the defendants had not infringed.

Judgment of Kekewich, J. ((1899) 16 R. P. C. 577) affirmed.

British Motor Syndicate, Ld. *v.* J. E. H. [Andrews & Co., Ld., (1901) 18 R. P. C. 85 H. L. (E.).

33. *Petition for Revocation — Inspection — Insufficiency of Specification — Fraud — Prior User—First and True Inventor—Results of Two Inventions compared.*]—The stage at which a petition for revocation comes into the Petition List is the stage at which the parties, if they want discovery, or inspection, or anything else, should say so, and the petition ought not to be put into the Witness List until it is effective for hearing.

A patent was granted in 1897 to E. G. S. for "Improvements connected with the concentration or distillation of glycerine." E. G. S. assigned his rights to F. W. S. Two things were included in the specification. First, that E. G. S. indicated

Specification—*Continued.*

a water condenser ; and secondly, that the way in which you are to arrive at the condensation of only a small fraction of the steam is a matter which any competent engineer would calculate from known data. There were three claims. In the third only E. G. S. referred to the drawing. C. & Sons and K. E. M. presented a petition for revocation. E. G. S. got 40 per cent. of glycerine and 60 per cent. of water left, K. E. M. got 5 per cent. of glycerine and 95 per cent. of water left.

HELD—that the specification was complete, as both the first and second claims referred to the body of the specification, and the body of E. G. S.'s specification is a body which introduces, by reference, the figure ; that E. G. S. did not steal K. E. M.'s invention ; that the petitioners had not reached the valuable result which E. G. S. had reached ; that there had not been prior user or anticipation ; that E. G. S.'s invention was new ; that he was the first and true inventor ; and that the petition must be dismissed with costs.

IN RE SCOTT'S PATENT (No. 5889 of 1897). [(1902) 19 R. P. C. 273—Buckley, J.

NOTE.—Reversed on a new point, 20 R. P. C. 257, *see* No. 40, *infra*.

34. *Action for Infringement—Subject-matter.*]—The plaintiff brought an action for infringement of the patent for "improvements in apparatus for hardening and tempering steel wire and tape." The wire referred to was more particularly that which was employed for making cards used in textile industries for combing fibrous materials such as cotton and wool. The invention claimed consisted in the addition to the processes, which formed the subject-matter of the patents of 1878 and 1884, of a further step or process immediately after the wire had left the tempering flame, namely, the passing of the wire through a chamber supplied with gas free, or nearly free, from oxygen, the object being to prevent any further discoloration or scaling. The defendants passed the wire, after leaving the tempering flame, into a narrow tube containing common air. The first few feet of wire absorbed oxygen from the air and were spoiled ; but after this the oxygen in the tube sealed against the admission of air was exhausted, the tube remained filled with inert gas, and the rest of the wire came out uncoloured.

HELD that the utility of the plaintiff's improvement was not disputed ; that a new idea had been introduced into the manufacture and a mode of carrying out by the plaintiff's invention, and their patent was valid ; that the defendants, though they took an additional step, and used an inert gas at the same stage and for the same purpose as described in the plaintiff's specification, and did so in a way which was an improvement on the form adopted by the plaintiffs, were liable for infringement.

Decision of Joyce, J. ((1901) 18 R. P. C. 367) reversed.

ASHWORTH *v.* ENGLISH CARD CLOTHING CO., [LD., (1902) 19 R. P. C. 463—C. A.

35. *Action for Infringement — Patent for Process—"Metal"—Application of old Process.*]—A patent was granted to the assignor of the plaintiffs for "Improvements in the formation of solid ends on flexible or compound electrical conductors." The complete specification stated : "According to my invention metal (which should be of the same kind as that of which the wires or strips are composed) is applied at the requisite temperature to the ends of the wires or strips. . . . What I claim is : Flexible or compound electrical conductors provided with solid ends in the manner hereinbefore described. The plaintiffs brought an action for infringement of this patent against the defendants.

HELD—that the patent was for a process ; that the word "metal" included all metals and that the patentee did not intend to confine himself to copper ; that the words "should be of the same kind" meant that it was better to have it so, but it might be of a different kind ; that the words "metal is applied at the requisite temperature to the ends of the wires or strips" extended to every known process of the time—soldering, brazing, burning-on, or casting—and therefore an old process was applied ; and that the action failed and must be dismissed with costs.

W. T. GLOVER & CO., LD. *v.* AMERICAN STEEL [AND WIRE CO., (1902) 19 R. P. C. 102—Farwell, J.

36. *Action for Infringement — No primâ facie Case—Assertion by Patentee that what his Specification did not Describe was his Invention.*]—The plaintiffs claimed relief in respect of an alleged infringement of a patent granted in 1889 to Mr. Devis and vested in the plaintiffs. The specification claimed : "A boiler flue or furnace consisting, as to its general form, of a series of annular or partially annular flutings connecting a corresponding series of sharp ridges." The defendants used existing corrugations or rings of a cylindrical character, and even if they were using ridges like the plaintiffs' they were not using the shape between those ridges which formed part of the combination alone claimed by the patentee. At the date of the patent a former patentee in 1877 had introduced the combination of equal hollows and projections or corrugations equal in extent.

HELD—that the patentee did not intend to cover by what he described as circumferential flutings something that would not be flutings at all, either if it were part of the original flat cylinder or if it were a convex corrugation projecting towards the fires ; and that the plaintiff's case broke down, as it was only by asserting that something, which the patentee had not described in his specification, was really his invention that the plaintiffs could make out a *primâ facie* case at all ; that the patentee's specification was not intended to cover a straight joining between the ridges, or a joining that was partly straight and which partly curved outwards instead of inwards as the defendants' did ; and that the defendants had not infringed.

Specification—*Continued*

Decision of Cozens-Hardy, J. ((1901) 18 R. P. C. 233) reversed.

LEEDS FORGE CO., LD. *v.* DEIGHTON'S PATENT [FLUE AND TUBE CO., LD., (1902) 19 R. P. C. 285—C. A.

37. *Action for Infringement — Taxation of Costs—Instructions for Brief—Expert Counsel.*]—A patent was granted in 1895 to one Schreiner, and became vested in the plaintiff association for a "method of producing a silky lustre upon fabrics and webs of all kinds," by engraving a great number of small surfaces into a plate or roller. At the date of the grant the idea of using rollers with lines on them for the purpose of producing various effects upon the surface of cotton and other stuffs was by no means new. The method of obtaining a silk-like finish upon a cotton fabric by subjecting it to pressure under a roller ruled with fine lines parallel to the axis of the roller was well known and practised. Such rollers had been, and were being, used for this purpose, ruled with as many as 88 or 90 such lines within the space of an inch. The defendant used for the same or a similar purpose a roller ruled with as many as 250 such lines to an inch, and it was contended that by so doing he had infringed the patent in question.

HELD—that what the defendant was doing was not using the invention described in the specification; that the specification was so obscure as to be unintelligible and it could not be said that it would enable an intelligent and competent workman to know what it was that the inventor meant should be done; that the specification did not mean what the plaintiffs claimed; and that the action for infringement must be dismissed with costs.

Judgment of Joyce, J. ((1901) 18 R. P. C. 161) affirmed.

Bradford Dyers' Association, Ld. v. *Bury* ((1901) 19 R. P. C. 1—C. A.), and judgment of Joyce, J. ((1901) 18 R. P. C. 229, *infra*) affirmed.

BRADFORD DYERS' ASSOCIATION, LD. *v.* [WILLIAMS, (1902) 19 R. P. C. 8—C. A.

On an application to vary the taxing Master's certificate in the above two cases objections were raised to the amount allowed by the taxing Master, after some reduction, to the solicitor of the defendants for instructions for the brief; to the fee allowed to Sir Frederick Bramwell for preparing to give evidence and so on; and in respect of the allowance to the defendants of three counsel on the hearing.

HELD that with respect to what was allowed for instructions for brief, and for the fee to the expert for preparing to give evidence and so on, these were matters peculiarly within the discretion of the taxing Master, and after considering the very important question in the action, and after looking into the papers to refresh the memory, there was on the whole no reason for supervising, in any way, the exercise of his discretion in this particular case as to those two amounts; and that with respect to the three counsel allowed to the defendants the taxing Master was right.

BRADFORD DYERS' ASSOCIATION, LD. *v.* BURY; [BRADFORD DYERS' ASSOCIATION *v.* WILLIAMS, (1902) 19 R. P. C. 125—Joyce, J.

38. *Action for Infringement — Omission in Specification and Drawing—Fatal Flaw.*]—The plaintiff hit upon the idea of having a shackle hitch with two eyes and a projecting lug as an improvement for connecting colliery trucks and the like to the hauling cables. In the specification and the drawing attached to it there was only one eye; whereas the drawing should have shown two eyes. The patent was granted to the plaintiff. In an action for infringement by him against the defendants:—

HELD—that there was a fatal flaw in the patent; and that there must be judgment for the defendants with costs.

PARKER *v.* POWELL DUFFRYN STEAM COAL [CO., LD., (1902) 19 R. P. C. 372—Walton, J.

39. *Revocation—Saccharine.*]—In his specification the patentee stated that he obtained saccharine by treating a lead saccharine compound with "sulphite" of ammonium.

It was proved that if "sulphite" was used the product would be largely contaminated with lead, and worse than useless; and that, if "sulphide" was meant, the claim was old.

HELD—that the patent must be revoked.

IN RE PARTRIDGE'S PATENT, (1903) 20 R. P. C. [459—Joyce, J.

40. *Insufficiency of Specification—Claim too Wide.*]—A patent was granted in 1897 to E. G. S. for "Improvements connected with the concentration or distillation of glycerine." Buckley, J., dismissed a petition for revocation based upon allegations of fraud, prior user and insufficiency of the specification. On appeal:—

HELD—that the claim was in fact too wide, because it referred in general terms to a "condenser" without distinguishing between "air condensers" and "water condensers," both of which were well known at the date of the specification, whereas an "air condenser" would not answer the necessary purpose.

The order for revocation was suspended to allow the patentee an opportunity of amending his specification; the petitioners were ordered to pay the increased amount of costs caused by the allegations of fraud.

Decision of Buckley, J. (19 R. P. C. 273) reversed on a new point.

IN RE SCOTT'S PATENT, (1903) 20 R. P. C. 257—[C. A.

See No. 33, *supra*.

41. *Action for Infringement—Novelty—Subject-matter.*]—If the Court finds that an article as made meets a recognised deficiency, it will endeavour to read the specification as defining such an article as has in fact attained a practical success.

Specification—*Continued.*

Letters patent were granted to the patentee, whose claim was: "A galvanic battery having the space between its positive and negative electrodes filled with a semi-solid or plastic exciting agent in two layers, the one layer in contact with the negative electrode, having depolarising agents intermixed therewith, and the other layer in contact with the positive electrode, having no such depolarising agents."

From the body of the specification the depolarising layer was to be made of ingredients of some such sort as that, when mixed with two parts of water, a semi-solid would be formed, and that the depolarising layer was to contain some hygroscopic. The exciting agent ought to be made of some materials which would set to the condition of a semi-solid, so that the temporary core could be removed. The important feature of his invention, he said, was "the interposition between the two electrodes of two layers such as I have above described." The plaintiffs' battery for some reason attained a commercial success never attained before. The owners of the patent brought an action against the defendants for infringement.

HELD—that the claim was not too wide, being for a class of battery defined by the limitations contained in the specification; and that there was novelty, and good subject-matter.

Decision of Buckley, J. (19 R. P. C. 113) reversed.

PATENT EXPLOITATION, LD. *v.* SIEMENS [BROTHERS & CO., LD., (1903) 20 R. P. C. 225—C. A.

42. *Action for Infringement — Electrical Meters — Thompson-Houston Meter—Additional Shunt Coil—Old Contrivance applied in a Manner not within Specification.*]—The essence of the plaintiff's invention was an improvement in electrical meters, in which the movement was obtained from the current to be measured, and he insured that result and guarded against any movement resulting from the current in the added coil by providing that such current should go direct from the main to the return conductor without going through the mercury armature. While improving electric meters by rendering them more sensitive to light loads, the plaintiff so constructed them as to involve risk of their registering when no lamp current was passing. The plaintiff's meter registered current only and did not include the case of an energy meter. The defendants, in order to increase their magnetic field, introduced a coil into the shunt passing through the armature. The effect of this was to have a constant standing field interacting with the rotary field, and so to give a torque to the meter even when no lamp current was passing. The defendants led the current through the armature, which a person was told by the plaintiff not to do. The meter was thus rendered more sensitive to a feeble lamp current and registered when only one lamp was lighted. In the defendants' meter the torque was always constant whether lamp current was passing or not, while in the plaintiff's meter the initial torque when no lamp current was passing was zero, and for a time the torque increased proportionately to the number of lamps.

HELD—that this application to a Thompson-Houston meter of an additional shunt coil did not constitute an infringement of the plaintiff's patent; that the defendant had made use of an old contrivance—an additional coil—and had applied it in a manner which was not within the plaintiff's specification, and in which the plaintiff told a person not to do it; and that, therefore, the defendants had not infringed.

Decision of Eady, J. (19 R. P. C. 147) affirmed.

DE FERRANTI *v.* BRITISH THOMSON-HOUSTON [CO., LD., (1903) 20 R. P. C. 308—C. A.

43. *Action for Infringement—Claim too wide—Subject-matter.*]—An amended specification ought to be construed without reference to parts struck out; but, if the Court is asked to draw inferences of probabilities, *semble*, such parts may well be considered.

The plaintiffs brought an action against the defendants to restrain the infringement of a patent which related to boxes or covers for electricity supply mains. The object of the invention was to avoid dangers and inconveniences attaching to short circuiting. If two boxes containing the fuses were near one another, and were both open at the same time, there was occasionally a danger of short circuiting. This was a thing to be avoided. The patent was for "the construction and arrangement of electrical fuse or cut-out boxes or covers which automatically prevent access being obtained to more than one main at a time." The invention consisted in arranging the boxes which contain them back to back, at such a distance from one another, fixed upon a base, so that not more than one box could be open at a time. So long as one of the two boxes was closed, and one only open, the danger of short circuiting was obviated.

HELD—that upon a true construction of the specification the claim was not confined to boxes of the make and arrangement shown in the body of the specification, but extended to any set of boxes provided that only one of the set could be opened at once; and that the claim was too wide and the patent invalid.

Semble, also there was no subject-matter.

Decision of Byrne, J. (19 R. P. C. 409) reversed.

REASON MANUFACTURING CO., LD. *v.* E. F. [MOY, LD., (1903) 20 R. P. C. 205—C. A.

44. *Action for Infringement—"Seltzogenes"—"Sparklets."*—In an infringement action it appeared that the plaintiff's claim was for "an apparatus for the direct saturation of gaseous liquids, consisting substantially of a syphon head fixed permanently on the bottle and closed at its upper part by a screw cap or stopper carrying a tube into which is introduced . . . a cartridge containing compressed or liquefied gas, which is to be gradually emitted through an indicator dip tube by means of a screw threaded rod fixed in the cap or stopper."

Specification—*Continued.*

HELD—that the plaintiff's claim covered only the details of the particular apparatus, and not any form of apparatus for holding and discharging a movable cartridge capable of aerating the liquid—in which case the validity of the patent must have been argued; and that, therefore, as the defendant's apparatus was differently constructed, there was no infringement.

CROCKER *v.* AERATORS, LD., (1903) 20 R. P. C. [621—Buckley, J.

45. *Action for Infringement — Tubes—Compressing, Shaping, and Drawing Metal Tubes.*]—The plaintiff was the owner of a patent for producing metal tubes by forcing softened metal over a rod; the novelty of his device consisted of the means used for water-cooling the metal and expelling the iron rod.

The defendants contested the validity of the patent on the ground that the water-cooling and expelling apparatus were not intended to be included in the words "pressing, shaping and drawing of tubes and means and apparatus therefor."

HELD—that, although the specification was not well worded, the water-cooling and expelling were included in the first claim, and that the patent was valid.

Decision of C. A. (18 R. P. C. 339) reversed.

Decision of Buckley, J. (17 R. P. C. 569) restored.

TUBES, LD. *v.* PERFECTA SEAMLESS STEEL [TUBE CO., LD., (1903) 20 R. P. C. 77—H. L. (E.).

46. *Action for Infringement—Sufficiency of Description in Specification—Essential Feature Shown in Drawings, but not in Letterpress.*]—The essential feature of a patent (the position of the centres of certain levers) was originally shown both in the drawings and the letterpress. In amending the specification by striking out one claim the drawings were not altered, but the letterpress relating to the position of the levers was struck out.

HELD—that the invention was insufficiently described in the specification, and that the letters patent were therefore invalid.

GEORGE HATTERSLEY & SONS, LD. *v.* GEORGE [HODGSON, LD., (1903) 20 R. P. C. 591—Kekewich, J.

See No. 49, *infra.*

47. "*Phonograph Records.*"]—The first claim in the plaintiff's specification was for "the process of producing copies of phonograph records by forcing a blank of suitable material, softening when heated, against the record surface of an indented matrix by heated fluid, as steam or the like, under pressure, until the blank is softened and an impression has been taken, and then continuing the pressure by means of a cooling fluid, as air, until the blank hardens."

HELD—that the plaintiffs' patent was confined to the particular combination described; and that the defendants' apparatus, which differed from it in several particulars (*e.g.*, in cooling by water and not air, and in providing specially for the escape of air from between the matrix and the blank), was not an infringement.

Decision of Buckley, J. (20 R. P. C. 705) affirmed.

LARBERT CO. *v.* INTERNATIONAL PHONOGRAPH [INDESTRUCTIBLE RECORD CO., LD., (1904) 21 R. P. C. 247—C. A.

48. *Novelty — Utility.*]—The plaintiffs were the owners of a patent for "improvements in attaching bindings to the brims of hats," in the specification of which they stated that the invention consisted "in fitting a hat having a stiff, curled, or rolled brim with a binding" by particular stitching and a process called by them "snapping over"; and that the invention also consisted of a machine, and the method of attaching the binding by means of the machine.

Their first claim was for "the herein described method of attaching to a hat having a stiff, curled or rolled brim a binding, &c., substantially as specified."

HELD—that upon the true construction this was only a claim for attachment by means of the machine, and did not (as the defendants contended) include attachment by hand sewing; and that, upon the facts, novelty and utility were established in respect of all the claims, and that the defendants had infringed.

Decision of Buckley, J. (20 R. P. C. 529) affirmed.

GAMMONS *v.* BATTERSBY, (1904) 21 R. P. C. 322—C. A.

49. *Specification amended by deleting part—Words deleted not to be looked at.*]—Where a specification has been amended by deleting portions of it, the portions so deleted cannot be looked at on a question as to the construction of the amended specification.

Inglis v. *Buttery* (1878) 3 App. Cas. 552—H. L. (Sc.) followed.

HATTERSLEY & SONS, LD. *v.* HODGSON, (1904) [21 R. P. C. 517—C. A.

See No. 46, *supra.*
See also Nos. 78, 107, 117, 119, 123, 129, *infra.*

(3) Disconformity.

51. *Validity — Anticipation — Previous Decisions as to same Patent.*]—In 1890, letters patent were granted to W. for "Improvements in rubber tyres and metal rims or felloes of wheels for cycles and other light vehicles." The Pneumatic Tyre Company, in whom this patent had become vested, brought an action for infringement against E. & S., trading as the L. Company. The defendants, in addition to special defences and counterclaims, denied infringement, novelty, utility, subject-matter, and that W. was the first inventor, and alleged disconformity. They alleged (*inter alia*) anticipation by a specification of Burton and Shaw (No. 1412 of 1871) for "Improvements in wheels for traction engines." Prior to the commencement of the action, W.'s

Specification—*Continued.*

patent had been held valid in an action of *The Pneumatic Tyre Co., Ld.* v. *Casswell*, in which the question of disconformity had been decided; and, before trial, the same question had been decided in favour of the patent in *The Pneumatic Tyre Co., Ld.* v. *The East London Rubber Co., Ld.*

HELD—that the evidence not having established different findings to those in the previous actions, the decisions as to disconformity were binding on the Court, and must be followed; also that the patent had not been anticipated, and was good, and had been infringed. Judgment was given for the plaintiffs upon the claim and counterclaims.

PNEUMATIC TYRE CO., LD. *v.* LEICESTER PNEU-[MATIC TYRE AND AUTOMATIC VALVE CO., (1898) 15 R. P. C. 158—Kennedy, J.

And see No. 115, *infra*.

52. *Validity.*]—In 1894, letters patent were granted for "Improvements in adjusting the driving chains for bicycles and other velocipedes." The first claim was for "the improvements in driving chain adjusting mechanism of velocipedes hereinbefore described and illustrated in the accompanying drawings, that is to say, making the ends of the arms or branches of the chain stay hollow or tubular and longitudinally slotted on their inner sides, and arranging on the ends of the driving wheel spindle carrier blocks for taking into and working in the said hollow or tubular ends of the chain stay, the said carrier blocks being moved in the hollow or tubular chain stays in the ways hereinbefore described and illustrated." By his fifth claim, the patentee claimed "the combination with the chain adjusting gear for velocipedes hereinbefore described and claimed, when used with semi-circular or semi-elliptical chain stay arms, of foot steps of the kind hereinbefore described and illustrated in Figures 22, 23 and 24 of the accompanying drawings." The provisional specification contained no reference to the foot steps. In 1897, a company, who were then the registered owners of the letters patent, commenced an action against another company for infringement of the same, alleging claim 1 to be infringed. The defendants denied infringement, and alleged want of novelty (setting up, *inter alia*, prior publication by a specification of Palmer in 1889), want of subject-matter, and disconformity. The defendants' arrangement had a chain-stay with a tubular end which had two slots in it, one at the side through which the end of the driving-wheel spindle passed, and one underneath for manipulating a nut which screwed on the end of the spindle inside the tubular chain-stay; on the side of the latter nearest the wheel a drawbolt was screwed on the spindle. The plaintiffs contended that the defendants had in substance their carrier-block. Draw-bolts in chain-adjusting mechanism were old, Palmer having them in his invention.

HELD—at the trial, that the defences of disconformity and of want of subject-matter failed, and that the patent was valid and had been infringed. A stay was granted upon terms.

The defendants appealed.

HELD, by C. A., that the invention claimed in claim 1 was the combination of the improved tubular end of the chain stay with the particular adjusting apparatus of which the carrier-block was the essential feature; that the defendants had not infringed, and that the patent was bad for disconformity, inasmuch as what was claimed in claim 5 was not shadowed forth in the provisional specification.

The appeal was allowed, with costs in both Courts.

OSMONDS, LD. *v.* BALMORAL CYCLE CO., LD., [(1898) 15 R. P. C. 505—C. A.

53. *Action for Infringement—Several Patents—Prior Grant—Utility.*]—The plaintiffs, in whom five patents had become vested, brought an action against the defendants for infringement of the same. Two patents were not gone into at the trial and three—viz., Candy's patent and Stubbs' two patents—were gone into. Candy's specification had been amended, and it was said that as amended it was bad for disconformity. This patent was for improvements in velocipedes and other wheeled vehicles, but the present action related to cycle wheels. In the provisional specification there was a reference to a longitudinally split cover or jacket to be fastened to the rim of the wheel, either inside or outside, by means of hooking devices. It was contemplated that one edge of the cover might be fastened to the other by hooking, and, further, that the cover might be attached to the rim by expansion against the overhanging sides of the metallic rim. In the complete specification claim 11 was for "the attachment of the jacket to the rim by means of the said jacket being moulded or formed so that the edge or edges of the jacket may just fit into the rim substantially as described."

HELD—that if between the respective dates of the provisional and complete specification the inventor discovered that he could dispense with overhanging edges, he was entitled in the complete specification to describe his invention without claiming as a necessary part of it such overhanging edges to the rim; and that it appeared that the essential matter referred to in the provisional specification was the holding on by means of pneumatic pressure alone, and that the complete specification was, in this respect, within the provisional.

In one form of Candy's invention was to be found a jacket with its edges strengthened by the insertion of a metal rim or cord, or by cemented canvas, the edges of the jacket being fastened together by hooks and eyes inside the rim, and one edge being attached to the rim by means of cement, the whole being held in place by means of pneumatic pressure or inflation of the inner tube. In the defendants' tyre was to be found a jacket with a series of opposing hooks on its edges, such hooks being cemented into the jacket so as to form continuous edges, or a continuous hook, partly yielding and partly unyielding, the continuous edges or hooks engaging with one another, with the intention that

Specification—*Continued.*

metal hook should engage with metal hook throughout.

HELD—that the object and result of what the defendants did was to fasten the edges of the jacket by means of opposing hooks, instead of by means of opposing hooks and eyes, and this was making use of an exact mechanical equivalent; and though the defendants' tyre might be an improvement upon the plaintiffs', nevertheless it was an infringement.

In Stubbs' patent the essence of the invention was to have a tyre with edges transversely rigid and laterally elastic, and this was attained by lapping the edges of the tyre over zig-zag wire, in the one patent simply zig-zagged flat, and in the other zig-zagged flat and then turned over so as to form a continuous and alternating series of hooks. In each case the wire was secured into the overlapping edges of the tyre.

HELD—that the defendants had taken exactly the invention so far as the method of stiffening the edges and forming the hooks was concerned, but instead of hooking the tyre into the rim they hooked one edge of the tyre into the other: that they had infringed claim 1 of Stubbs' for the tyre, though they did not infringe claim 2; that there was no want of utility; and a certificate that the validity of three patents came in question should be granted.

BIRMINGHAM PNEUMATIC TYRE SYNDICATE, [LD. *v.* RELIANCE TYRE CO., (1902) 19 R. P. C. 298—Byrne, J.

54. *Action for Infringement—Subject-matter—Mechanical Equivalents.*]—The plaintiffs owned a patent for certain "improvements in shuttle box mechanism for looms."

In weaving the body and border of, *e.g.*, a handkerchief, two different cylinders come into operation, and the essence of the plaintiffs' invention was to effect the change from one cylinder to the other without any intermediate mechanism such as had always previously been employed; it had also certain other lesser advantages.

In practice the plaintiffs had departed slightly from the details described in the specification; they claimed, however, that such departure was a matter of detail only and not of principle. The defendants employed a machine similar to the plaintiffs' machine as actually made.

HELD—that the plaintiffs' patent was valid, but that the defendants had not infringed it. The plaintiffs had only discovered a way in which one cylinder could be made to operate on another; and, where a specific mechanical improvement is claimed, the claimant must be strictly held to the particular mechanical device which he has claimed for effecting his object.

WHITE AND OTHERS *v.* HARTLEY AND OTHERS, [(1903) 20 R. P. C. 265—Hall, V.-C.

55. *All Claims struck out—One amended—Variance between it and Provisional Specification—Invalidity.*]—Upon an application for a patent an opponent submitted that the invention had already been patented, and the Comptroller-General refused to allow any of the four claims; he, however, allowed one of them to be amended, so as to define the invention more precisely.

HELD—that to allow the patent would be to allow something entirely different from anything described in the provisional specification, and to allow a claim for a process by the introduction of new and particular machinery; and that the patent must not be sealed.

IN RE LANCASTER'S APPLICATION FOR A [PATENT, (1903) 20 R. P. C. 366—Sir E. Carson, S.-G.

56. *Action for Infringement—"Improvement in Dobbies"—Utility.*]—The plaintiff was the owner of a patent for "improvements in dobbies, or apparatus for operating the healds of looms for weaving." The defendants had unsuccessfully in the Court below attacked the patent on the grounds of anticipation, disconformity and want of utility; upon appeal they relied on the last two grounds.

HELD—that the appeal failed.

A patent is not bad for disconformity merely because mere steps in the method are altered, so long as they are not in any way matters essential to the nature of the invention as stated in the provisional specification. Similarly, a total omission does not amount to disconformity, unless it is an omission which goes to the essence of the invention.

Wo dward v. *Sansum* ((1887) 4 R. P. C. 166—per Cotton, L.J.) approved.

It is not necessary that a patent should be shown to be useful, or an improvement on previous machines, in every respect or for every part of the process: it is sufficient if it be useful for some purposes, and the amount of utility need not be very great.

Decision of Wills, J. ((1901) 18 R. P. C. 481) affirmed.

WARD BROS. *v.* JAMES HILL & SON, (1903) 20 [R. P. C. 189—C. A.

57. *Revocation—Petition for Disconformity between Provisional and Complete Specification.*]—A patentee is at liberty to describe in his complete specification a method of carrying out his invention different from that given in the provisional specification, provided that the new method is really within the invention of which the nature is described in the provisional specification; and the question is one of fact.

Woodward v. *Sansum* ((1887) 4 R. P. C. 166) followed.

Decision of Buckley, J. ([1903] 2 Ch. 715; 73 L. J. Ch. 47; 52 W. R. 63; 89 L. T. 127; 20 R. P. C. 545) reversed.

IN RE GEIPEL'S PATENT, (1904) 21 R. P. C. 379 [—C. A.

See also Nos. 72, 89, 93, 113, 115, 132, *infra.*

II. GRANT: APPLICATION AND OPPOSITION.

58. *Claim—General Claim—Master Patent—Pioneer Invention—Evidence of existing State of Knowledge.*]—If an attempt is made to limit subsequent patents by the language of a general claim upon the ground that the patent is a master patent and is for a pioneer invention, it is the duty of the person maintaining that contention to support it before the Comptroller by evidence, unless the parties agree as to the existing state of knowledge.

In re Southwell and Head's Application [for a Patent, (1899) 16 R. P. C. 361—Sir R. Webster, A.-G.

59. *Right to be heard as Opponent—Interest in Prior Patent—Application to Attorney-General for Directions*—Mandamus—*Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *ss.* 11, 95—*Patents, Designs, and Trade Marks Act*. 1888 (51 & 52 Vict. *c.* 50), *s.* 4.]—Opposition to the grant of a patent under sect. 11 of the Patents, Designs and Trade Marks Act, 1883, as amended by the Patents, Designs and Trade Marks Act, 1888, s. 4, on the ground that the invention has been patented in this country on an application of prior date, can only be made by a person having an interest in the earlier patent. Where, on an application by the Comptroller of Patents to the Attorney-General for directions in a matter of doubt or difficulty, under sect. 95 of the first-mentioned Act, the Attorney-General directs that the Comptroller shall not hear a particular person as an opponent to the granting of a patent, the Court will not grant a *mandamus* to the Comptroller to hear such person.

Reg. *v.* Comptroller-General of Patents, [Ex parte Tomlinson, [1899] 1 Q. B. 909; 68 L. J. Q. B. 568; 47 W. R. 567; 80 L. T. 777; 15 T. L. R. 310; 16 R. P. C. 233—C. A.

60. *Rule as to Persons entitled to be heard—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 11.]—If there has been a *bonâ fide* attempt to carry out an invention sought to be protected by the person who desires to be heard in opposition, and proof that he may be damnified or affected by the application which he desires to oppose, he is entitled to be heard. This is a rule, not an exhaustive one, for the guidance of the Office.

In re Meyer's Application for a Patent, [(1899) 16 R. P. C. 526—Sir R. Webster, A.-G.

61. *Secret Process—Co-owners—Right to use Invention—Injunction.*]—Each co-owner of a secret process or invention may, in the absence of contract, use the knowledge which he possesses without the consent of the other co-owners.

Heyl-Dia *v.* Edmunds, (1900) 48 W. R. 167; [81 L. T. 579—Kekewich, J.

62. *Substantial Identity between Two Inventions—Improvement—Specific Reference—General Disclaimer—Form.*]—Where there is substantial identity between the fundamental parts of two inventions, but a difference which can only be justified upon the ground of improvement and it being right to protect in that case both the public and the prior patentee by a specific reference to his invention, such specific reference should be made.

In order to determine whether or not a specific reference or a general disclaimer is required what the invention is in each case must be grasped.

There is a broad distinction between a statement of what is the result of the knowledge of the public and a specific reference to a specification by name.

Where there is not sufficient identity to justify a specific reference, a disclaiming statement incorporating the substantial words of the claim should be made.

In re Newton, (1900) 17 R. P. C. 123—Sir R. [Webster, A.-G.

64. *Collusion—Delay—Law Officer's Jurisdiction to Direct Sealing—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 12 (3) (*a*).]—Where the delay of the grant of a patent has been purposely brought about for an ulterior object—*e.g.*, to obtain a grant in the United States—the law officer has no jurisdiction under sect. 12 (3) (*a*) of the Act of 1883 to give a direction that a patent should be sealed.

In re A. B.'s Application for a Patent, [(1902) 19 R. P. C. 556—Sir E. Carson, S.-G.

65. *Specification—Time for leaving Complete—Comptroller's Power to extend Time—Collusive Application refused—Agent lending himself to an Opposition which is not Genuine—Patents, Designs and Trade Marks (Amendment Act)*. 1885 (48 & 49 Vict. *c.* 63), *s.* 3.]—When the time fixed by the Act of Parliament for sealing a patent expires by reason of opposition being entered, no patent can be sealed without an order from the law officer that the time shall be extended. If the opposition is bogus and collusive, the law officers have no power whatever to extend the time under the statute. If in any case there is reasonable ground for supposing that any chartered agent, or any agent who practises before the Comptroller, lends himself to the entering of an opposition which is not a genuine opposition, or is one made in collusion with the applicant for the patent, the matter will be reported to the Board of Trade to take such steps, if any, as they may think proper under the circumstances. The result of the refusal of such extension of time is a very serious matter, because if the time is not extended the patent cannot be sealed, and the applicant may lose the whole advantage of his invention.

In re an Application for a Patent by A. B. [(1902) 19 R. P. C. 463—Sir E. Carson, S.-G.

66. *Improvement—Very small Invention—General Words not to be used in Claim.*]—Where there is a very small invention, or what may prove to be a very small invention, care must be taken that the patent is limited to the actual

Grant: Application and Opposition—*Continued.*

invention itself. Cases are to be deprecated where the applicants, who are obtaining a patent for an improvement on previously existing patents, put in their claim any general words which may in any sense be taken to include in their patent anything that has been previously patented, as such patents might be made use of fraudulently to prevent either the public, or some person who it is wished to deter from so doing, from using previous inventions by pointing to general words which would include matters which have been already patented.

In re Hamilton's Application for a [Patent, (1902) 19 R. P. C. 33—Sir E. Carson, S.-G.

67. *Prior patenting—Opponent's Interest in Prior Patent.*]—An opponent is not entitled to oppose an application for a patent upon the ground of prior patenting unless he can show an interest in one of the patents upon which such further ground of opposition is based.

In re J. & J.'s Application for a Patent, [(1902) 19 R. P. C. 555—Sir E. Carson, S.-G.

68. *Application for Protection in Foreign State — International Convention — Subsequent Application in this Country by another Person—Later Application by Patentee in this Country —Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *ss.* 29, *sub-ss.* 2, 6; 31; 103, *sub-ss.* 1, 2.]—Where a person has made an application in a foreign State, he is entitled under sect. 103, sub-sect. 1, to a patent for his invention under the Patents, Designs and Trade Marks Act, 1883, in priority to other applicants, and such patent or registration shall have the same date as the date of the application in the foreign State. If the applicant has previously applied to a foreign State he has two alternatives, and may take which he likes; he may take a patent to run from the date of his prior application to the foreign State (which will, of course, be for a shorter time, having regard to the time that has expired since that); or he may, if he is so minded, take a patent to run for fourteen years from the date of his English application. He is entitled to the former under sect. 103 if he asks for it; he is not bound to ask for it, but he is entitled to it if he does. His election of exercising the option to which he is entitled must be made within seven months from his applying for protection in the foreign State with which the arrangement is in force.

Sub-sect. 2 of sect. 103 was never intended to apply to all cases of patents where the patentee had previously obtained a patent in a foreign country, but only to apply it as part of the general provisions of sect. 103 in cases where the patentee was availing himself of the privileges given to him by that section.

British Tanning Co. v. *Groth* ((1890) 8 R. P. C. 113, 122—Romer, J.) approved.

On February 28th, 1891, the patentee, whose successors in title were the plaintiffs, made an application in the United States in respect of the invention the subject of the patent.

On March 16th, 1894, there was publication at the Patent Office Library of a communication from a man M.

On September 1st, 1894, the plaintiffs' patentee lodged his application in common form in this country for a patent. The seven months limited by sect. 103 expired on September 28th, 1894, and before that time this patentee had not sought to avail himself in any way of the section. Subsequently, on June 20th, 1895, he was desirous of doing so, but the Patent Office declined to seal his patent as of the date of his foreign application, namely, February 28th, 1894.

Held—that the Patent Office rightly declined so to seal his patent; and that the date of the patent was conclusive; and that therefore it was invalid by reason of anticipation, as M.'s paper covered the whole ground.

Semble, also there was no subject-matter.

Decision of Buckley, J. ([1902] 1 Ch. 494; 71 L. J. Ch. 301; 50 W. R. 361; 19 R. P. C. 213) affirmed.

Acetylene Illuminating Co. *v.* United [Alkali Co., 72 L. J. Ch. 214; 20 R. P. C. 161—C. A.

Two other appeals raising the same point were dismissed without argument; viz.: —

Acetylene Illuminating Co. *v.* Giffre [Electro-Chemical Co. and Acetylene Illuminating Co. *v.* Thorn and Hoddle Acetylene Co., (1903) 20 R. P. C. 286—C. A.

69. *Confidential Relationship — Right of Servant to take out Patents in his own Name.*]—The mere existence of a contract of service does not *per se* disqualify a servant from taking out a patent for an invention made by him during his term of service, even though the subject-matter of his invention is germane to his employers' business, and even though he has made use of his employers' time and servants and materials in perfecting his invention, and has allowed his employers to use the invention, while he remained in their employment. But some forms of confidential employment are inconsistent with such a right on the part of the employee.

The plaintiff had for a number of years been the manager of the English branch of an engineering company, dealing in a special pattern of pumps. He was paid a very high salary, and the relationship between him and his employers in America was of the most confidential character. Upon the facts the judge held that the degree of good faith due from him to his employers was inconsistent with any right to keep back ideas for improvements, &c., with a view to his personal profit at the expense of his employers; and that he must be declared to be a trustee for his employers of the patents taken out by him during his service.

Worthington Pumping Engine Co. *v.* Moore, [(1903) 19 T. L. R. 84: 20 R. P. C. 1—Byrne, J.

See also Nos. 9, 87, 88, 147.

III. SUBJECT-MATTER.

(1) Invention.

70. *Petition for Revocation — Fraud upon Rights of Petitioner—Patents &c., Act*, 1883, *ss.* 26, 4 (*c*).]—In 1891, two patents were granted to N., one on December 4th, for "the manufacture of an improved compound for coating walls and other surfaces, and for the production of casts or mouldings, and for analogous purposes"; and the other on December 7th for the "manufacture of an improved compound for coating walls and other surfaces, and for analogous purposes." In 1894, C. and H. presented a petition for revocation of these patents, and it was held, as to the earlier patent, that C. was the first and true inventor, and that the patent had been obtained by N. in fraud of C.'s rights, and it was accordingly revoked; but no order was made as to the later patent, C. having abandoned the case as to that patent. A patent for the invention to which the revoked patent was subsequently granted to C., who in 1895 presented another petition for revocation of the later patent, alleging the same grounds as before. The earlier patent related to a compound formed from glue and an active base, whilst the later patent related to a compound formed from glue and an inert base, and the processes were admitted to be identical.

HELD—that the process being C.'s invention, he might have taken out a patent to cover the combination of glue with an inert base, and that the later patent was also obtained by N. in fraud of C.'s rights. The later patent was accordingly revoked, but no order was made as to costs.

RE NORWOOD'S PATENT (No. 2). (1898) 15 [R. P. C. 98—Stirling, J.

71. *Infringement.*]—This was an action for infringement of a patent for a protector for the air tube of a pneumatic tyre. The specification described and claimed a strip or covering of skin, treated or cured in manner well understood, but not tanned as ordinary leather, placed all round the air tube so as to completely protect the same between the air tube and the outer covering of the tyre, and applied to the tyre in any convenient manner.

The defendant denied infringement and set up want of novelty, utility, and subject-matter; he also alleged insufficiency of the complete specification and disconformity.

HELD—the plaintiff's patent was invalid for want of subject-matter, and judgment was given for the defendant, with costs.

BRASSINGTON *v.* COX, (1898) 15 R. P. C. 502— [Romer, J.

72. *Alleged Anticipation — Variance — Practice—Certificates.*]—This was an action for the infringement of four patents (one being not relied on at the trial). The first for improvements relating to the frame of cycle saddles; the second for improvements in the boss on the pillar of the cycle; the third for improved means of adjusting the tilt of the saddle. The defendants denied infringement, and alleged that the patents were invalid on various grounds; No. 1, on the grounds of want of novelty and subject-matter, anticipation, want of utility and insufficiency; No. 2, on the grounds of want of novelty and subject-matter, insufficiency, variance, and anticipation; and No. 3, on the grounds of anticipation, want of subject-matter, variance, and prior grant. It was held, at the trial, that all the patents were valid, and had been infringed, the first patent being the application of an old principle in a way which involved the exercise of ingenuity; as to the second patent, that the alleged variance from the provisional was only such a change as might fairly follow on further consideration by an inventive mind of the method of the provisional; as to No. 3 patent, that the specification alleged as a prior grant was itself invalid on the ground of variance. Judgment was given for the plaintiff, with costs, except so far as the same had been increased by the inclusion of the abandoned patent, and the order certified that the alleged prior grant was invalid.

The defendants appealed.

HELD—on appeal, that the first patent was valid, since the words at the end of the first claim, "substantially as described and set forth," limited the claim for use in base frames of a trussed beam to the particular manner described in the specification, and, further, that this patent had been infringed; that, as to second patent, Figures 8, 9, and 10 were not within the provisional specification, and, further, the defendants had not infringed this patent; and that, as to the third patent, without deciding the question of validity, the defendants had not infringed it. The appeal, as regards the first patent, was dismissed with costs; but, as regards the second and third patents, it was allowed with costs, the costs to be taxed as if there were separate actions.

A certificate was given that the particulars of objections to the second and third patents were reasonable and proper.

BROOKS *v.* LAMPLUGH, (1898) 15 R. P. C. 33— [C. A.

And see No. 97, *infra*.

73. *Action for Infringement.*]—This was an action for infringement of a patent for a method of cutting, at one operation, necktie linings by means of a revolving band-knife, the material being clamped firmly between two templets of identical form.

HELD—that the invention claimed was n sufficient to form the subject-matter of a paten being merely the application of the use of a band-knife, in its ordinary function as a cutter of piles of substances, by applying it to necktie linings, when such linings to be cut were clamped together with guides. A more skilled application of well-understood tools and well-understood processes is not patentable. It is mere ingenuity and not invention.

Decision of Romer, J. and C. A. ([1898] C. A., 15 R. P. C. 84; 14 T. L. R. 210) affirmed.

DREDGE *v.* PARNELL (1899) 16 R. P. C. 625— [H. L. (E.).

Subject-Matter—*Continued.*

74. *Claim—Whether for Apparatus or Process Infringement.*]—The plaintiff's patent was an invention of an improved case into which moulds were placed. The case must be strong, and the mould need not be so. The defendant made a strong mould. It was contended that the defendant was employing plaintiff's process.

HELD—that the plaintiff's claim was not for a process, but for an improved apparatus; and that the whole object was to secure the rigidity of the moulds used by means of rings, bolts or stays, and that the defendant had not infringed.

Decision of Bigham, J. (1898) 15 R. P. C. 663) affirmed.

PETERS *v.* OWEN, (1899) 16 R. P. C. 83—C. A.

75. *Principle—Machines intended to produce the same Result—Things common to both—A Principle cannot be Patented—The Application of a Principle can.*]—There are, and there must be, when the same subject-matter is being dealt with, and when machines intended to produce the same result are being dealt with, some things which must be common to both, whether the apparatus in question is an infringement or not; but the thing to be considered is whether or not the invention—the thing which has been protected and which the rest of mankind are prohibited from using for the period during which the patent lasts—has been taken by the person who is alleged to have infringed.

That there is any principle which can be claimed as a principle, as distinct from the application of it to the particular machine, is quite outside the region of patent law. A mere principle cannot be appropriated by any one; the application of the principle can only be appropriated.

PNEUMATIC TYRE CO., LD. *v.* TUBELESS PNEU-[MATIC TYRE AND CAPON HEATON, LD. AND OTHERS, (1899) 16 R. P. C. 77; 15 T. L. R. 105—H. L. (E.).

77. *Process—Validity.*]—A patent was taken out to protect a process communicated from abroad by one Prosper Monnet, commonly known as "Monnet's Patent," and described as being "for improvements in the manufacture of toluene-sulpho-chlorides." Toluene, or toluol, being also known as methyl benzine, is a necessary ingredient in the production of saccharin, and in the course of the manufacture it has to be converted into toluene-sulpho-chloride, which by subsequent processes passes through another stage of amide before the finished product, saccharin, is obtained. The patent in question had to do with the conversion of toluene into toluene-sulpho-chloride, and by the process patented the whole of the toluene, instead of about half, was converted into toluene-sulpho-chloride, no bye-products of an organic character being formed, and about 60 per cent. of the total theoretical yield of chlorides was ortho-chloride. The production of useless sulphuric acid, which was formerly 50 per cent. of the whole, was practically got rid of and the product was better for industrial purposes than that previously obtained.

HELD—that there was sufficient subject-matter to support the patent; that an injunction to restrain the infringement should be granted and costs follow the event, and usual certificate granted.

SACCHARIN CORPORATION, LD. *v.* THE CHEMI-[CALS AND DRUGS CO., LD., (1900) 17 R. P. C. 28—North, J.

78. *Process—Validity—Use Abroad—Sale in England.*]—In 1898 the Saccharin Corporation, Ld., the owners of the patent for "improvements in the manufacture of toluene-sulpho-chlorides," having brought an action for infringement, it appeared that saccharin made by two firms in Switzerland had been imported and sold in England by the defendants.

HELD—that there was subject-matter to support the patent, that there was no want of novelty, and the patent was valid.

Saccharin Corporation, Ld. v. *The Chemicals and Drugs Co., Ld.* ((1900) 17 R. P. C. 28—North, J., No. 77, *supra*) followed.

HELD, also, that the defendants by importing saccharin, in the course of the production of which the patented process was used, were indirectly making use of the invention, and had infringed.

The principles of *Elmslie* v. *Boursier* ((1869) L. R. 9 Eq. 217; 18 W. R. 665) and of *Von Heyden* v. *Neustadt* ((1880) 14 Ch. D. 230; 28 W. R. 496) followed.

HELD, also, that as this action had been commenced before the date of the judgment in which North, J. had granted the certificate of validity, it was not a "subsequent action."

Automatic Weighing Machine Co. v. *Combined Weighing Machine Co.* ((1889) 6 R. P. C. 120—Charles, J.) followed.

SACCHARIN CORPORATION, LD. *v.* ANGLO-[CONTINENTAL CHEMICAL WORKS, LD., (1900) 48 W. R. 444; 17 R. P. C. 307; [1901] 1 Ch. 414; 70 L. J. Ch. 194—Buckley, J.

79. *Machinery—Novel and Useful Improvement—State of Knowledge.*]—The way to ascertain whether a novel and useful improvement in machinery required invention in the true sense is to consider how matters stood just before the improvement was discovered.

The patent in question related to the most modern form of newspaper printing machines, known as the "Endless Web Letterpress Printing Machines." The defects of this method of printing late news were apparent for some years, but prior to the invention no remedy for them had been discovered.

The invention consisted of the employment of a short movable printing drum revolving on an axis, parallel with the axis of the stereo cylinder, and capable of having quickly inserted and holding firmly on its surface boxes of ordinary movable type, whose face should be concentric with the drum. This drum was so adjustable and geared that any column of the paper left

Subject-Matter—*Continued.*

unprinted on by the main stereo cylinder could be printed on by the type on the face of the drum. It was necessary for the complete success of the invention that the box should be one into which type could be quickly and firmly fixed, and so that, when fixed, the type should have its face concentric with the drum. The patentees invented and by their specification described a special mode of packing a box with type to answer the above requirements.

HELD—that, having regard to the state of knowledge at the time the improvement described by the patentees was made, there was sufficient invention on the part of the patentees to justify a patent for the improvement, or, in other words, there was proper subject-matter for the patent.

Decision of Cozens-Hardy, J. ((1899) 16 R. P. C. 547) reversed.

Decision of C. A. ((1900) 16 T. L. R. 84; 17 R. P. C. 126) affirmed.

TAYLOR AND SCOTT *v.* ANNAND AND THE [NORTHERN PRESS AND ENGINEERING CO., LD., (1901) 18 R. P. C. 53—H. L. (E.).

81. *Existing State of Knowledge—Disclosures, Successful and Non-Successful—Anticipation.*]—In patent cases which depend on subject-matter, the most important thing of all, and that which the Court should always be first informed of, in order to put a proper construction on the patent, is what was the existing state of knowledge.

From the point of view of regarding subject-matter all the disclosures prior to the specification have to be considered, whether they have been successful or whether they have not been successful; and it is in that respect the subject-matter differs from anticipation.

The plaintiff claimed his invention in these words: "In the manufacture of indented glass-stoppered bottles for mineral and aërated waters making the indents of such a shape as will form a curved channel for the passage of the ball instead of the present horizontal one."

HELD—that there was nothing else involved in the claim, or intended to be made the subject-matter of the invention, than turning the channel from what the plaintiff thought was the common shape (possibly the best known shape)—the horizontal shape—of channel into the curved, and that in changing the form of the channel he did not disclose anything which, in the face of the previous knowledge, could be subject-matter.

Appeal from the decision of Farwell, J. ((1900) 17 R. P. C. 93) dismissed.

BEAVIS *v.* RYLANDS GLASS AND ENGINEERING [CO., LD., (1901) 17 R. P. C. 704—C. A.

82. *Application of well-known Instrument to New Purpose.*] — The patentee claimed "the construction of shore groynes in the manner described, by preparing braced uprights, inserting them in holes, fixing them by cement concrete, and finally screening the intermediate spaces by horizontal planks, or their equivalents, as set forth, the structure taking the form shown on the annexed drawings."

HELD—that the patentee had merely used on the sea shore a fence made in a manner perfectly well known and apparently used on land; that this was simply the application of a well-known instrument to a purpose with results which had never before been accomplished, and, therefore, was clearly not proper subject-matter for a patent.

Decision of Buckley, J. ((1900) 17 R. P. C. 255) affirmed.

CASE *v.* CRESSY, (1901) 18 R. P. C. 419—C. A.

83. *Utility.*]—A patented combination of a strap and gaiter was new and useful; new at the time of the grant because it had not been previously commonly used, and the large sale which it had obtained was itself strong evidence of its usefulness.

HELD—that, as a matter of fact, there was no such evidence of invention as to make the combination of strap and gaiter the subject-matter of a valid patent, as the subject-matter of the patent required no exercise of the inventive faculty to produce it.

Thompson v. *American Braided Wire Co.* ((1889) 6 R. P. C. 518—H. L. (E.)) distinguished.

STOHWASSER AND WINTER *v.* HUMPHREYS AND [CROOK, (1901) 18 R. P. C. 116—Bigham, J.

84. *Action for Infringement—Combination of Old Parts—Sufficient Ingenuity—Anticipation—Subsidiary Claims—Injunction.*]—A very small alteration which is the result of experiment, or which is the result of a happy thought and works a complete revolution, may be good subject-matter.

The plaintiffs were the registered proprietors of a patent granted in 1895 for an improved device for holding or retaining ladies' hair. The patentee claimed (1) an improved device for holding and retaining ladies' hair having pivotally connected toothed jaws for the insertion of the hair, and arms around which the hair is wound; (2) in an improved device for holding and retaining ladies' hair the arrangement for holding the jaws closed, the characteristic features of such arrangement being that the wings arranged on the upper extremity of the said jaws were springy or elastic, so that they can be hooked into one another; (3) in the device described in claim (1), etc.

The plaintiffs brought an action for injunctions to restrain the infringement of their patent and "passing off."

HELD—that the injunction as to the passing off would be continued until the expiration of the patent.

HELD, also, that claims (2) and (3) were subsidiary and only appendant to the improved device in claim (1); that the plaintiffs' invention consisted in the combination of the binder as a means of making a secure foundation for the coiffure, with arms and wings, as a means of coiling or arranging the hair, so as to form a complete edifice, and had the merit of ingenuity

Subject-Matter—*Continued.*

and invention sufficient to support the claim for invention; that there had been no anticipation; and that the plaintiffs were entitled to an injunction restraining infringement of their patent.

PARKER & SMITH *v.* SATCHWELL & CO. LD. [(1901) 18 R. P. C. 299—Farwell, J.

85. *Petition for Revocation — Patent valid except as to First Claim—Conditional Revocation of Grant—Disclaimer of First Claim—Form of Order.*]—The respondent was granted a patent for "Improvements in cyclometers, revolution counters, or indicators." No separate part of the invention, taken by itself, was claimed to be new: each of the five claims was for a combination. A petition was presented for revocation of the patent on the ground of want of novelty and subject-matter.

HELD—that the instrument did, in a neat and ingenious manner, accomplish the main object of the invention, and very completely fulfilled the requirements and objects of a cyclometer, and required the exercise of ingenuity to invent it: that there was no question as to its utility; that it was superior to any other cyclometer previously on the market: that the invention was good subject-matter for a patent; that the several claims were good and valid, except the first; but that the first claim was bad on the ground of want of novelty, which depended upon the squaring of the hub, and the use of the spring arms in the minor combination, the subject of the first claim; and that the patent must be revoked, unless within three months, or such further time as the Court might allow, the patentee obtained leave to amend his specification by disclaiming the first claim.

Form of order in *Deeley* v. *Perkes* ([1896] A. C. 496; 65 L. J. Ch. 912; 75 L. T. 233; 13 R. P. C. 581—H. L. (E.)) followed.

IN RE JUSTICE'S PATENT, (1901) 18 R. P. C. 241 [—Joyce, J.

86. *Petition for Revocation—Want of Novelty.*]—In 1900 letters patent were granted to K. for "improvements in and connected with stencil sheets." The object of the invention was: "To provide the sheets with an indicating scale or scales, and with guide lines for enabling the user to determine the space available for the inscribing matter." The objection of want of novelty was supported by a reference to Carter's specification, 1896, which amounted merely to making out a margin, which a person might use or not use as he thought fit. K. numbered the lines, the effect of which was to save a person the trouble of counting the lines on the squares. A petition was presented for revocation of K.'s patent.

HELD—that in the difference, if any, between what was described in Carter and what was sold by Ellam before K.'s patent, and what was described in K., there was nothing whatever worth calling invention; that there was no real novelty; and that the petitioner was entitled to succeed.

IN RE KLABER'S PATENT, (1902) 19 R. P. C. 174 [—Joyce, J.

87. *Application for Patent—"Manner of New Manufacture"—Within Statute of Monopolies—Alleged Invention—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 46.]—The applicant applied for a patent for "improvements in reply missives." The alleged invention related to an envelope, post card, or the like, with certain matter printed thereon, which would have enabled a certain system of business correspondence to be carried out. No claim was made for the system of correspondence, the claim being confined to the envelope or the like as "a new article of manufacture."

HELD—that the alleged "invention" was not a "manner of new manufacture" within the Statute of Monopolies, but was a plan for the conduct of business in a particular way and did not satisfy the test imposed by sect. 46 of the Patents, Designs and Trade Marks Act, 1883.

IN RE JOHNSON'S APPLICATION FOR A PATENT, [(1902) 19 R. P. C. 56—Sir E. Carson, S.-G.

88. *Application for Patent—"Manner of New Manufacture" within Statute of Monopolies—Alleged Invention—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 46.]—A patent cannot be granted for a mere scheme or plan. The subject with reference to which a person must apply for a patent must be one which results in a material product of some substantial character and not merely a printed sheet or its equivalent or a mere arrangement of words.

The applicant applied for a patent for "an improved form of newspaper page, and of printed surfaces of a like kind." His proposal was that a blank space, or blank spaces, should be left down the middle of or across the newspaper. The advantage of that was said to be the mechanical advantage that when a person folded his newspaper he would probably fold it down the middle either way, and then he would not interfere with any printed matter and would be able to read the newspaper more easily and more comfortably.

HELD—that the application related to a manufacture, that this particular alleged invention satisfied the test imposed by sect. 46 of the Patents, Designs and Trade Marks Act, 1883, and that at this stage the novelty or utility was not in question.

IN RE COOPER'S APPLICATION FOR A PATENT, [(1902) 19 R. P. C. 53—Sir R. Finlay, A.-G.

89. *Action for Infringement—Anticipation—Disconformity—Subject-matter—Development or Improvement.*]—The plaintiff's invention was for "improvement in candlesticks," and was a combination in one piece of an ordinary socket for a candle with a series of fangs which would act either as a save-all, hold the smaller end of the candle and admit air underneath, or as reducing or even possibly increasing the gauge of the candle which naturally fitted to the socket. The plaintiff added to the provisional specification small tits near where the nozzle was fitted, to overlap the same, and also to the drawing by the showing of a bulging continuous ring formed by the overlapping of the blank just where the

Subject-Matter—*Continued.*

fangs ended and the socket began. The plaintiff brought an action against the defendant for infringement. The important defences were anticipation, disconformity and infringement.

HELD—that there was no invention, for it was simply taking two things perfectly well known to the trade and fastening the one to the other; and that, however, the final specification did not disconform with the provisional specification.

Decision of Phillimore, J. ((1901) 18 R. P. C. 508) reversed in part and affirmed in part.

CARTER *v.* LEYSON, (1902) 19 R. P. C. 473—[C. A.

90. *Action for Infringement—Invalidity.*]—The plaintiff was the owner of a patent for an invention intended to increase the efficiency and certainty of "arc rupturing" devices by permitting them to be brought very close to the point where the arc may form.

It was previously well known that such proximity was desirable, but that it increased the probability of the arc springing from the electrode to the magnet, and that the remedy for this defect was insulation.

The plaintiff's invention consisted of "a shield of insulating material located between the surfaces of the electrodes and adjacent conducting surfaces, &c."

HELD—that there was no invention in directing the use of an insulator.

BRITISH THOMSON-HOUSTON CO., LD. *v.* MAN-[CHESTER CORPORATION, (1903) 20 R. P. C. 461—Buckley, J.

91. *Action for Infringement — Claim for a Product— Claim for a Process.*]—Letters patent were granted for a "New or improved manufacture of covered whalebone." The claim was for "the manufacture of new material, strips of natural whalebone covered or braided with threads of fibrous material applied substantially in the manner and by the means hereinbefore described with reference to and shown in the drawings." The mechanism employed might be "of any of the well-known types heretofore used in braiding machines."

HELD—that this was a claim for a process and not for a product; that it was a claim to something which was known before; and that it was simply the application of a known machine in such a manner that a certain number of threads interlace, and a certain number of threads form the selvage; that the patentee had not indicated the real essence of his invention, viz., the number of heads and spindles required to produce the result according as different numbers of strips were used, and that the patent was invalid.

Decision of Buckley, J. (19 R. P. C. 205) affirmed.

KOPP *v.* ROSENWALD BROTHERS, (1903) 20 [R. P. C. 205—Buckley, J.

92. *Action for Infringement — Bobbins — Ferrules for—Want of Utility—Prior User—No Evidence of Infringement.*]—The owner of a patent for a new method of fastening a ferrule on to the end of a bobbin used in spinning, brought an action against the defendants for infringement. The invention consisted of a ferrule with a lip folded over, which could (so it was claimed) be forced into the wood of the bobbin in order to hold the ferrule firm without any necessity for first grooving the wood. Somewhat similar ferrules requiring a prepared groove were previously known.

The C. A. (reversing Bruce, J.) held that, having regard to the prior specifications and previous knowledge, there was no invention and no subject-matter for letters patent. On further appeal,

HELD—that there was no invention and no utility, for the inventor had never used the invention described in the specification; and further that there had been no infringement, for no one else had used it.

Semble, "utility" means having commercial existence as a process of manufacture.

Decision of C. A. affirmed.

WILSON BROS.' BOBBIN CO., LD. *v.* WILSON & [CO. (BARNSLEY), LD., (1903) 20 R. P. C. 1—H. L. (E.).

93. *Action for Infringement—Dust Separator—Subject-matter — Disconformity—Utility—One of two Patents Abandoned—Costs.*]—The plaintiff was the owner of two patents for a contrivance for separating dust from hay, straw and other fibrous materials. The defendant set up want of utility, disconformity, and want of subject-matter, placing special reliance on a previous specification of L. for purifying air from dust.

HELD—that the plaintiff's first patent was not merely an invention to improve the mechanical means and arrangement adopted by L.; and that there was therefore a good subject-matter for the invention as being one to produce a new result and by new means.

Proctor v. *Bennis* ((1887) 36 Ch. D. 741) followed.

HELD, also, that the nature of the invention was fairly described in the provisional specification.

The plaintiff, having abandoned one patent was ordered to pay the costs so far as they were increased by the inclusion of that patent.

SUTCLIFFE *v.* ABBOTT, (1903) 20 R. P. C. 50—[Buckley, J.

94. *Glass Envelope for Electric Arc Lamps—Size of Envelope.*]—An invention for a small glass envelope for electric arc lamps with a closely fitting opening at the top, the object of the invention being to prolong the life of the carbon, is a good subject-matter for a patent, though enclosing envelopes for electric arc lamps were known before, inasmuch as the small envelope so made did prolong the life of the carbon, thus giving a new method of producing a result until then incapable of attainment.

JANDUS ARC LAMP AND ELECTRIC CO., LD. *v.* [ARC LAMPS, LD., (1905) 21 T. L. R. 308—Kekewich, J.

And see Nos. 13 and 18, *supra*.

Subject-Matter—*Continued.*

(2) Combination.

95. *Validity — Novelty.*]—In 1885, Letters Patent were granted to A. for "The use of earthenware pipes in place of brickwork or other material in the formation of self-flushing water closets." The claim (as amended) was for "The use of pipes of the above form, constructed of earthenware to form, as hereabove stated and described, a direct communication of the water closet seat with the main drain." The patentee brought an action for infringement, in which the defendants alleged (*inter alia*) non-infringement, want of subject-matter, and want of novelty. The plaintiff alleged that his invention consisted in a combination of pipes performing a function not performed by the parts separately. Held, at the trial, that the claim was for the use of the pipes in combination, that it was useful, but that the patent was invalid for want of subject-matter, since the combination performed no function not performed by the parts separately, which functions so performed were not novel, and that even if this were not so, the combination was not novel. The action was dismissed, with costs. The plaintiff appealed. The appeal was dismissed, with costs.

Allen *v.* Oates and Green, Ld., (1898) [15 R. P. C. 744—C. A.

96. *Infringement.*]—In 1893 a patent was granted for "Improvements in or connected with cases or covers for the chains or gear of velocipedes." In 1897 a company, in whom the patent had become vested, commenced an action for infringement of the same. At the trial, the only question substantially contested was that of infringement. The patentees' first claim (which was one of those alleged to be infringed) was for "A case or cover for the chain or gear of velocipedes, composed of a frame, covering the inner part of the chain gear, mounted on the bottom stay tube, and having upper and lower longitudinal guides in combination with an outer case or cover divided transversely, and adapted to take into and slide endwise upon such fixed guides, to cover the outer parts of the gear, all substantially as and for the purposes herein set forth." The defendants' gear case consisted also of two parts—one a frame almost identical with the frame described in the specification, and the other part consisting of a cover divided into parts, but divided longitudinally and not transversely. In attaching this cover to the frame there was a certain amount of sliding along the grooves on the short vertical edges of the frame. Gear cases in parts were old, but not gear cases which could be removed from the velocipede without disturbing any of the parts of the velocipede.

Held—that the defendants had taken the plaintiffs' frame and had also in substance taken the plaintiffs' cover, and had consequently infringed their combination. The plaintiffs were granted the usual relief, but execution, except as regards the injunction, was stayed in the event of an appeal within a fortnight.

Presto Gear Case and Components Co., Ld. *v.* Simplex Gear Case Co., Ld., (1898) 15 R. P. C. 635—Stirling, J.

97. *Combination of Old Materials—Different Contrivances—Mechanical Appliances—Mechanical Equivalents.*]—When there is a real and substantial difference between the mechanical contrivances, which are mere combinations of old materials, the first person who contrives one cannot exclude all the rest of the world from making another and a different kind of contrivance, although the object of both may be to attain the same end.

If there is a difference between the mechanical appliances which are made use of, they cannot be treated as if they were mechanical equivalents, and so establish a patent against all the world, by applying different mechanical processes to get the same result.

Brooks *v.* Lamplugh, (1899) 16 R. P. C. 41—[H. L. (E.).

And see No. 72, *supra.*

98. *Improvements—Combination of Materials and Apparatus—Specification—Limitation of Claim—Distinction between New and Old—Invalidity.*]—Any machine protected by a patent is susceptible of improvements, and such improvements, if in other respects conforming to the Patent Law, may be protected themselves, but they can only be made use of by the licence of the proprietor who is in command of the master patent.

A man cannot introduce some variation or improvement, whether patentable or not, into a known apparatus or machine, and then claim as his invention the whole apparatus. Where there is an almost complete absence of novelty in the parts, and an almost complete identity in the manner of arrangement and of operation, it is especially necessary to insist upon the condition of the Patent Law, that the patentee must describe and ascertain his invention with such certainty as not to deter the public from using what is old, by purporting to include it in the claim for the monopoly.

The respondent's case was held to fail because his specification for a combination of materials and apparatus, the main parts of which were known before, did not ascertain or describe his invention as an apparatus known and in previous use, and limit the claim so as to cover only the real addition to knowledge which his specification disclosed.

Foxwell v. *Bostock* ([1864] 4 De Gex, J. & S. 298) and *Harrison* v. *Anderston Foundry Co.*, ((1876) 1 App. Cas. 574) followed.

Kynoch & Co., Ld. *v.* Webb, (1900) 17 R. P. C. [100—H. L. (Ir.),

99. *Mechanical Equivalents—New Result—Infringement.*]—A patent was granted for an apparatus for the production of artificial stone, consisting of a closed chamber within which moulds or boxes charged with a mixture of caustic lime and sand are subject to high pressure steam, the moulds being so placed together that they offer each other mutual support to withstand the bulging strain produced by the expansion of the lime in slaking, while the strain transmitted to the outermost surfaces is effectually resisted in one direction by circular

Subject-Matter—*Continued.*

rings, and in the other direction by stay bolts. It was not disputed that the patent was for an apparatus and not a process.

An apparatus in which no circular rings or stay bolts were used, and where no means were employed for resisting the pressure exerted on the four vertical sides of each mould, but in which a combination of four vertical rods and vertical tie rods constituted the mechanical equivalent of the casing, is not an infringement on the ground indicated in *Proctor* v. *Bennis* ((1887) 36 Ch. D. 740), viz., that the combination described produced a new result, and that the machine was one in which the substance and essence of the patented combination was used.

In the patent the bottom and side plates of the system of moulding boxes were held together by plates forming the common ends of the system secured by rails or ties.

The defendant used separate ends and sides, to which the bottom and side plates were separately attached by numerous pins and collars.

HELD—no infringement.

PETERS *v.* THE OWEN STONE CO., LD., (1900) [17 R. P. C. 80—Stirling, J.

100. *Action for Infringement—Mere Idea or Principle — Objects aimed at — Costs.*]—The plaintiffs sought an injunction to restrain an infringement of their patent for improvements in electricity meters, parts of which improvements were applicable to dynamo electric generators and motors. The defence was a denial of the infringement and invalidity of the patent. The claim had been held by Mr. Justice Wills to be one for a combination of a number of appliances for the purpose of producing a new result, or for the purpose of producing an old result by new means.

HELD—that the appliances combined might be either new or old, or partly new and partly old, and that the patent, if aptly framed, might effectually claim protection for such of the appliances as were novel as subordinate integers in addition to the invention contained in the combination and protected by the patent.

HELD, also, that it is well settled that a mere idea or principle cannot be the subject-matter of a patent; there must be some concrete form to which the principle is applied, and that concrete form must be defined and limited, for if the claim is in general terms for every mode of carrying the principle into effect, it becomes a claim to the principle itself, and therefore fails.

HELD, also, that the objects aimed at by the plaintiffs and defendants differed in this respect. Both made a meter, but the plaintiffs' was a current meter—the defendants' was an energy meter. The plaintiffs' meter measured currents only, and was incapable of measuring anything else. The defendants' meter measured energy, *i.e.*, both the pressure and the quantity. The defendants' meter worked with alternating currents and the plaintiffs' meter would not: that, therefore, the object aimed at and attained by the defendants' meter was both more extensive and more practically useful than that attained by the plaintiffs', and that the plaintiffs had failed to show any infringement of their patent.

Costs were given on higher scale.

CHAMBERLAIN AND HOOKHAM, LD. *v.* BRADFORD CORPORATION, (1900) 17 R. P. C. 493 —Farwell, J.

101. *Old Parts — Anticipation — Invention—Costs.*]—No patent can be taken out for a combination which simply consists in placing together machines or parts of machines which have been anticipated by earlier patents.

A patent was applied for for "Improvements in movable partitions for dividing schoolrooms, lecture halls, and other buildings," made up of shutters running on rollers.

HELD—that there was no invention in putting matters or parts together in a combination where they were each only applied to what had been their original object in connection with the shutters; that the features of the applicant's construction had, broadly speaking, been anticipated by earlier patents; and that no costs should be given, as it was a very fair case to try.

IN RE BRIDGE'S APPLICATION FOR A PATENT, [(1901) 18 R. P. C. 257—Sir E. Carson, S.-G.

103. *Action for Infringement—More effective than Methods previously used—Defendant taking Elements of, but not the whole Combination.*]—Where the patent is for a combination as a whole, a defendant does not infringe if he takes one element by itself, or if he takes two elements by themselves, provided the third essential element is not embraced within the ambit of the patent fairly construed.

Letters patent were granted to the plaintiff for the invention of "a horizontal sifting machine with circular-shaped sieves." The class of machine was one in which the substance to be sifted was delivered by a shoot at the centre. The first step in the process, after the delivery at the centre of the machine, was to transfer the material which was deposited to the circumference of the circular sieve, which was to operate. Having arrived there it dropped on the sieve. The sieve was worked by a rotary motion, *i.e.*, a motion in which each part of the sieve described a circle of a certain size. The sieves were horizontal and circular, and the material when it arrived upon them was transferred from the circumference to the centre without the interposition of any obstacles, and without being knocked about or disturbed in any way. The under surfaces of the sieves were kept clean by means of rotating arms provided with brushes and fastened to the inner walls of the sieves. The material fed by the shoot fell on the cone-shaped surfaces placed above each sieve, and glided from there over the edges into the sieves. The defendants in their sifting machine, resembling the plaintiffs', did not use a cone-shaped surface, but a plain surface, with Haggenmacher's slats or bars upon it, which also transferred the material from the centre to the circumference: they also used brushes, but on arms fastened to

Subject-Matter—*Continued.*

a ring a little less in diameter than that of the outer walls of the sieves, and were at an angle and not radial.

HELD—that the substitution of the flat plate with slats for the cone was a more known mechanical equivalent; that the non-radial arms were not a mechanical equivalent for radial arms; that the patentee had claimed the combination and not the individual elements of the combination; and that the defendants had not infringed.

BUNGE *v.* HIGGINBOTTOM & Co., LD., (1902) [19 R. P. C. 187—C. A.

104. *Action for Infringement—Dumb-bells.*]—The plaintiffs were the owners of a patent for improvements in dumb-bells, divided longitudinally into two parts with springs between them. The provisional specification mentioned compressed air springs, but the complete specification did not; it, however, mentioned resilient means of expansion generally.

HELD—that, in view of the existing state of knowledge at the time, the plaintiffs' patent could not be regarded as a "master patent"; that the patentee, having omitted air springs from his complete specification, presumably did not intend to claim for them, and that therefore the plaintiffs could not complain of the defendants' dumb-bells, the parts of which were separated by inflated indiarubber balls.

Decision of Byrne, J. ((1904) 21 R. P. C. 33) affirmed.

SANDOW AND OTHERS *v.* SZALAY, (1904) 21 [R. P. C. 333—C. A.

105. *Action for Infringement — Defendants manufacturing one Component Part—Intention—No Infringement.*]—The plaintiffs were the owners of letters patent for a "combination," the well-known bicycle tyre.

The defendants made covers capable of being used as one component part of such combination. Such covers were sold mainly for export, and to the persons holding licences from the plaintiffs; some, however, were sold to non-licensees; they could, in fact, be used for other purposes than as part of the plaintiffs' combination, and the defendants did not invite purchasers to infringe it.

HELD—that by making one component part of the combination the defendants had not infringed the plaintiffs' patent.

HELD, also, that the intention with which they made and sold the covers was not in fact material.

United Telephone Co. v. *Dale* ((1884) 25 Ch. D. 778; 53 L. J. Ch. 295—Pearson, J.) and *Innes* v. *Short* ((1898) 15 R. P. C. 449, No. 111, *infra*) distinguished.

Townsend v. *Haworth* ((1875) 12 Ch. D. 831 n.; 48 L. J. Ch. 770 n. — Jessel, M.R.) and *Sykes* v. *Howarth* ((1879) 12 Ch. D. 826; 48 L. J. Ch 769; 41 L. T. 79—Fry, J.) followed.

Decision of Eady, J. ([1904] 1 Ch. 164; 73 L. J. Ch. 227; 52 W. R. 189; 20 T. L. R. 85; 21 R. P. C. 53) affirmed.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* DAVID [MOSELEY & SONS, LD., [1904] 1 Ch. 612; 73 L. J. Ch. 417; 52 W. R. 454; 91 L. T. 40; 20 T. L. R. 314; 21 R. P. C. 274—C. A.

106. *Validity — Combination of two old Machines—Want of Invention.*]

HELD—that a patent for the combination of two well-known printing machines, erected end on with a space between them, and a single or double longitudinal folding machine placed in the space for folding the paper web or webs and passing the same on to any other machine, either for transverse folding, cutting, or delivery, or any two or all three of these operations or processes, was not a valid patent, upon the ground that such an arrangement, having regard to the state of knowledge at the time, required no substantial exercise of invention, and did not furnish sufficient subject-matter for a patent; and also upon the ground that it was not new.

Decision of Joyce, J. ((1906) 22 T. L. R. 453; 23 R. P. C. 417) affirmed.

THE NORTHERN PRESS AND ENGINEERING CO., [LD. AND ANNAND *v.* HOE & CO., (1906) 22 T. L. R. 723; 23 R. P. C. 613—C. A.

107. *Infringement — Fitting new Component Part—Repair of Patented Article.*]—A patent was granted to the plaintiffs for a metal rim of new shape to hold a solid rubber tyre for vehicle wheels, and also in combination with a tyre to fit. No claim was made to the tyre except in combination with the rim.

The defendants, who were rubber manufacturers, supplied a new rubber tyre and inserted it in an old rim manufactured by the plaintiffs under their patent, which was as good as new, to replace the old tyre, which was worn out. The tyre was inserted in the rim by the use of machinery which was old, and by which all solid tyres of the kind were placed in metal rims. This was done *bona fide* by way of repair. In an action for infringement of the patent:—

HELD by Eady, J. (assuming the validity of the patent)—that, as the real claim was for a metal rim of a particular shape to receive a rubber tyre, this was a fair repair not amounting to reconstruction or to a new article, and there was no infringement.

HELD, however, by the C. A., whilst expressing no opinion upon the above point, that the patent was invalid on the ground of insufficiency of specification.

Decision of Eady, J. ([1905] 1 Ch. 451; 74 L. J. Ch. 315; 53 W. R. 346; 92 L. T. 564; 21 T. L. R. 283; 22 R. P. C. 257) affirmed on other grounds.

Decision of C. A. ([1906] 1 Ch. 252; 75 L. J. Ch. 233; 94 L. T. 183; 22 T. L. R. 246; 23 R. P. C. 132) affirmed.

SIRDAR RUBBER CO., LD. *v.* WALLINGTON, [WESTON & CO., (1907) 97 L. T. 113; 24 R. P. C. 539—H. L. (E.).

See also Nos. 21, 84, *supra*.

IV. ANTICIPATION : PRIOR USE OR PRIOR PUBLICATION.

108. *Manufacture of an Alloy — Petition for Revocation — Same Alloy sold before date of Patent — Issue whether Composition of last-mentioned Alloy could have been then ascertained by Chemical Analysis.*]—In 1890 a patent was granted to M. for the manufacture of an alloy from certain metals, including bismuth, in the proportions stated in the specification, and for the use of sal ammoniac as part of the process. M., who was an American citizen, was trustee of the patent for an American company or companies. H. presented a petition for revocation of this patent. After the petition had been several times before the Court, it was established, to the satisfaction of the judge, that the patented alloy had been sold in England before the date of the patent. The American companies were then desirous of intervening, and of raising the further point that the said sales of the patented alloy before the date of the patent were not a prior publication of the invention, because at the dates of the sales a competent chemist, analysing the alloy, could not have discovered the presence of bismuth, bismuth being alleged to be the important ingredient in the alloy. This point was tried before the judge separately, with oral evidence.

HELD—that if reasonable care and reasonable skill were used by analysts before the date of the patent, the constituents and the proper proportions of the constituents of the alloy sold could have been ascertained, and therefore the patent was anticipated, and an order for revocation was made ; but the registration of the order was suspended, pending an appeal.

The respondents appealed, but subsequently applied to the Court of Appeal for leave to withdraw the appeal. The petitioner thereupon asked that the appeal might be dismissed with costs, and this was done.

IN RE MILLER'S PATENT, (1898) 15 R. P. C. 205 —[C. A.

109. *Validity—Subject-matter.*]—This was an action for the infringement of a patent for a particular form of electric arc lamp, in which an enamelled disc was placed immediately above the arc in order to serve as a reflector. The defendant denied infringement, and alleged that the patent was invalid, as the invention had been anticipated by prior user, and there was not sufficient subject-matter to support a patent.

HELD—that the plaintiffs' invention was anticipated, and the patent was invalid for want of subject-matter, and the action was dismissed, with costs.

HELIOS ELECTRICITATS AKTIEN-GESELLSCHAFT [*v.* BRAVLIK, (1898) 15 R. P. C. 523— Bigham, J.

110. *Validity — Construction — Invention — Patent held Invalid—Action and Appeal both dismissed.*]—In 1892 a patent was granted to D. for "Improvements in hollow rivets and studs, and in the process of riveting, which improvements are applicable to braces . . . and oth like articles." The first claim of D.'s patent was as follows :—"Making hollow rivets and studs of a tubular shank closed at one end and flanged at the open end, the said hollow shank at and near the closed end being of less diameter than the part at or near the open end, the parts of the shank of different diameters passing into one another preferably by a conical shoulder, and the use with hollow rivets and studs of this construction of ring-like plates or eyes, either detached or formed in the articles with which the rivets or studs are to be used substantially as hereinbefore described and illustrated in Figures 1 to 24, both inclusive of the accompanying drawings." In 1896 D. commenced an action for infringement against K., who denied infringement, subject-matter, and novelty, alleging prior user by P., himself, and others, and prior publication by prior patents of himself and others. It appeared that hollow rivets having the closed top but without the shoulder were old, and that hollow eyelets with the shoulder with an open top were old.

HELD—at the trial, that the first claim was a combination claim for the use, with the rivets described, of the ring-like plates, and that there was, having regard to what had been done before, no novelty or invention, for the defendant had, prior to the patent, made rivets only differing from D.'s in not having closed ends and giving substantially the same result, and the washer was old. The action was therefore dismissed. D. appealed.

HELD, on appeal, that D., by his specification, claimed the rivet or stud separately as well as in combination with the discs or plates, and that the stud was anticipated, the exact thing having been made and used by P. as a button prior to the patent, and (*semble*, per Lindley, M.R.) that the separate claim for the stud was also invalid by reason of the prior manufacture by K. of studs similar to D.'s, except that they had open ends instead of closed ones.

DOWLER *v.* KEELING, (1898) 15 R. P. C. 214 ; [14 T. L. R. 257—C. A.

111. *Infringement — Infringement denied — Sale of Article to be used in Infringement of a Patent.*]—A patentee of an invention for using zinc powder to prevent corrosion in steam boilers appointed S. his agent. S. sold zinc powder, with printed directions for use headed "Innes' Patent Metallic Zinc." Subsequently the agency was determined, but S. continued to sell zinc powder with the same directions, except that the words "Innes' Patent" were struck through in red ink. The patentee brought an action against S. for infringement. S. denied infringement, and alleged that the patent had been anticipated and was invalid.

HELD—that the patent had not been anticipated, and that S. had infringed, and an injunction was granted to restrain S. from selling powdered zinc with an invitation to his purchasers to use it so as to infringe the patent.

Townsend v. *Haworth*, (1875) reported 12 Ch. D. 831.

INNES *v.* SHORT, (1898) 15 R. P. C. 449 ; 14 [T. L. R. 492—Bigham, J.

Anticipation: Prior Use or Prior Publication— *Continued.*

112. *Action for Infringement — Validity — Infringement—Appeal to House of Lords dismissed.*]—A company, the owners of a patent for "Improvements in tyres or rims for cycles and other vehicles," brought an action for infringement. The complete specification claimed, first, the combination of a grooved rim or metal tyre and an arched tyre of india-rubber or other flexible material held in the groove by the pressure of an inflated tube within the arch which forces its edges against the sides of the groove substantially as described. In the body of the specification the tube was described as of cloth and india-rubber. The defendants denied infringement, and alleged the invalidity of the plaintiffs' patent on grounds of anticipation and prior grant. The alleged infringement had the inner tube of pure india-rubber, and differed also from the tyre shown in the specification in the bending and adjustment of the edges of the metal rim, these presenting approximately the formation of a hook. It was held, at the trial, that the patent was valid and had been infringed, and an injunction and an inquiry as to damages were granted, and this decision was upheld by the Court of Appeal. The defendants appealed to the House of Lords.

HELD — that the first claim was for the method shown in the specification, and any method substantially the same of connecting the outer cover with the rim so that the ends of the cover are gripped; that an inner tube of cloth and india-rubber was not of the essence of the invention; and that the patent was valid and had been infringed.

Appeal dismissed, with costs.

GORMULLY AND JEFFERY MANUFACTURING CO. [*v.* NORTH BRITISH RUBBER CO., LD., (1898) 15 R. P. C. 245; 14 T. L. R. 335—H. L. (E.).

113. *Action for Infringement—Validity—Disconformity—Patent held to be Anticipated and not to be Infringed—Action Dismissed—Higher Scale Costs.*]—In 1887, a patent was granted for "Improvements in the manufacture of explosives." According to the provisional specification, the invention consisted "in the employment of a nitrated body such as nitrated woody matter or fibre which is dissolved in a solvent such as ether and then dried and reduced to powder." In the complete specification, the patentee claimed, first, "The manufacture of an explosive suited for use in small arms or ordnance by taking vegetable fibres, woody matters, cellulose or the like . . . and nitrating them and then completely dissolving them in acetic ether or acetone, or like solvents of equal strength, until they assume a gelatinous plastic consistency, and forming the mass into suitable shapes, and drying or allowing to dry or distilling off the solvent from the mass, and finally, when required, reducing the product to a powder or granular or other required form, with or without the use therewith of an oxygen yielding substance, or both an oxygen yielding substance and a hydro-carbon all substantially as hereinbefore described." H., in whom the patent had become vested, brought an action for infringement thereof against the S. Company, who alleged want of novelty, want of subject-matter, insufficiency, disconformity, anticipation by (*inter alia*) publication of W.'s German patent. The defendants, in their manufacture of powder, treated nitro-cellulose with acetone, but they alleged that the greater part of the fibre was not dissolved. The evidence showed that it was known at the date of the patent that nitro-cellulose could be dissolved by the substances named by the patentee; that the solvents were of two classes—one, which included acetone, dissolving both trinitro-cellulose and dinitro-cellulose, and the other, which included ether-alcohol, dissolving dinitro-cellulose only: that the result of solution was to reduce nitro-cellulose to an amorphous condition, although chemically unchanged, and that the solvent could be evaporated off. W.'s patent described the manufacture of cartridge cases out of an explosive material obtained by adding chlorate of potash to guncotton, drying and pouring such a quantity of collodion thereon until the saturation effected a dissolution of the cotton, and a gelatinous mass was produced.

HELD—that it was an essential feature of the invention that there should be complete dissolution of the fibre of the nitro-cellulose: that the provisional specification included both classes of nitro-cellulose and both classes of solvents, and that there was no disconformity or insufficiency of description; that on the above-mentioned construction of the patent it was not shown to be anticipated, except by W.'s patent, but was anticipated by that; and that the defendants had not infringed, since in their powder the fibre remained undissolved to a considerable extent. The action was therefore dismissed, with costs on the higher scale.

HEIDEMANN *v.* SMOKELESS POWDER CO., LD., [1898] 15 R. P. C. 305—Jeune, P.

114. *Action for Infringement—Prior Grant—Subject-matter—Utility—Pleadings.*]—On June 1st, 1892, a patent for an improvement in electrical insulating sheets was granted to W. On the following day a patent for a similar invention was granted to D. The M. Company, as proprietors, brought an action for infringement of both patents against the E. company, but subsequently dropped the claim in respect of W.'s patent. The defendants denied infringement of D.'s patent, and alleged that it was invalid on the following among other grounds: Prior grant to W. in his patent, anticipations by S. and T., and prior users of the invention. The plaintiffs, by their reply, denied the prior grant to W., and alleged that W.'s patent was invalid by reasons of the matters stated in the defendants' original particulars of objections. The defendants rejoined that even if W.'s patent had been anticipated, that was no defence to the plea of prior grant. It was admitted at the trial that the specification of S. and T. anticipated W.'s patent.

HELD—that as S. and T. anticipated W., D.'s patent was not invalid on the ground of a prior grant to W.: but if so, then D.'s patent was anticipated by S. and T., and also certain prior

Anticipation: Prior Use or Prior Publication – *Continued.*

users of the invention were proved. On these grounds judgment was given for the defendants, and a certificate as to some of their particulars of objections.

Mica Insulator Co. *v.* The Electrical Co., [Ld., (1898) 15 R. P. C. 489—Kekewich, J.

115. *Disconformity—New Element.*]—Where it is a question of construction of the provisional document and a question of construction of the complete document, and a comparison of the one with the other, the surrounding circumstances, the subject-matter, and so on, are to be taken into consideration by the Court; and the Court must be instructed as to the history. The prior knowledge of an invention to avoid a patent must be knowledge equal to that required to be given by a specification, namely, such knowledge as will enable the public to perceive the very discovery, and to carry the invention into practical use. The invention must be shown to have been before made known. Whatever is assented to, the invention must be read out of the prior publication.

Pneumatic Tyre Co., Ld. *v.* Leicester [Pneumatic Tyre and Automatic Valve Co., (1899) 16 R. P. C. 50—C. A. *See also* 16 R. P. C. 531—H. L. (E.).

And see No. 51, *supra*.

116. *User merely for Experiment—User for Purposes of Business and Profit.*]—When a patentee supplies a patented article in such a way and to such an extent that he cannot recall the patented article—that he cannot impose any obligation of secrecy—it becomes impossible for the inventor subsequently to take out letters patent.

In re Newall and Elliott ((1858) 4 C. B. (N.S.) 269; 27 L. J. C. P. 337; 4 Jur. (N.S.) 562) distinguished.

Hoe & Co. *v.* Foster & Sons, (1899) 16 R. P. C. [33—C. A.

117. *Interpretation of Specification already determined by Decisions—Costs—Three Counsel—Scientific Evidence—Costs on Higher Scale.*]—The plaintiffs brought an action on the well-known Welch patent for "improvements in rubber tyres and metal rims or felloes of wheels for cycles and other light vehicles," and claimed an injunction against infringement and the usual consequential relief. The defendants denied infringement, and said, "If the said letters patent are capable of such a construction as would cause the pneumatic tyres and parts complained of, or any of them, to be infringements thereof, the defendants will contend that the said letters patent are invalid on the grounds stated in the particulars of objection."

Held—that the true construction of the Welch specification had been determined in numerous decisions, including two in the Appeal Court and one in the House of Lords, and there was no want of novelty.

Held, also, that the defendants' tyre was no infringement of Welch's patent, for the following reasons:—First, that the defendants' tyre was held on, not by the brute resistance of an inelastic core on either side of the convexity, but by the resilient play of counteracting pneumatic forces; and, secondly, even if the hoop of wire was inelastic in use, the inextensibility resided not in the edge but in the tyre as a whole, including the tread, which lay not on either side of, but above the convexity.

If it is essentially necessary for the purpose of doing justice three counsel should be employed, *i.e.*, where a reasonable and prudent man, acting with ordinary prudence, would not venture to come into Court without three counsel.

If scientific evidence is really wanted, costs on the higher scale will be allowed.

Dunlop Pneumatic Tyre Co., Ld. *v.* Wap- [share Tube Co., Ld., (1899) 17 R. P. C. 433 —Buckley, J.

119. *Interpretation of Specification.*]—On the face of the specification the Court came to the conclusion that the patentee claimed as against the public to include, as within the ambit of his invention, a claim to a motor in which the field magnet was centred or sleeved on the driving axle, its armature supported directly upon the said field magnet, and having a shaft separate from the driving axle, and gearing communicating motion from the armature shaft to the driving axle, whether supported by springs or not.

The plaintiffs brought an action for infringement, and the sole defence of the tramways company was that the patent was void, because the patentee had made his own invention void, and that he had done so by reason of having claimed in claim 1 something which was really not new.

Held—that the patent had been anticipated by the publication at the Patent Office Library of the drawing and claims set out in the Official Gazette of the U.S.A. Patent Office of an American specification.

Claims for subordinate integers considered.

Plimpton v. *Spiller* ((1877) 6 Ch. D. 412; 47 L. J. Ch. 211—C. A.) discussed.

Decision of Cozens-Hardy, J. (16 R. P. C. 631) affirmed.

Electric Construction Co., Ld. *v.* Imperial [Tramways Co., Ld., (1900) 17 R. P. C. 537 —C. A.

120. *Action for Infringement—New Apparatus for Old Process—Process rendered a Success—Interpretation of Claim—Paper Anticipation.*]—In interpreting a claim the patentees must be given the benefit, as well as be subjected to the disadvantage, of the common knowledge at the time when they published the specification.

The plaintiffs' claim was: "In an electrolytic tank furnished with anodes, the use of a perforated, revolving, horizontal drum cylinder or the like, to contain the articles to be plated, the said articles being brought into the effective electric circuit, so as to receive a deposit, by contact (either directly or through one another,

Anticipation: Prior Use or Prior Publication— *Continued.*

or through metallic contact arms or their equivalents) with the axis which forms the negative pole." The patent was a success.

HELD—that the claim limited the use of a perforated horizontal drum to cases in which the new invention was applied, and indicated that there was no claim to the general use of a horizontal drum or anything of that kind, but only of such a horizontal drum as should ensure the articles being brought into effective electric circuit by contact with the axis which formed the negative pole through the articles which had to be plated.

HELD, also, that what is commonly called a paper anticipation was not sufficient to invalidate the claim.

HELD, also, that the defendants' apparatus, where all the details were the same, excepting that a disc was substituted for the contact pieces, which was exactly what was meant by an equivalent, and was covered by the word "equivalent," was an infringement of the claim.

ELECTROLYTIC PLATING APPARATUS CO., LD. [*r.* THOMAS EVANS & SON, (1901) 17 R. P. C. 733—Wills, J.

121. *Action for Infringement—Three Patents—Case of each Patent heard separately—Injunctions as to each Patent.*]—The plaintiffs were owners of three patents for improvements in and relating to motor vehicles, viz., No. 16,072 of 1893, No. 19,734 of 1895, and No. 13,671 of 1899, and claimed that the defendants had infringed. The case as to each of the three was tried separately.

The letters patent No. 16,072 of 1893 by the complete specification claimed that: "The object of my improvements is to produce a mixture of never-varying composition, irrespective of the speed of the engine as well as of that of the piston in different parts of the path of this latter."

HELD—that the mere fact that all the elements he used, and all the materials were old, did not prevent the method from being new; that the method had overcome great difficulties; that the only anticipations were paper specifications, which in point of fact had not been worked; and that with regard to this there must be a verdict for the plaintiffs.

The letters patent No. 19,734 of 1895 referred to electrical ignition of the explosive charge in the cylinder of the motor. By means of the device shown, the liability to miss fire was reduced to a minimum, and at the same time the speed of the engine was governed. All the various parts of the apparatus were old, but the invention consisted in the combination and arrangement.

HELD—that there was no evidence to show that this invention was not new; that the evidence showed this invention was useful; and that the patent must stand.

The defence was withdrawn in respect of letters patent No. 13,671 of 1899 after evidence was given as to utility and invention.

As to each of the three letters patent an injunction and certificate for validity were granted.

BRITISH MOTOR TRACTION CO., LD. *v.* J [VAUGHAN SHERRIN, (1901) 18 R. P. C. 265—Kekewich, J.

122. *Action for Infringement—New Apparatus for old Process—Process rendered a Success.*]—The plaintiffs were the owners of a patent for "improved apparatus for the electro-deposition of metals," and they brought an action for infringement against the defendants. The defence was anticipation and prior user.

HELD—that (1) there was no anticipation, as in itself the central idea of the plaintiffs' patent—that is to say, the advantage of the machine—is that the articles are placed between the anode and the cathode so that the current flows into the work and only a minute portion of it into the connections. The point is that the work shall be outside the cathode machinery. (2) It was not a case of much or decided invention. It was a case where a man had just hit upon the right thing which others had failed, perhaps by a small margin, to hit, but not having hit it they had failed; whereas the invention of the plaintiffs once made had proved an unqualified success upon the evidence; and that there was subject-matter, and sufficient novelty to give validity: and (3) as to prior user, although experiments had with a similar apparatus been carried on in a room to which the public had access, if they chose to go up a staircase, and were not strictly speaking a failure, yet they, as they perished with the object, were not a public but an experimental use, and therefore there was no prior user.

ELECTROLYTIC PLATING APPARATUS CO., LD. [*r.* HOLLAND, (1901) 18 R. P. C. 521—Ridley, J.

123. *Action for Infringement—Claim for a Method—Specification—Interpretation—Subject-matter.*]—The plaintiffs were the owners of letters patent for "Improvements in the method of producing the explosive mixture in hydrocarbon engines," and they claimed an injunction to restrain the defendants from infringing their patent. The method of the plaintiff consisted "in sucking liquid hydrocarbon by the air sucked by the working-piston, substantially as described."

HELD—that (1) on the true construction of the specification the patent was for a method and not for a machine; (2) that unless the patent was for a method it failed for want of subject-matter or of novelty, and had been anticipated, and (3) if the patent was valid for a machine the defendants had not infringed.

BRITISH MOTOR TRACTION CO., LD. *v.* FRIS- [WELL, (1901) 18 R. P. C. 497—Farwell, J.

124. *Action for Infringement—Utility—Practical Scale—Economy of Power.*]—A patent was granted to the plaintiffs for "improved means

Anticipation: Prior Use or Prior Publication—*Continued.*

and apparatus for separating alkaline and earthy metals and other products from the salts of such metals, or from other substances containing them." The process was one by which, with the use of their apparatus, the mercury, while exposed to electrolytic action, was to flow continuously and comparatively slowly. The plaintiffs brought an action for infringement against the defendants.

HELD—that the patentees did not know, and left to the public to find out, whether speed was advantageous or injurious for the process which they described: that there was nothing new in the process; that the plaintiff's process was not useful as indicating any way of conducting the known process of formation of sodium amalgam and caustic so as to attain an efficiency greater than that attained by previous methods, and therefore failed for utility; and that the defendants had not infringed, as they used an apparatus of which it was of the essence that the cathode should be mercury only, and that the base should be of a non-conducting material.

ATKINS AND APPLEGARTH *v.* CASTNER-KELL-[NER ALKALI CO., (1901) 18 R. P. C. 281—Buckley, J.

125. *Action for Infringement.*]—Letters patent were granted to G. and G. for "Improvements in closing devices for preserve jars or other receptacles." The object of the invention was to obtain an air-tight closure for vessels used for preserving fruit, fish, and other things where the goods are subjected to a process of boiling for the purpose of sterilisation. The merit of the plaintiff's invention consisted in having a cover of a particular shape, so designed as to press obliquely "in a tangential direction" on an india-rubber packing ring, resting in a groove in the conical neck of a jar, and by means of slight pressure from a spring of a particular shape placed over the cover to produce an air-tight closure. The plaintiffs brought an action for infringement against the defendant. The defendant denied the infringement, and also pleaded that the letters patent were invalid by reason of prior publication and prior user. That the invention was one of great commercial utility was shown by the fact that millions of the covers had already been sold.

HELD—that no prior publication had anticipated the plaintiff's invention, and there were no instances of prior user as invalidating the patent, and that the defendant had infringed.

AUTOMATIC AIR-TIGHT COVER, LD. *v.* STOCK-[FORD, (1902) 19 R. P. C. 453—Eady, J.

126. *Action for Infringement—Construction of Specification—Utility.*]—The plaintiffs were the owners of a patent for "improvements in attaching bindings to the brims of hats," in the specification of which they stated that the invention consisted "in fitting a hat having a stiff, curled, or rolled brim with a binding" by particular stitching and a process called by them "snapping over;" and that the invention also consisted of a machine, and the method of attaching the binding by means of the machine.

Their first claim was for "the herein described method of attaching to a hat having a stiff, curled or rolled brim a binding, &c., substantially as specified."

HELD—that upon the true construction this was only a claim for attachment by means of the machine, and did not (as the defendants contended) include attachment by hand sewing; and that, upon the facts, novelty and utility were established in respect of all the claims, and that the defendants had infringed.

Decision of Buckley, J. ((1903) 20 R. P. C. 529) affirmed.

GAMMONS *v.* BATTERSBY, (1904) 21 R. P. C. 529 [—C. A.

127. *Action for Infringement—Patent held Valid by Court of Appeal—New Action against other Defendants—Fresh Evidence of Want of Novelty and Anticipation.*]—In the infringement action, *Patent Exploitation, Ld.* v. *Siemens Bros. & Co., Ld.* (*see* No. 41, *supra*) the C.A. had construed the plaintiffs' specification, and held their patent to be valid.

In the present action the plaintiffs were proceeding against other alleged infringers, who adduced further evidence upon which the judge found that the essential feature of the invention was not novel, and that there had been anticipation. He further held that there had in fact been no infringement.

PATENT EXPLOITATION, LD. *v.* AMERICAN [NOVELTY AND MANUFACTURING CO., LD., (1903) 20 R. P. C. 689—Buckley, J.

128. *Action for Infringement—Subject-matter—Anticipation—Invalidity.*]—In 1898 letters patent were granted to the plaintiff for "improvements in attachments for corsets." The essence of the invention was in having a belt with upright ribs with the points of attachment for a corset immediately above the upright ribs. The mode of attachment was to be by safety pins passing through ready made holes.

HELD—that for many years belts had been made for attachment to corsets; that there was no invention in saying that they could be attached in any particular place; and that the patent was invalid for want of subject-matter.

Decision of Kekewich, J. (19 R. P. C. 550) affirmed.

WARDROPER *v.* GIBBS, LD., (1903) 20 R. P. C. [355—C. A.

129. *Action for Infringement—Machine for Printing Sacks, &c.—Defective Specification.*]—The claim was for a multi-colour printing machine, for printing sacks, &c., including (as was admitted) pieces of material of uniform thickness.

The patent was held invalid on the grounds that, (1) though printing sacks of irregular thickness might have been good subject-matter, yet no novelty was disclosed in printing materials of uniform thickness, nor in the

Anticipation: Prior Use or Prior Publication— *Continued.*

adjusting of the rollers, for the specification contemplated their omission, nor in the adjustment of the cylinders, for well known alternative methods were specified.

The real advantages, viz., the method of carrying the sacks under the cylinders by a travelling band, and the solution of the "feeding" difficulty, were not sufficiently insisted on, or described, in the specification.

KINMOND *v.* KEAY, (1903) 20 R. P. C. 497—[Ct. of Sess. (O. H.).

130. *Action for Infringement — Repairing-patch for Pneumatic Tyres—Subject-matter.*]—Invention, as distinct from discovery, suggests an act to be done, and it must be an act which results in a new product, or a new result, or a new process, or a new combination for producing an old product or an old result.

A patent was granted to R. for an improvement in the means of repairing the outer cover of a bicycle tyre: a strip of canvas faced with rubber was to be placed over the injury with its ends tucked in between the rim and the side of the tyre: upon fully inflating the tyre the ends of the strip would be tightly gripped, and the central portion held in position over the injury.

HELD—that the patent was bad for want both of subject-matter and of novelty.

Decision of Buckley, J. ((1903) 20 R. P. C. 123) affirmed.

REYNOLDS *v.* HERBERT SMITH & CO., LD., [(1903) 20 R. P. C. 410—C. A.

See also Nos. 22, 33, 41, 48, 51, 78, 81, 82, 85, 86, 101, 132.

V. FIRST AND TRUE INVENTOR.

131. *Petition for Revocation — Master and Servant—Fraud—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 26 (8).]—G. W. petitioned for revocation of a patent granted to Marshall and Naylor. G. W. worked under the direction of Marshall and Naylor, who were respectively managing director and director. G. W. was paid £10 for work done on the models in overtime, and he communicated his invention to the respondents in confidence, informing them at the same time that it was his intention to take out letters patent for the same. The respondents, however, applied for and obtained the grant to themselves of letters patent for the said invention.

HELD—that the order to revoke must be made as the whole merit of the invention was due to G. W., and the patent was obtained in fraud of G. W.'s rights.

IN RE MARSHALL AND NAYLOR'S PATENT, [(1900) 17 R. P. C. 553—Farwell, J.

132. *Action for Infringement—Onus of Proof — Utility — Disconformity.*]—An action was brought for infringement of a patent granted to the plaintiffs, and the usual objections were taken, viz., that the patent was not new, not useful, &c.

HELD—(1) that there was no anticipation; (2) that the patent gave an alternative method of effecting the same result, and that there was utility enough to support the patent; (3) that as the defendants had pleaded that the patentees were not the true and first inventors, the plaintiffs were not bound to show that they were the true and first inventors, but it lay on the defendants on the plea that the plaintiffs were not the true and first inventors to prove the plea, and this the defendants had failed to do.

Young v. *White* ((1854) 17 Beav. 532; 18 Jur. 277; 23 L. J. Ch. 190—Romilly, M.R.) differed from, but followed.

The issue of disconformity lies emphatically on the objectors.

WARD BROTHERS *v.* HILL (JAMES) & SON, [(1901) 18 R. P. C. 481—Wills, J.

133. *Action for Infringement—Communication from Abroad—Prior Publications — Stay of Execution.*]—The plaintiff sued as assignee of letters patent originally granted to T. J., who applied for letters patent on a communication from abroad by R. M. R. of America. The communication, so far as there was a direct communication to T. J. by letter or orally, was made by A., and not by R. M. R. himself. The plaintiff brought an action for infringement against the defendants, who admitted infringement, but denied that the patent was communicated from abroad by R. M. R., and alleges prior publication.

HELD—that on the evidence when A. was over here he did not impart the invention to T. J. so that T. J. could understand it, but that the substance of the communication came after A. had returned to America, when he was abroad; that there was no prior publication, the communication being by a layman to a friend, an expert, and the plaintiff was entitled to judgment; and that a stay of execution could not be granted on the plaintiff giving the usual undertaking as to costs, and undertaking that the machines should not be destroyed, but kept in custody pending the hearing of the appeal.

Marsden v. *Saville Foundry Co.* ((1878) 3 Ex. D. 203; 26 W. R. 784—C. A.) distinguished.

PILKINGTON *v.* YEAKLEY VACUUM HAMMER [CO., (1901) 18 R. P. C. 459—Kekewich, J.

134. *Petition for Revocation—Prior Action for Infringement—First and True Inventor—Fraud—Attorney-General's Fiat—Estoppel.*]—In 1894 J. obtained letters patent on a communication from abroad for "Improvements in atmospheric or power hammers." P., as assignee of these letters patent, sued the Yeakley Vacuum Hammer Co. for infringement, who admitted infringement, but denied that the patent was communicated from abroad, and alleged prior publication. P. succeeded before Kekewich, J. ((1901) 18 R. P. C. 459). The defendants appealed, and this appeal was still pending. Y. subsequently presented a petition for the revocation of the patent, alleging that he

First and True Inventor—*Continued.*

invented a vacuum hammer described in the specification and drawings of the patent granted to J. in 1894 : that in March, 1894, the petitioner handed a model hammer and a copy of the drawing to A., a salesman in his employ ; that the petitioner intended to take out a patent in England for the hammer, but did not do so immediately, as he was advised the provisional protection in America proteeted the invention in England for two years ; that in April, 1894, A. came to England and fraudulently instructed J. to take out a patent for the invention, and J. sold the patent to P. ; and that in 1896, Y., in ignorance of the fraud, obtained a patent for the invention. The Attorney-General's fiat was obtained.

HELD—that as the Attorney-General's fiat was obtained the whole matter was open, and there was no estoppel in anything that was done by Kekewich, J. : that J. was the first and true inventor ; that fraud was not proved ; and that the petition failed and must be dismissed with costs.

IN RE JAMESON'S PATENT, (1902) 19 R. P. C. [246—Farwell, J.

135. *Master and Employee — Employed to carry out Master's Ideas.*]—When a dispute arises as to whether an employee or his master is entitled to the benefit of suggestions made by the former when carrying out an invention of his master's, the question depends upon the merits of each case ; but where the main principle and object are complete without the suggestions, which merely relate to the facilitating of the desired result, the suggestions are to be regarded as merely accessories.

Allen v. *Rawson* ((1845) 1 C. B. 551) followed.

IN RE SMITH'S PATENT, (1905) 21 R. P. C. 57— [Buckley, J.

136. *Prior User—User not Amounting to Publication—Statute of Monopolies* (1623) (21 Jac. 1, *c.* 3), *s.* 6.]—A "first inventor" in patent law is the person who, being a true inventor, *i.e.*, not having borrowed the invention from somebody else, either first publishes the invention or first files in respect of it a provisional specification on which letters patent are subsequently granted. User may or may not amount to publication ; but even if there is no publication, there may, under sect. 6 of the Statute of Monopolies, be such a user as, although not amounting to a publication, will render invalid a patent for the invention or process so used.

ROBERTSON *v.* PURDEY, (1907) 23 T. L. R. 343 ; [24 R. P. C. 273—Parker, J.

See also No. 33.

VI. UTILITY.

137. *What Sufficient to Support a Patent.*]—"Utility" in patent law does not mean either abstract utility, or comparative or competitive utility, or commercial utility, but an invention better in some respect, but not necessarily in every respect, than the preceding knowledge of the trade as to a particular fabric. An article which is good, though not so good as that previously known, but which can be produced more cheaply by another process, is better in that it is better in point of cost, although not so good in point of quality.

An invention is patentable which offers the public a useful choice.

A very small amount of utility is sufficient to support a patent.

WELSBACH INCANDESCENT GAS LIGHT CO. *v.* [NEW INCANDESCENT (SUNLIGHT PATENT) GAS LIGHTING CO., [1900] 1 Ch. 843 ; 69 L. J. Ch. 342 ; 48 W. R. 362 ; 82 L. T. 293 ; 16 T. L. R. 205 ; 17 R. P. C. 237— Buckley, J.

138. *False Suggestion—Invalidity.*— A patent will be held void upon the ground of fraud on the Crown, without entering into the question whether the utility of each and every part of the invention is essential to a patent, where such utility is not suggested in the patent itself as the ground of the grant. A false suggestion of the grantee avoids a grant, not only against the Crown merely, but in a suit against a third person.

Where the process claimed, taken as a whole, is useless, and the specification contains false suggestions as to the utility of two elements of the process, the patent is bad, and ought to be revoked.

IN RE OWEN'S PATENT, (1900) 17 R. P. C. 68— [Stirling, J.

139. *Action for Infringement—Validity—No Intention to Manufacture in the United Kingdom — Exorbitant Prices.*] — In an infringement action the defendants attacked the validity of the plaintiffs' patent for dyes on the following grounds ; (1) that there had been no manufacture or intention to manufacture in this country, and (2) that exorbitant prices had been charged for the patented articles in this country.

HELD—(1) that it is not necessary for a patentee to have any intention of manufacturing his article in this country ; the mere introduction into the country of the complete article for which there is a demand may make the invention one worthy of encouragement and protection as being "for the public good."

(2) That on the facts the prices charged here were not exorbitant as compared with those charged in the country of manufacture where the invention was not so well protected.

Quære, moreover, whether *R.* v. *Eyre*, (1720) 1 Str. 43, does decide that the charging of exorbitant prices can invalidate a patent.

BADISCHE ANILIN UND SODA FABRIK *v.* W. G. [THOMPSON, LD., AND OTHERS, (1904) 21 R. P. C. 473—Warrington, J.

See also Nos. 21, 48, 53, 56, 92, 124.

VII. ASSIGNMENT OR SALE, AND CONSTRUCTION OF AGREEMENTS THEREFOR.

140. *Royalties—Conflicting Claims to Patent—Construction of Agreement—Improvement.*]—In

Assignment or Sale, and Construction of Agreements therefor—*Continued.*

1893, D. agreed to sell to The Valveless Gas Engine Syndicate, Ld., certain patents and the benefit of all inventions which D. might then have made, or be entitled to, or which he might thereafter make, being for improvements upon the inventions the subject of any of the patents, or applications for the same, thereby agreed to be assigned. The patents comprised two patents of D., of 1891, for "Improvements in gas engines" and "Improvements in gas or vapour engines" respectively, and the benefit of an application by C. in 1892 for a patent for "Improvements in gas engines." In 1895, letters patent were granted to D. for "Improvements in oil engines." Actions were brought by D. against the syndicate and others, and by the syndicate against D., in both of which the question arose whether the syndicate was entitled to the patent of 1895.

HELD—that the invention transferred by the agreement of 1893 was one by which the patentee dispensed with a number of valves in gas and vapour engines, and that the 1895 patent was for an invention which was a method of working the engine to which the 1891 patent related by petroleum instead of by gas, and that it was not an "improvement" on the patents transferred within the meaning of the agreement.

DAY *v.* MILLBAY ENGINEERING CO., LD., AND [THE VALVELESS GAS ENGINE SYNDICATE, LD., (1898) 15 R. P. C. 233—Bigham, J.

140a. *Agreement to Assign—Notice—Licence—Registration—Priority—Equities—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *ss.* 23, 85, 87—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 Vict. *c.* 50), *s.* 21.]—Where persons having express notice of an agreement entered into by the registered owner of letters patent to assign them for value, obtain a licence to manufacture under the letters patent from him, and register their licence prior to the registration of the agreement, they take the licence subject to the agreement.

Decision of Kekewich, J. ([1898] 2 Ch. 137; 67 L. J. Ch. 324; 78 L. T. 543; 15 R. P. C. 380; 46 W. R. 567) affirmed.

NEW IXION TYRE AND CYCLE CO., LD. *v.* [SPILSBURY, [1898] 2 Ch. 484; 79 L. T. 229; 15 R. P. C. 567—C. A.

141. *Sale under Limited Licence—Sale through a Third Party of Infringing Articles—Injunction.*]—A patentee has a right not merely by sale without reserve to give an unlimited right to the purchaser to use and thereby to make in effect a grant from which he cannot derogate, but may attach to it conditions, and if those conditions are broken then there is no licence, because the licence is bound up with the observance of the conditions.

The defendant supplied through Smith infringing articles. His arrangement with Smith was that he was to get 5 per cent. commission.

HELD—that the course of business constituted an infringement on the part of the defendant.

THE INCANDESCENT GAS LIGHT CO., LD., AND [OTHERS *v.* BROGDEN, (1899) 16 R. P. C. 179—Kennedy, J.

142. *Grant to Two Persons—Sale to Company—Death of One Vendor—Construction of Agreement—Joint and Several Covenants that Patents are Valid—Liability of Representatives.*]—Two patentees, Gaulard and Gibbs, were entitled to various patents, and amongst others, to a patent for England, for the distribution of electricity. They were not merely co-owners of that patent, but they took out that patent in order to make money by selling it and sharing any profits which they might get out of it, and they agreed to sell it to the plaintiff company by an agreement dated May, 1883, which was afterward modified by an agreement dated October, 1883.

HELD—that upon the true construction of the agreement of May, 1883, the right of the plaintiff company to relief against the administratrix of Gaulard, was to be ascertained upon the footing that Gaulard and Gibbs had jointly covenanted to assign the patents mentioned in the agreement to the plaintiff company, and that such assignments should contain joint and several covenants by Gaulard and Gibbs with the company that such patents were valid and in no wise void or voidable.

Decision of Cozens-Hardy, J., ([1899] 2 Ch. 289; 68 L. J. Ch. 503; 47 W. R. 518; 80 L. T. 524; 15 T. L. R. 336; 16 R. P. C. 518) reversed.

NATIONAL SOCIETY FOR THE DISTRIBUTION OF [ELECTRICITY BY SECONDARY GENERATORS, LD. (1900) *v.* GIBBS, [1900] 2 Ch. 280; 69 L. J. Ch. 457; 48 W. R. 499; 82 L. T. 443; 16 T. L. R. 348; 17 R. P. C. 303—C. A.

143. *Action for Infringement—Title to Patents—Equitable Title—Legal Title—Foreign Judgment—Evidence.*]—In 1888 the plaintiff company was incorporated, under the law of Germany, for the purpose of purchasing and working certain patents belonging to T. R. and J. S. relating to the grooving of cardboard. T. R., who signed the statutes of the plaintiff company in the German language, stipulated that he would transfer to the company, without payment, all further inventions or improvements or additional or independent patents having reference to the patents then sold to the company which might be made to him before the expiration of such patents.

On January 31st, 1893, T. R. entered into an agreement with J. T., his son-in-law, whereby J. T. was to purchase T. R.'s business, and receive a licence to use (*inter alia*) one of two patents for improvements in bending cardboard and strawboard granted in 1892 to T. R. In certain events which happened J. T. was to become T. R.'s partner in the business on the terms of half shares. The licence was granted in February, 1893.

T. R. refused to transfer the two patents to the plaintiff company. The plaintiff company instituted legal proceedings in the German Courts

Assignment or Sale, and Construction of Agreements therefor—*Continued.*

to enforce against him the rights they claimed. In the Court of First Instance they were unsuccessful, but the Superior Court in 1898 reversed the decision of the Court below, and this decision was upheld by the ultimate Court of Appeal in 1899. T. R., in obedience to the judgment, executed transfers to the plaintiff company of the two patents, which were entered on the Patent Register on June 28th and July 6th, 1899, respectively. The plaintiff company brought an action for infringement against J. T. and his co-defendant. The defendant J. T. set up his equity to a licence, and an assignment through J. S. In April and June, 1899, J. T. obtained judgments of the Court for licences to use the patents to which the plaintiffs were not parties, and obtained in the absence of a defence.

HELD—that the agreement of January 31st, 1893, and consequently the partnership at will between T. R. and J. T., was put an end to by certain licences subsequently granted by T. R. to J. T. which were inconsistent therewith, and there were circumstances calculated to arouse suspicion of collusion between T. R. and J. T., and that the defendant J. T. had failed to establish the existence of a right on his part in equity, to the licence which he claimed, but that J. T. was entitled to rely on his legal title under an assignment from T. R. and J. T., but that in equity J. T. took subject to the obligation which the statutes of the company imposed on T. R.; that the German judgments were admissible in evidence, and must be taken *primâ facie* to be correct, and that according to the law of Germany T. R. was obliged to assign the patents to the plaintiff company. J. T. therefore took subject to the equity of those obligations, and the defences, therefore, failed, and that there was nothing to prevent the plaintiffs from enforcing the legal rights which they had acquired.

ACTIEN GESELLSCHAFT FÜR CARTONNAGEN [INDUSTRIE *v.* TEMLER AND SEEMAN, (1901) 18 R. P. C 6—Stirling, J.

144. *Contract—Interpretation — Agreement to Supply a Patent Cloth to Plaintiffs only Sale of well-known similar Cloth to Others.*]—The defendants entered into an agreement with the plaintiffs that the defendants should, during the continuance of the agreement, make "Flexifort patent cloth" for tyre covers for the plaintiffs only. The plaintiffs brought an action to restrain the defendants from selling "Flexifort patent cloth" to persons other than the plaintiffs without their consent. It was agreed between the parties that the particular cloth in question, as to which the complaint was made, was "string cloth."

HELD—that "string cloth" was not "Flexifort patent cloth," as the latter was without weft and not a textile fabric at all: whereas the former was a textile fabric, and was well known before the agreement, and, therefore, "string cloth" was not "Flexifort patent cloth" within the meaning of that term in the agreement.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* MOSELEY [& SONS, (1901) 18 R. P. C. 411—Joyce, J.

145. *Covenant by Assignor with Assignee of Part not to licence or assign—Subsequent assignment of Part to Another—Legal Owner—Disputing Validity of Patent.*]—One D. acquired a patent for some improvements in the manufacture of bicycle tyres. The plaintiffs claim to be—under an option to purchase—the owners of a one-sixth share in that patent, and that D. bound himself not to deal with their interest. Subsequently W. had a one-fourth share assigned to him, and he was registered and became owner of that one-fourth share, and being so he assigned his one-fourth share to B., who assigned to M., who ultimately gave the assignment, or gave the benefit of his interest, to the defendant company.

HELD—that there was no evidence that W. had anything to debar him from becoming the legal owner, and he was the legal owner, and there was no evidence impeaching B.'s *bona fides*, and the assignments resulted in the defendants getting their title; and even if the defendants had no title, they were not estopped from saying that the patent—a new one—was bad, as they came under the ordinary conditions of an infringer.

WAPSHARE TUBE CO., LD. *v.* HYDE IMPERIAL [RUBBER CO., LD., (1901) 18 R. P. C. 374—C. A.

146. *Action for Infringement — Conditional sale of Patent Right of Purchasers to prosecute further Proceedings in Name of Patentees—Action dismissed — Appeal — Application by Patentees to withdraw Appeal—Injunction.*]—Atkins and Applegarth—the patentees—commenced an action against the Castner-Kellner Alkali Co., Ld., for infringement of their patent. Atkins and Applegarth and the Commercial Development Corporation, Ld., entered into an agreement of November 29th, 1897, for the sale of their patents to the corporation subject to certain conditions—*inter alia*, a condition that the persons therein named should be satisfied as to the validity of the patentees' title to the patent sued upon and the validity of the other patents themselves; and that within two years a company should be formed by the corporation, for the purpose of taking over the patents and working them.

A further agreement of April 7th, 1898, was that the patentees should instruct certain solicitors therein named, who were in fact the solicitors of the corporation, that that firm would prosecute the "first-mentioned action on their behalf to final judgment or settlement," and there was an express agreement on the part of the corporation for the indemnity of the patentees from all future costs and expenses in connection with the action, but in the event of any change of solicitors they should repay to the corporation all disimbursements, costs, charges, and expenses incurred in respect of such action, and thereupon the liability of the corporation should cease.

Assignment or Sale, and Construction of Agreements therefor—*Continued.*

An action was brought by Atkins and Applegarth against the Castner-Kellner Co., Ld., and judgment was given for the defendants; the patent sued upon was held to be invalid, and that if it was valid there was no infringement. Notice of appeal was given by the solicitors on the record for the plaintiffs. The Castner-Kellner Co. were paid their taxed costs by the corporation and afterwards moved for an order striking out the appeal and that the corporation should pay the costs of the motion, which motion was adjourned. The patentees applied in person to the Court of Appeal for leave to withdraw the notice of appeal.

The corporation commenced an action against the patentees, claiming a declaration under the two several agreements that the patentees were trustees of the corporation and an injunction to restrain the withdrawal of appeal.

HELD—that the corporation, being purchasers in certain events, had a right to prosecute further proceedings in the name of the patentees, and having that right under the first agreement, were not affected as regards the exercise of that right by the second; and that the patentees were not entitled to withdraw the appeal, but that they were really trustees of the litigation for the corporation.

COMMERCIAL DEVELOPMENT CORPORATION, LD, [*v.* ATKINS AND APPLEGARTH; ATKINS AND APPLEGARTH *v.* CASTNER-KELLNER ALKALI CO., LD., (1902) 19 R. P. C. 93—C. A.

147. *Application for Patent by Inventor and Purchaser of Invention—Threat by Inventor to withdraw and abandon Application—Action to restrain—Injunction.*]—A joint application for a grant of letters patent for a certain invention was made by the inventor—the defendant—and the plaintiffs, to whom the former had agreed to sell the invention. Subsequently the plaintiffs went into liquidation and G. D. was appointed liquidator. Disputes arose and the defendant threatened to withdraw from the joint application and to abandon the same so far as he was personally concerned. The result of an abandonment of the application would have been that in a few weeks the invention would have become public property.

HELD—that the defendant must be restrained until the motion for an injunction was heard.

The defendant, when the motion came on for hearing, consented to an injunction.

WOOL, HIDE AND SKIN SYNDICATE, LD. *v.* [RICHES, (1902) 19 R. P. C. 127—Kekewich, J.

148. *Agreement for Sale—Action for Breach of Warranty of Validity—Proceedings abroad for Specific Performance*—Res Judicata.]—A contract under seal was entered into under which L. G. and J. D. G. agreed to assign certain patents to the plaintiff company, and they also agreed jointly and severally to warrant the validity of the patents. There was great delay in assigning the patents; there was litigation in this country for revocation of the English patent—one of the said patents. Pending the carrying of the case to the House of Lords by the plaintiffs in support of the patent the plaintiffs commenced proceedings in France for specific performance and damages for delay, with the result that there was a judgment for specific performance against the defendant, with an inquiry as to the extent to which the purchase price had been paid, and the plaintiffs admitted their liability to pay the sum found due. The decision of the House of Lords was then given adverse to the English patent before the appeal in the French Courts came on. The plaintiffs brought the present action in England for assignment and transfer of the patents, payment of damages for breaches of agreement and warranty contained in the said agreement, and repayment of parts of the purchase-money attributable to the patent declared invalid.

HELD—that the plaintiffs' claim was not *res judicata*, and that an inquiry should be directed as to damages.

Decision of Cozens-Hardy, J. ((1901) 18 R. P. C. 393) affirmed.

NATIONAL COMPANY FOR THE DISTRIBUTION [OF ELECTRICITY BY SECONDARY GENERATORS, LD. *v.* GIBBS, (1902) 19 R. P. C. 492—C. A.

149. *Rectification — Application to rectify Register — Person Aggrieved — Assignment by Bankrupt — Trustee subsequently confirming — Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 90.]—S. agreed to purchase a fourth share in M.'s patent, but became bankrupt after paying part of the price. Thereupon P. paid the balance and took from M. and S. an assignment of the one-fourth share; this assignment was duly entered in the register.

Subsequently C. agreed to purchase from M. an eighth share, and took out a summons to rectify the register by expunging the assignment to P. on the ground that it was executed by S. when a bankrupt.

HELD—that at the date of the issue of the summons C. was a "person aggrieved," but that the entry must stand, because in the interval the official receiver had executed a formal assignment to P., and so perfected his title: and that C. must pay the costs, because he had not ascertained, as he might have done, the views and intentions of the official receiver.

IN RE MANNING'S PATENTS, (1903) 20 R. P. C. [74—Kekewich, J.

150. *Action for Royalties—Gunpowders — "Argus" Powder—"Bulldog" Powder—Essence of Invention.*]—The defendants manufactured "Argus" powder under a royalty agreement with the plaintiff; they subsequently began to make "Bulldog" powder under agreement with its inventor.

The plaintiff claimed royalties on their sale of the latter powder on the ground that it was an "improvement or addition" to his invention, and therefore covered by his agreement.

Assignment or Sale, and Construction of Agreements therefor—*Continued.*

HELD, upon the facts, that the essence of the plaintiff's invention was the use of lignite, or carbonised lignite, instead of ordinary charcoal; and that the "Bulldog" powder, not being made with lignite, was not an infringement of the plaintiff's invention, and that the process employed in its manufacture was not an improvement of, or addition to, his process.

DAVIES *v.* CURTIS AND HARVEY, (1903) 20 [R. P. C. 561—C. A.

151. *Sale of Patent Rights — Construction of Contracts.*]—The D. Co. invented and patented a time register, and until June 10th, 1898, H. Bros. acted as their agents. On that day the D. Co. agreed to sell to H. Bros. the patent rights for various countries, and on October 14th, 1898, the D. Co. agreed not to sell outside Canada or the United States; there was a subsequent contract of November 3rd, and the D. Co., when sued for breach of contract, contended that the agreement of October 14th was not a complete and binding contract.

HELD, upon the facts, that it was intended to be a binding, and not (as alleged by the D. Co.) only a conditional contract; and, further, that it was not superseded by the document of November 3rd, and that the contract between the parties was contained in all the documents, and had been broken.

Damages were agreed between the parties.

Decision of outer House affirmed.

DAY PATENTS CO. *v.* HOWARD BROS., (1903) 20 [R. P. C. 21—Ct. of Sess. (I. H.).

Subsequently the D. Co. brought an action claiming fulfilment of the contracts of June 10th and November 3rd.

HELD—that the matter was concluded by the former action.

20 R. P. C. 369—Ct. of Sess. (I. H.).

152. *Agreement for Sale — Warranty of Validity—Patents shown by Purchaser to be Invalid*—Restitutio in Integrum.]—An agreement for the sale of a patent contained a warranty of validity in these words: "The assurance to the purchasers shall contain a covenant by the vendor guaranteeing the validity of the patent."

HELD—that, in answer to a claim for the balance of the purchase-money, the purchaser might show the patent to be invalid; and that upon his doing so there must be a *restitutio in integrum*, the machines, &c., being returned to the vendor, and money already paid to the purchaser.

Decision of Bigham, J. (20 R. P. C. 129) reversed.

NADEL *v.* MARTIN, (1903) 20 R. P. C. 721— [C. A.

153. *Action for Infringement—Parties—Title to Patent at Date of Writ—Equitable Assignee — Legal Owner not a Party — Amendment Terms — R. S. C., Ord. 16, r 11.*] In June, 1897, B. applied for letters patent, and in December, 1897, assigned to the plaintiffs his invention, the letters patent and protection. The patent was subsequently granted to B., and post dated (as usual) to June, 1897.

In 1903, while B. was still registered as the owner, the plaintiffs commenced this present action for infringement. Three months later B. assigned to them the patent in pursuance of the agreement of 1897.

HELD—that the document of 1897 did not amount to an assignment of the patent; and that the plaintiffs, being at the date of the writ merely equitable assignees, could not sue alone. Amendment granted upon terms as to costs, &c.

E. M. BOWDEN'S PATENTS SYNDICATE, LD. *v.* [HERBERT SMITH & CO., [1901] 2 Ch. 86; 73 L. J. Ch. 522; 52 W. R. 630; 21 R. P. C. 438—Warrington, J.

The plaintiffs amended accordingly.

HELD—that, having done so, they could not appeal.

[1904] 2 Ch. 123; 73 L. J. Ch. 776; 21 R. P. C. 596—C. A.

154. *Agreement for Sale — Warranty of Validity — Patent held Invalid — Rights of Parties.*]—A. agreed to sell his patent for a certain valve to B., and guaranteed it to be valid and in full force. The first instalment of £250 was duly paid, and B. took over and carried on the business (as agreed) for several months. When sued for the balance of the price, B. pleaded that the patent was not valid, and claimed rescission of the contract and repayment of the £250.

HELD that the patent was not valid, similar valves having formed the subject of an earlier patent now expired; but, that as the valves in question were saleable, and as B. had carried on the business for some months, and the parties could not be restored to their original position, he could not rescind the contract; that the business was in fact worth £240 to him, and that therefore he was entitled to recover £10 of the money paid by him, and was not liable in respect of A.'s claim for the final instalment.

BERCHEM *v.* WREN, (1904) 21 R. P. C. 683— [Darling, J.

155. *Infringement — Sale — Restrictive Condition as to User—Re-sale—Licence—Estoppel.*] —If a patentee sells the patented article, imposing no restriction or condition on the purchaser at the time of sale, he cannot subsequently impose a condition by delivery of the goods with a condition endorsed thereon, or upon the package in which they are contained: unless the purchaser knows of the condition at the time of the purchase and buys subject to it, he has the benefit of an implied licence to use free from the condition.

If a purchaser buys from a licensee to whose licence the patentee has attached a condition, it is immaterial whether the purchaser from the licensee knows of the condition or not. Such a

Assignment or Sale, and Construction of Agreements therefor—*Continued.*

condition may be attached to patented goods so as to follow the goods.

A person infringes a patent who innocently uses a patented article, though ignorant that there is a patent, or ignorant that the licence of his vendor is limited by conditions, which he is breaking. In the latter case, however, the patentee may be estopped from suing.

BADISCHE ANILIN UND SODA FABRIK *v.* ISLER, [1906] 1 Ch. 605 ; 75 L. J. Ch. 411 ; 94 L. T. 367 ; 22 T. L. R. 326 ; 23 R. P. C. 173—Buckley, J.

HELD, on appeal, affirming the decision of Buckley, J., that in the particular case no condition had in fact been attached to the licence ([1906] 2 Ch. 443 ; 75 L. J. Ch. 749 ; 95 L. T. 273 ; 22 T. L. R. 710 ; 23 R. P. C. 633) —C. A.

VIII.—LICENCE.

156. *Revocability of Licence.*—C., being the patentee and owner of an invention, entered into the employ of L., under an arrangement whereby L. purchased C.'s stock of the patented goods, and was to be entitled to make and sell the patented articles. C. subsequently left L.'s employ, and commenced an action for infringement of the patent against L., and a second action also against P., who claimed to be the assignee of L.'s business. On behalf of L. and P., it was contended that C. had granted an irrevocable licence to manufacture and sell the patented articles.

HELD—that so far as the licence to L. was by parol, it was *primâ facie* revocable, and was in fact intended to be revocable, and that the documentary evidence confirmed this view, and that C. having revoked the licence, L. and P. must be restrained from infringing the patent.

COPPIN *v.* LLOYD, (1898) 15 R. P. C. 373—[Channell, J.

157. *Action for Infringement—Repairs—Construction of New Article—Repairs ordered by Patentees' Agent—Injunction.*]—The plaintiffs complained that their agent had taken to the defendant an old, worn-out pneumatic tyre for cycles made by the plaintiffs under their patent, and that the defendant had constructed a new canvas cover and a new rubber cover and put in the old wires.

HELD—that the only licence or authority given by the sale by the plaintiffs was that the tyre, including the wires, might be used till it should be worn out. Any simple repairs might be done by any person without licence from the manufacturer. But when a person takes the whole thing and makes and sells that which is really a new tyre, leaving merely the old wires in it, there is no licence from the plaintiffs to use the old wires for the purpose of putting them into a new article, making up precisely the combination which is the subject of the letters patent. The defendant had consequently infringed the plaintiffs' patent, and showed an intention to continue to infringe it, and that plaintiffs were entitled to an injunction.

HELD, also, that the plaintiffs' agent had no authority to direct the articles to be made, and that the defendant did not know that the former was an agent of the plaintiffs.

Kelly v. *Batchelar* ((1883) 10 R. P. C. 289) distinguished.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* NEAL, [1899] 1 Ch. 807 ; 68 L. J. Ch. 378 ; 47 W. R. 632 ; 80 L. T. 746 ; 16 R. P. C. 247—North, J.

158. *Controlling Patents—Equitable Title of Licensors — Misrepresentation — Rescission of Licence — Prior Specifications — Registered Assignment admissible in Evidence — Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *ss.* 23, 96.]—In 1893 letters patent for "Improvements in electric arc lamps" were granted to L. E. H.

On March 24th, 1898, the plaintiffs granted to the defendant licences to make and sell arc lamps for which they possessed controlling patents. At that time the plaintiffs had only an equitable title to L. E. H.'s patent, which was alleged by them to be included in the licence. The defendant commenced making and selling lamps which the plaintiffs alleged were made under L. E. H.'s specification, but paid no royalties. The plaintiffs brought an action for an account and royalties. The defendant denied that plaintiffs possessed the said patents at the date of the licence, that he had, since the date of the licence, used or sold any arc lamps under the said patents, and he counterclaimed rescission of the said licence on the ground of misrepresentation.

HELD—that the licensee could not challenge the patent, and as there was no ambiguity in the specification, prior specifications were not admissible in evidence.

Adie v. *Clark* ((1876) 3 Ch. D. 134 ; 24 W. R. 1007—C. A.) followed.

HELD, also, that the counter-claim must be dismissed, as the alleged misrepresentations would have made no difference to the defendant, for he did not consider them material.

HELD, also, that the Court could admit the original assignment, which was the document on which the entry in the Patent Office Register pursuant to sect. 23 of the Patents, Designs and Trade Marks Act, 1883, was based, and was authenticated as having come from the Patent Office.

JANDUS ARC LAMP AND ELECTRIC CO., LD. *v.* JOHNSON, (1900) 17 R. P. C. 361—Farwell, J.

159. *Action for Infringement—Licence to use on Conditions—Distraint by Licensee's Landlord—Sale of Distress—Position and Title of Purchaser—Distress Act*, 1689 (2 *Will. & M., s.* 1), *c.* 5, *s.* 2.]—A patentee's rights cannot be distrained upon as they are of an incorporeal nature and incapable of physical possession. A patentee is entitled to restrain any person in whose hands he finds an article which infringes his patent

Licence—*Continued.*

from infringing such patent, unless such person can show a title direct or derivative from the patentee to use the patent.

A purchaser who buys with knowledge of the conditions under which his vendor is authorised to use the patented invention is bound by such conditions, and such conditions are not contractual, but are incident to and a limitation of the grant of the licence to use, so that if the conditions are broken there is no grant at all.

The plaintiffs were the owners of letters patent for an invention relating to mutoscopes. The licensees of the plaintiffs delivered to M. certain of the mutoscopes for exhibition purposes on certain conditions, one of which was that the mutoscopes were to remain the sole property of the licensees. M. placed these mutoscopes in a shop of which he was tenant. M.'s landlord distrained and seized the mutoscopes, which were purchased by the defendant at the sale by auction. It was admitted that the notice required by 2 Will. & M. c. 5, was given, and that the defendant knew, before he purchased, of the terms and conditions on which M. held the mutoscopes.

HELD—that the defendant was in no better position than if M. had been a mere infringer, and the plaintiffs were entitled to an injunction to restrain infringement.

BRITISH MUTOSCOPE AND BIOGRAPH CO. *v.* [HOMER, [1901] 1 Ch. 671 ; 70 L. J. Ch. 279 ; 49 W. R. 277 ; 84 L. T. 26 ; 17 T. L. R. 212 ; 18 R. P. C. 177—Farwell, J.

160. *Interpretation—Action for Infringement—Surrounding Circumstances.*]—The plaintiffs gave a licence to the persons under whom the defendants claim to use patents for "Improvements in rubber tyres and metal rims or felloes of wheels for cycles and other light vehicles," "so far as related to the manufacture of felloes or metal rims to cycle wheels, and as far as the rubber tyres, consisting of an air tube or balloon cover and wires, are concerned, of the same design and pattern as the tyre, which has, for the purpose of identification, been deposited with the licensors, and bears the stamp of the licensees as hereinafter defined upon the terms hereinafter appearing." At the date of the licence there was no reason at all for fixing the holes in the rim at any special place. The deposited drawings showed the holes in the shoulder of the rim.

HELD — that the object of the deposit of the tyre was simply to show the mode of attachment ; that the licensees were at large, if they liked, to use any rim to which they could fit the pattern tyre, a tyre conforming in all respects to that deposited ; and that there was nothing in the licence to debar the licensees from putting their holes in such parts of the rim as were most convenient for enabling them to attach in the manner in which they were bound to attach in making use of the privilege conferred by the licence ; and that the plaintiffs were seeking to unduly restrict the terms of the licence by reason of subsequent events, a course they were not entitled to pursue.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* [BUCKINGHAM AND ADAMS CYCLE AND MOTOR CO., LD., (1901) 18 R. P. C. 423—C. A.

161. *Action for Infringement — Licence to Manufacture in Accordance with a deposited Tyre—Purchase of Materials by Licensee—Article not completed by a Licensee but by a Third Person.*]—The predecessors in title of the Dunlop Co. granted licences to the Grappler Co. to manufacture and sell, at certain royalties, a sample tyre deposited with the licensors. C. agreed to supply the Grappler Co. canvas solutioned strips for the purpose of the contract. These canvas solutioned strips were supplied to the Grappler Co., who applied the invention to them, and sent them back to C., and C. completed the tyre by putting on the rubber surface, and when that was put on the thing was available for being fastened on to a rim, and C. sold it at that stage. It was said that this was an infringement.

HELD—that the licence was to use the Welch patent by the affixing to the tyres of a wire in a particular form, and that had been done here, and that C. had not infringed.

Dunlop Pneumatic Tyre Co., Ld. v. *Buckingham and Adams* ((1901) 18 R. P. C. 423—C. A., *supra*) followed.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* CRESS- [WELL AND OTHERS, (1901) 18 R. P. C. 473—Buckley, J.

162. *Agreement to take a Licence—Claim for Specific Performance—Defendant making such Agreement as Agent for a Purchaser.*]—In an action claiming specific performance of an agreement to take a licence under a certain patent, and to pay £750 therefor, the defendant pleaded that, as the plaintiff well knew, the licence was to be taken up by a company for whom the defendant acted, and with whom he had a definite written agreement upon the subject. It was stated that the defendant had obtained judgment against the company on this agreement, subject to his proving his title to the patent.

HELD—no defence to the plaintiff's claim.

BRAKE *v.* RADERMACHER, (1903) 20 R. P. C. [631—Farwell, J.

163. *Licensee infringing Patent — Cannot dispute Validity.*] — A licensee, working a patent under a licence from the owner, is not entitled to dispute the validity of the patent.

M. was manufacturing and selling under a licence from N. a patented apparatus for improvements in furnace-bars, the chief features of which were (1) construction with longitudinal openings between parallel webs, and (2) a rocking contrivance suitable for the bars of a long furnace, the bars being made in sections and resting on transverse bearers.

M. subsequently took out a patent for, and manufactured, a somewhat similar apparatus

Licence—*Continued.*

with (1) longitudinal webs with continuous longitudinal openings between the webs, (2) a rocking apparatus adapted to rock eccentrically, N.'s apparatus being adapted to rock centrally.

HELD—that M.'s apparatus might be described as a "cognate invention," and was an infringement, and a breach of the licence agreement.

JAMES NEIL *v.* T. & S. MACDONALD, (1903) 20 [R. P. C. 213—Lord Ordinary.

164. *Partnership owning Licence—Dissolution of Partnership—One Partner retiring—Assigning his Share—Covenant not to manufacture—Form of Deed—Jurisdiction of Arbitrator.*]—A partnership held a licence from a patentee. Upon the retirement of one partner it was referred to an arbitrator to determine "the form of the deed of dissolution and assignment and any other question arising in respect thereof."

The arbitrator required the retiring partner, when assigning his share in the licence to the continuing partners, to covenant not to manufacture according to the patent.

HELD—that it was reasonable and within the arbitrator's jurisdiction to insert such a covenant which would prevent the retiring partner from disputing the validity of the patent.

GONVILLE *v.* HAY, (1904) 21 R. P. C. 49—[Buckley, J.

And see Nos. 140a, 141, 143.

IX. PROLONGATION.

165. *Insufficiency of Accounts—Prolongation refused — Duty of a Patentee as to keeping Accounts in view of a Petition for Prolongation.*]—H. applied for prolongation of a patent granted to him, alleging utility of the invention and that he had received no remuneration at all. He had kept no books, but shortly before the presentation of the petition he had marked upon certain cheques drawn upon his private account approximately the amounts expended by him at different times in working the patent. Upon these materials the accounts accompanying the petition were made up by the accountant. There were no vouchers or other corroboration.

HELD—that prolongation ought to be refused.
RE HUGHES' PATENT, (1898) 15 R. P. C. [370—P. C.

166. *Merits of Invention — Prolongation refused.*]—Question discussed, but not decided, whether a patent will be prolonged when one of the claims in the specification is admitted by the petitioner to be invalid.

RE BURLINGHAM, INNES, AND LEE'S PATENT, [(1898) 15 R. P. C. 195—P. C.

167. *Petition by Assignee — No Benefit to Patentee — Petition dismissed.*] — A patent, granted in 1884, was in 1888 absolutely assigned, in consideration of a sum then paid, to F., who had in 1886 obtained a patent for a similar invention. F., in 1898, presented a petition for prolongation of the patent of 1884.

HELD—that, as the patentee would not derive any benefit from a prolongation, the petition must be dismissed.

In the Matter of Bower and Barff's Patent (12 R. P. C. 383) followed.

RE FINCH'S PATENT, (1898) 15 R. P. C. [674—P. C.

168. *No Remuneration—Utility proved—Prolongation granted for Ten Years.*]—A. and B. obtained a patent for improvements in working railway signals by electricity, and the patent became vested in B., who applied for prolongation. It appeared that there had been a difficulty in getting the invention adopted by railway companies, and that the patentees had sustained a large loss. It also appeared that the invention was one of considerable merit.

HELD — that, under the circumstances, the patent should be prolonged for ten years.

RE CURRIE AND TIMMIS' PATENT, [1898] A. C. [347 ; 67 L. J. P. C. 66 ; 15 R. P. C. 63—P. C.

169. *Disclosure of earlier Patents—Duty of Petitioners.*]—Explained that non-disclosure of prior patents was an unintentional omission. The history of everything bearing on the matter should be stated in the petition.

RE STANDFIELD'S PATENT, (1898) 15 R. P. C. [17—P. C.

170. *Merit—Remuneration to Inventor Inadequate — Period of Protection extended.*] — P. patented an invention for "Improvements in rotary motors actuated by elastic fluid pressure and applicable also as pumps," first in England (1884) and then in various foreign countries. The invention was one of great merit. The merit of the invention lay in setting down the conditions essential to the successful use of the velocity of steam for causing rotary motion without the intervention of any reciprocating apparatus. The apparatus, when used for marine propulsion, considerably increased the rate of speed. Five of the foreign patents had been allowed to lapse owing to circumstances rendering them of an unremunerative character. From 1884 to 1894 the patentee, in conjunction with partners and alone, endeavoured to profitably make use of his invention for purposes other than marine propulsion. The accounts showed a considerable loss. In 1894 the patentee granted to a company an exclusive licence to use the letters patent, together with other of his patents, for the purpose of marine propulsion, the consideration being the payment of certain royalties (in respect to which, up to the date of the petition, he had received no payment) and £9,000 in fully paid shares. Experiments were made, and a sum of £16,000 spent in fitting a vessel with engines driven by steam turbines. Shortly before the date of the petition a new company took over the interest of the first company in the vessel and licence. The consideration for this transfer was £30,000 in cash and £80,000 in shares, with certain royalties and rights to further shares. Of this consideration the patentee received for his interest in the first company £9,000 in cash and about £30,000

Prolongation—*Continued.*

in shares. In the valuation of the patents made for the purpose of the transfer from the first company to the second company, the sum of £1,000 in cash and shares was apportioned to the patent in question. At the date of the petition, the second company, being satisfied with the experiments made, was about to erect its workshops and commence operations. In 1895 the patentee granted a licence to a third company to work under certain of his foreign patents, reserving to himself and his licensees the right to use the invention for marine propulsion. From the accounts it appeared that the net sum received from the third company was £5,263 18*s.* 0*d.*, one-fifth of which was treated for the purpose of the petition as in respect of the patent in question. Apart from the sums realised in respect of the rights relating to marine propulsion, the accounts showed a net loss on the working of the patent.

HELD — that the patentee had not been adequately remunerated, and that the patent should be prolonged for five years.

RE PARSONS' PATENT, [1898] A. C. 673; 67 [L. J. P. C. 55; 15 R. P. C. 349—P. C.

171. *Petition by Patentee and Assignees — Sufficient Remuneration in Relation to the Merit of the Invention — Prolongation refused.*]—In 1884 a patent was granted to L. for "improvements in moulds for moulding decorative or other slabs and blocks." He assigned this patent with others to the P. A. Company, and £6,000 was the consideration for the assignment, besides which L. had received £250 from another company. The P. A. Company went into liquidation and a new company, the A. S. Company, acquired the patent. L. and the A. S. Company presented a petition for prolongation of the patent. It transpired that L. had for some eight years received £300 per annum as managing director of the A. Company. L. claimed to deduct from the £6,250 the costs incurred by him in certain legal proceedings in relation to the patent, and that the balance was an insufficient remuneration. The accounts showed that the patent had been worked at a loss.

HELD—that the £300 a year ought to have been brought into account by the patentee; that he was not entitled to make the deductions claimed, and that having regard to the merits of the invention and the circumstances of the case, it was impossible for the Judicial Committee to report that the patentee had been inadequately remunerated, and the petition was dismissed.

RE MCLEAN'S PATENT, (1898) 15 R. P. C. 418— [P. C.

172. *No striking or unusual Merit—Proof of no Profit.*]—Where the invention had reference to what are known as water-tube boilers, and consisted of the combination of various parts, all or most of which were admittedly not new at the date of the letters patent, and had been applied with success both in this country and abroad, an extension of the term of the patent was not recommended, as the evidence failed to show that the invention was one of sufficiently striking or unusual merit. As no explanation was offered why a large loss (nearly 10 per cent. on the amount expended), was incurred in building boats fitted with the patent boilers for the patentees, while a handsome profit was made on supplying the boilers built by other builders, and the facts proved were consistent with the existence of some error of judgment, miscalculation or other defect in the petitioners' mode of carrying out their business of boat-building, the proof that no profit was or could have been made in working the patented invention failed.

RE THORNYCROFT'S PATENT, [1899] A. C. [415; 68 L. J. P. C. 68; 16 R. P. C. 202— P. C.

173. *Petition presented more than Six Months after the Expiration of the Patent — Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 25.]—If a patentee does not present his petition praying that his patent may be extended for a further term at least six months before the time limited for the expiration of the patent, the Judicial Committee is powerless to excuse him from non-compliance with sect. 25 of the Patents, Designs and Trade Marks Act, 1883.

RE ADAMS' PATENT, (1899) 16 R. P. C. 1.—P. C.

174. *Patentee's Interest—Patent purchased as a Speculation — Accounts.*]— The following are objections to the application for the prolongation of a patent, any one of which is fatal:—

(a) Where the patentee has practically no interest whatever in the application or in the prolongation of the patent.

(b) Where the application is really made by a company, who entered into the speculation of buying the patent, which has been an unfortunate speculation.

The principle of *Norton's Case* ((1863) 1 Moore, P. C. (N.S.) 339; 9 Jur. (N.S.) 419; 11 W. R. 720) and *Barff's Case* ((1895) 12 R. P. C. 383) applied.

(c) A patentee who comes to make an application for the prolongation of a patent ought from the first to keep his accounts in such a manner that it may be clear to the Court what profits have been made.

Thomas' Patent ((1892) 9 R. P. C. 367) and *Saxby's Patent* ((1870) L. R. 3 P. C. 292) followed.

RE CLARK'S PATENT, (1899) 16 R. P. C. 431 [—P. C.

175. *Accounts—No Evidence as to Merit.*]— A petition for prolongation of a patent was presented on the ground of inadequacy of remuneration and the merit of the invention. The accounts showed a profit of £3,105 16*s.* The petitioner stated that expenses amounting to £3,650, which were not stated in the accounts, had been incurred, and intimated he did not intend to call evidence as to merit.

HELD—that the petition must be refused.

KELLY'S PATENT, (1900) 17 R. P. C. 476—P. C.

176. *Non-disclosure of Material Facts.*]—A petitioner for the prolongation of letters patent

Prolongation—*Continued.*

stated in the petition that the patent was and always had been vested in him. Yet from an agreement it was clear that a company since 1890 had been the beneficial owners of the patent. Counsel for the Crown asked for the petition to be dismissed, as these were material facts which were not disclosed and which ought to have been disclosed. The petitioner paid for the upkeep of the patent.

HELD—that the petition should be dismissed with one set of costs between three sets of opponents.

RE FERRANTI'S PATENT, (1901) 18 R. P. C. 518 [—P. C.

177. *Assignee of Patent—Commercial Adventure — Proof of insufficient Remuneration — Accounts—Further Particulars—Failure to push Patent for Seven Years—Expiration of Foreign Patents.*]—An assignee who has acquired a patent as the subject of commercial adventure is not entitled to a prolongation when the inventor himself could have no legitimate interest in making such an application.

It is the duty of every patentee who comes for the prolongation of his patent to take upon himself the *onus* of satisfying the Judicial Committee, in a manner which admits of no controversy, what has been the amount of remuneration which in every point of view the invention has brought to him, in order that the Judicial Committee may be able to come to a conclusion whether that remuneration may fairly be considered as a sufficient reward for his invention or not.

In re Saxby's Patent ((1870) L. R. 3 P. C. 292 ; 7 Moore, P. C. C. (N.S.) 82 ; 19 W. R. 513—P. C.) followed.

The failure of the patentee to push the patented invention in this country for seven years, and the circumstance of the expiration of the foreign patents, are serious obstacles to the success of a petition for prolongation ; neither of them by itself is conclusive against the petition, but it would require a very strong case to induce the Judicial Committee to recommend the prolongation of a patent where these circumstances occur.

Semet and Solway's Patent ([1895] A. C. 78 ; 64 L. J. P. C. 41 ; 71 L. T. 674 ; 11 R. 362 ; 12 R. P. C. 10—P. C.) and *Pieper's Patent* ([1895] 12 R. P. C. 293 ; 72 L. T. 782 ; 11 R. 581—P. C.) approved.

RE HENDERSON'S PATENT, [1901] A. C. 616 ; 70 [L. J. P. C. 119 ; 55 L. T. 358 ; 17 T. L. R. 676 ; 18 R. P. C. 449—P. C.

178. *Utility—No Profit—Foreign Patents—Prolongation for Seven Years.*]—A petitioner for prolongation of letters patent for an invention of "a mechanical fuze for causing the explosion of shells and indicating the number of revolutions performed and distances traversed by projectiles," alleged that it was an invention which, in its very nature, was attended with many difficulties as regards the making of experiments. It was an invention which took much time to perfect, and was capable only of occasional use. If its utility could ever be established there might be a great field before it. The War Office had declined to make any further experiments at the public expense. An eminent firm had become sole licensees under the patent since 1892, and they declined to concur in the application for prolongation. It was not contended that the petitioner had made any profit. Foreign patents would expire if the patent here was not prolonged.

HELD—that a recommendation to extend the patent for seven years would be made.

RE THOMPSON'S PATENT, (1902) 19 R. P. C. [565—P. C.

179. *Rules as to must be strictly followed—Patent communicated from Abroad—Absence of Proof that Patentee has not been sufficiently Remunerated — Adjournment refused—Refusal of Petition.*]—The rules which guide their Lordships in the exercise of their duty of advising the Crown whether a patent should be extended or not are perfectly well known, and they must be strictly followed.

An application for the extension of a patent is an application for an indulgence, and for an indulgence of a very extraordinary kind, and patentees who come to ask for that indulgence must understand that the settled rules that guide the Board will be adhered to.

An application was made for an extension of a patent which was a communication from abroad. The petitioners, who were a commercial company, the assignees of the patent, had given their Lordships no opportunity of judging whether the inventor had been remunerated in any shape or form.

HELD—that their Lordships must refuse an application for adjournment, and advise his Majesty to refuse the petition.

RE PEACH'S PATENT, EX PARTE PEACH [AND BOSWELL, HATFIELD & CO., [1902] A. C. 414 ; 71 L. J. P. C. 98 ; 87 L. T. 153 ; 19 R. P. C. 65—P. C.

180. *Insufficiency of Accounts—Application refused.*]—A patentee, applying for an extension of his patent, must submit intelligible and complete accounts, so as to enable the committee to ascertain from the accounts themselves what remuneration he has in fact received. If he does not do so, his application must be refused ; and (except perhaps in very special circumstances) he cannot be allowed to give oral evidence at the hearing to vary or add to the accounts already lodged.

Judgment of Lord Chelmsford, L.C., in *Betts' Patent* ((1862) 1 Moo. P. C. (N.S.) 49) approved.

RE WUTERICH'S PATENT, [1903] A. C. 206 ; [72 L. J. P. C. 60 ; 88 L. T. 306 ; 20 R. P. C. 285—H. L. (E.).

181. *Failure to get Patented Invention taken up by the Trade.*]—Prolongation of a patent ought not to be granted where the invention has

Prolongation—*Continued.*

not been taken up in the past and there is no good reason to expect a different result in the future.

RE SCOTT'S PATENT, (1906) 23 R. P. C. 478—[P. C.

182. *Advertisement of Intention to Apply—Necessity for—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 25 (1).]—A petition for extension of a patent cannot be entertained unless there has been published the advertisement required by sect. 25 (1) of the Act of 1883.

RE FRIESE-GREENE'S PATENT, [1907] A. C. [460; 76 L. J. P. C. 106; 97 L. T. 223; 24 R. P. C. 464—P. C.

[Under special circumstances leave to present a petition, though advertisements had not been issued, was granted in *Re Poyser's Patent*, 24 R. P. C. 157.]

183. *Petition by Assignee—Inventor dead—No Special Merit—Invention not pushed.*]

Semble, a patent will not be prolonged on the application of an assignee when the inventor is dead, and could not, if living, have reaped any advantage.

Prolongation refused where there was no "exceptional" merit in the invention, and it had not been pushed with reasonable energy.

RE VAN GELDER'S PATENTS, EX PARTE [THOMPSON, [1907] A. C. 174; 76 L. J. P. C. 44; 96 L. T. 333; 24 R. P. C. 169—P. C.

X. MEASURE OF DAMAGES.

184. *Action for Infringement—Inquiry as to Damages — Principle.*]—On an inquiry as to damages in an action for infringement of a patent for improvement in rubber tyres for cycles, Wills, J., found that as the plaintiffs' "Dunlop" tyres, on which they made a profit of about £1 a tyre, could not have been sold for the purpose for which the defendants' infringing tyres had been sold, the damage sustained by the plaintiffs was the amount of royalty the plaintiffs would have received from tyres of a similar class had they been manufactured by the plaintiffs' licensees.

HELD—that Wills, J., correctly stated the principle—viz., the plaintiffs had to show that they had sustained pecuniary loss, and, as far as the nature of the case permitted, the amount of that loss—and correctly acted on the defendants' admission that if they had not succeeded in selling the tyre they improperly sold, their customers would very likely have bought, in the place of machines which used those tyres, other machines fitted with other tyres made by licensees of the plaintiffs in which the plaintiff's patent was made use of, though in a form and to an extent which made the tyres inferior to the high-priced Dunlop tyres.

PNEUMATIC TYRE CO., LD. *v.* PUNCTURE PROOF [PNEUMATIC TYRE CO., LD., (1899) 16 R. P. C. 209—C. A.

185. *Importation — Articles patented in this Country imported from America—Expiration of English Patent before all the Articles were delivered — Injunction — Costs.*]— The Dublin United Tramway Company purchased from the National Conduit and Cable Company of New York a quantity of cable which it was admitted was an article identical in its nature with the cable protected by the patent of the plaintiffs. The plaintiffs' patent expired on September 2nd, 1898. The plaintiffs on September 10th, 1898, eight days after the expiration of their patent, brought an action for an injunction and delivery up of the cable, damages, and costs.

HELD—that so far as any goods were brought into this country similar to the patented article, to which the tramway company were parties or privies, they were liable for any loss sustained by the plaintiffs in respect of what was brought in before the date of the expiration of the patent. Except, however, as regards the quantity delivered before September 2nd the plaintiffs had failed to make good their case; and that consequently the damages must be confined to the goods that were actually supplied and brought into this country before September 2nd, 1898; that the plaintiffs, who had no right to claim an injunction because the patent had expired, were entitled to the general costs of the action and the defendants to so much of the costs as were occasioned by the prayer for an injunction, and by the interlocutory motion.

BRITISH INSULATED WIRE CO., LD. *v.* DUBLIN [UNITED TRAMWAY CO., LD., (1900) 17 R. P. C. 14—Chatterton, V.-C.

186. *Action for Infringement of Twelve Patents—Three Modes of Production — No Proof of Patents actually infringed—Injunction—Costs.*]—The plaintiffs were the owners of twelve patents. They alleged in their statement of claim that the defendant had infringed, and threatened to infringe, these several patents, and they sought an injunction and damages. The defendant had purchased saccharin. The twelve patents might be conveniently treated as only three in number, and these three related to separate and distinct modes of producing saccharin, and it was not possible to tell from the examination of any particular parcel of saccharin under which process it had been produced. No evidence was adduced as to the place where, or as to the process by which, the parcel purchased by the defendant was produced.

HELD—that as the parcel was not made under all three processes but under one of the three, though it could not be said under which of the three (it might have been under an expired patent), the plaintiffs, therefore, had not established that which was necessary to entitle them to an injunction.

HELD, also, that as one of the three patents must have been infringed the right to and measure of damage must be the same, whichever of the three patents was in fact infringed, and therefore an inquiry should be directed whether any, and what damages had been sustained, and

Measure of Damages—*Continued.*

that the plaintiffs were to have no costs up to and including judgment.

SACCHARIN CORPORATION, LD. *v.* QUINCEY, [1900] 2 Ch. 246 ; 69 L. J. Ch. 530 ; 64 J. P. 633 ; 82 L. T. 792 ; 16 T. L. R. 384 ; 17 R. P. C. 530—Cozens-Hardy, J.

187. *Action for Infringement—Innocent Purchasers—Inquiry as to Damages Sustained and Incurred—Inability to purchase Goods patented—No Pecuniary Loss shown—No Damages—Costs.*]—The defendants purchased an organ which was an infringement of the plaintiffs' patent. There was no evidence to show that they were other than innocent purchasers. An inquiry whether any, and what, damages had been sustained or incurred by the plaintiffs by reason of the defendants' infringement of the said patent was ordered. The defendants had used the organ altogether on sixteen days. The organ had been delivered up to the plaintiffs.

HELD—that the true rule was to endeavour to ascertain what loss had accrued by reason of the wrongful acts complained of, such loss being the natural and direct consequence of the defendants' acts ; that as under no circumstances could the defendants have been able to have purchased one of the plaintiffs' organs—the price charged being £500—as their means would not permit of such a thing ; and there being nothing to show that any pecuniary loss had been suffered by the plaintiffs during the sixteen days, the plaintiffs had failed in establishing any damages ; and that the defendants were entitled to the costs of the inquiry.

GAVIOLI ET CIE. *v.* SHEPHERD, (1900) 17 R. P. C. 157—Byrne, J.

189. *Action for Infringement—Prior Publication—Subject-matter—Misleading and Untrue Specification — Amendment — Injunction — Damages prior to Amendment — Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 20.]—The inventor invented a different method of manufacturing the particular kind of candy known as "hard crack" or "stick" candy. He took out a patent which became the subject of litigation in the case of *Kane* v. *Guest* ((1899) 16 R. P. C. 433), before Stirling, J., who said (at p. 441, line 51) : "On the whole, I come to the conclusion that the patent extends to subjecting any compound of cane-sugar and glucose to a cooking or boiling action *in vacuo*," and held that the patent was invalid. There the patentee amended his specification, and the plaintiffs brought an action for infringement on the amended specification.

HELD—that, as amended, the specification being confined to "hard crack," the plaintiffs had a valid patent, and were not entitled to an injunction, as the patent had expired before judgment ; that the inventor could not be regarded as having framed his claim in good faith within the meaning of sect. 20 of the Patents, Designs and Trade Marks Act, 1883, and that he meant and intended to make a larger claim than that which he knew he was entitled to ; and that the plaintiffs were only entitled to damages as from the date of the amendment or disclaimer.

KANE AND PATTISON *v.* J. BOYLE & CO., (1901) [18 R. P. C. 325—Byrne, J.

190. *Purchasers of Infringing Articles—Sale of some in Market—Sending Remainder Abroad for Sale—Evidence of Infringement—Exposing for Sale—"Use and Vend"—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *Sched. I., Form D.*]—The plaintiffs, owners of a patent, had, prior to this action, brought an action against Messrs. R. and G. for infringement, and had obtained judgment for damages against them, but those damages had not been paid. The plaintiffs then took the present proceedings against the defendants, who were ignorant of the plaintiffs' patent rights, and were purchasers of infringing articles from Messrs. R. and G. The defendants purchased twenty-seven machines from Messrs. R. and G. at some time before the action. They sold eight of the twenty-seven in the market, and they sent abroad at some time the remaining nineteen, with a view of selling them—that is, with the object of turning them to profitable account. They thus prevented the operation of the order contained in the judgment for the delivery up and destruction of the infringing articles ; and they actually obtained the benefit of the proceeds of sale.

HELD—that there was evidence of infringement with respect to the whole twenty-seven articles.

Minter v. *Williams* ((1835) 4 Ad. & E. 251 ; 1 Web. Pat. 135) considered.

United Telephone Co. v. *London and Globe Telephone and Maintenance Co.* ((1884) 26 Ch. D. 766 ; 53 L. J. Ch. 1158 ; 32 W. R. 870 ; 51 L. T. 187—Bacon, V.-C.) followed.

HELD, also, that the measure of damages should be the amount which the defendants would have had to pay for the permission to do that which they wrongfully did.

Pneumatic Tyre Co. v. *Puncture Proof Pneumatic Tyre Co.* ((1899) 16 R. P. C. 209—C. A., No. 184, *supra*) approved.

Decision of Stirling, J. ([1900] 1 Ch. 577 ; 69 L. J. Ch. 377 ; 48 W. R. 345 ; 82 L. T. 106) affirmed.

BRITISH MOTOR SYNDICATE, LD. *v.* TAYLOR & [SON, [1901] 1 Ch. 122 ; 70 L. J. Ch. 21 ; 49 W. R. 183 ; 83 L. T. 419 ; 17 T. L. R. 17 ; 17 R. P. C. 723—C. A.

191. *Action for Infringement of Fire Patents—Validity not denied—No Proof under which Patent the Infringing Articles were made—Injunction—Certificate—Solicitor and Client Costs—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 31.]—The plaintiffs were the registered proprietors of five patents, all of which related to the manufacture of pure saccharin. In 1899 they brought an action for infringement against the defendant, and in 1901

Measure of Damages—*Continued.*

they commenced another action against him alleging infringement of all five patents, and asking for an injunction and the usual relief. The defendant denied infringement, but did not deny the validity of the plaintiffs' patents. The original patent granted in 1885 had expired before the date of the writ, and with regard to that patent it was proved that by it a person could not make pure saccharin. In order to produce pure saccharin—such as had been dealt with by the defendant—it was absolutely essential that one of the processes described in the patents of 1891 or 1893 should be used. The plaintiffs did not know which had been infringed since they were unable to tell by which method the infringing article was made.

HELD—that pure saccharin had been produced in breach of some of the plaintiffs' patents; that the proper course was to grant an injunction against infringement of five patents, but to limit it to the period of the oldest of them, *i.e.*, the shortest life left of any one of the patents, viz., the patent of 1891; that there would be an inquiry as to damages at plaintiffs' risk: and that even if sect. 31 of the Patents, Designs and Trade Marks Act, 1883, applied, the plaintiffs ought to have their costs, but not costs as between solicitor and client.

Automatic Weighing Machine Co. v. *International Hygienic Society* ((1890) 6 R. P. C. 480—Charles, J.) followed.

SACCHARIN CORPORATION, LD. *v.* DAWSON, [(1902) 19 R. P. C. 169—Farwell, J.

192. *Infringement.*]—The defendants bought a motor-car which was fitted with certain accessories, the accessories being an infringement of the plaintiff's patent. In an action to recover damages for the infringement:—

HELD—that the measure of damages was the difference between the value of the car with and its value without the accessories.

CLEMENT TALBOT, LD. *v.* WILSON, (1907) 97 [L. T. 328; 23 T. L. R. 643; 24 R. P. C. 511—Kekewich, J.

See also Nos. 240, 296, 297, *infra*.

XI. ACTION TO RESTRAIN THREATS.

193. Bonâ fides—*Action for Infringement—Whether duly prosecuted—Action dismissed—Costs—Patents, &c., Act*, 1883, *s.* 32.]—A company, being the owners of some patents relating to metal clamps for uniting certain parts of boxes of wood, cardboard, leather and the like, and their agents, S. and Sons, issued threats against T. and his customers, alleging that T.'s clamps infringed the said patents. The company, in October, 1894, sued T. for infringement of three of these patents, but one of them was dropped out of the statement of claim, and the action as to one of the others was abandoned in January, 1896, after re-amended particulars of objections had been given, and as to the remaining patent it was discontinued in April, 1896, after such particulars had been further re-amended. T., in November, 1895, commenced the first of the present actions against S. and Sons, and in February, 1896, commenced the second of these actions against the company, both actions being to restrain threats.

HELD—first, that as the defendants in each action had acted *bonâ fide* in issuing the threats, no action lay against either of them, apart from sect. 32 of the Patents, &c., Act, 1883; secondly, that S. and Sons, not claiming to be patentees, did not come within that section; and, thirdly, that, although the patent action had been discontinued, it had been prosecuted within the meaning of the proviso to the section, and that notwithstanding the abandonment of the action as to one patent before the statement of claim; for the threats had been founded generally on all three patents, and not in respect of any special one of them. The two actions were therefore dismissed, but without costs.

TEMLER *v.* STEVENSON & SONS; TEMLER *v.* [ACTIEN GESELLSCHAFT FÜR CARTONNAGEN INDUSTRIE, (1898) 15 R. P. C. 24—Romer, J.

194. Ex parte *Motion for Interlocutory Injunction restraining Issue of Circular—Injunction not granted—Patents, &c. Act*, 1883, *s.* 32.]—The plaintiff company, formed for the purpose of purchasing a patent, sent copies of their prospectus to various newspapers for insertion, on November 5th, 1897. The prospectus stated that the list of subscribers would be opened on November 5th and closed on November 8th. The defendant company, the assignees of another patent, sent a circular to all the leading newspapers for publication simultaneously with the plaintiffs' prospectus. The plaintiffs, having commenced an action to restrain the defendants from alleging that the patent, under which the plaintiffs proposed to work, was an infringement of the defendants', and from using threats, moved for an injunction *ex parte* to restrain the defendants, over November 8th, from issuing the circular.

HELD, by Byrne, J. and the C. A.—that it was not a proper case for granting an injunction *ex parte*.

COMMERCIAL DEVELOPMENT CORPORATION, [LD. *v.* CASTNER-KELLNER ALKALI CO., LD., (1898) 14 R. P. C. 939—C. A.

195. *Action for Infringement commenced and discontinued — Due Diligence — Good Faith — Statute of Monopolies—Claim for Treble Damages under s. 4—Patents, &c., Act*, 1883, *ss.* 32 *and* 18, *sub-s.* 9.]—The H. Company were the owners of two patents for hair curlers. In 1894 P. & Co. placed upon the market a hair curler which the H. Company alleged was an infringement of their patent rights. On May 10th, 1894, the H. Company commenced an action against P. & Co. for infringement, but discontinued this action on June 18th, 1895, on account of their having discovered that an amendment of the specification of one of their patents, which they thought had been made, had not been in fact completed, and, therefore, such patent was invalid. Thereupon P. & Co. commenced an

Action to Restrain Threats —*Continued.*

action against the H. Company for an injunction to restrain them from threatening, to which the H. Company raised, by way of defence, the action which they had commenced and discontinued as aforesaid. The threats action came on for trial before a judge and a special jury. The jury found that the threats of the H. Company to take proceedings against P. & Co. were made in good faith, and that their action against P. & Co. was commenced and prosecuted with due diligence. A question was then argued before the judge as to whether the H. Company's action was an illegal one under the Statute of Monopolies. The judge held that it was not, and gave judgment for the H. Company with costs.

PECK & Co. *v.* HINDES, Ld., (1898) 67 L. J. [Q. B. 272 ; 15 R. P. C. 113 ; 14 T. L. R. 164 —Mathew, J.

196. *Single Threat—Threat unjustifiable.*]—The L. Company, being owners of a patent, wrote to B. & Co. a threatening letter in respect of certain glass vessels which they were in fact making for W. W. brought an action to restrain the L. Company from threatening. The L. Company, after being allowed by arrangement to inspect B. & Co.'s works, admitted that what they were doing was no infringement of their patent.

HELD—that the plaintiff was entitled to an injunction, or an undertaking by the defendants not to threaten in respect of the glass vessels specified in the letter, and that the defendants must pay the costs of the action.

WEBB *v.* LEVINSTEIN & Co., Ld., (1898) 15 [R. P. C. 78—Stirling, J.

197. *Injunction—Breach—Contempt of Court — Costs — Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 32.]—C., trading as M. & Co., had been restrained by injunction—in an action brought by E. against M. & Co.—from publishing, either verbally or otherwise, any statement that, or to the effect that, an injunction had been granted against E. restraining him from infringing certain letters patent, and also from threatening E. or any of E.'s customers with any legal proceeding or liability in respect of the manufacture, sale, or purchase of a certain machine. After the order M. & Co. circulated amongst E.'s customers a pamphlet prepared by the A. B. Co., which stated in effect that M. & Co. were the special agents of the A. B. Co., who were the exclusive makers of the machine in question under the licence of the patentee, and who intended to prosecute all infringers of their patents.

On motion to commit C. to prison for contempt of Court for a breach of the injunction, Romer, J., ordered C. to pay the costs of the motion on appeal.

HELD, by Lindley, M.R., and Vaughan Williams, L.J. (*dissentiente* Chitty, L.J.)—that the injunction was not so plainly worded to prohibit what C. had done as to justify a judicial decision that a breach of the injunction had been committed.

Per Lindley, M.R.—the Court will not strain the language of an injunction even to meet a case which would have been prohibited if foreseen.

ELLAM *v.* MARTYN & Co., (1899) 68 L. J. Ch. [123 ; 47 W. R. 212 ; 79 L. T. 510 ; 15 T. L. R. 107 ; 16 R. P. C. 28—C. A.

198. *Prosecution with due Diligence—Action by Patentees before Threats—Action by Patentees after Threats — Interim Injunction — Costs — Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 32.]—In an action that was brought by J. D. P. Co. against W. and S. for infringement due diligence was not shown, and judgment was given for W. and S. with costs. J. D. P. Co. afterwards issued a circular making threats against persons using the identical machine which, as between W. and S. and J. D. P. Co., in the action which had already been determined, was held not to be an infringement of J. D. P. Co.'s patent. W. and S. brought an action to restrain J. D. P. Co. from threatening, and J. D. P. Co. issued a writ in an action for infringement against a customer of W. and S.

HELD—that there was no evidence before the Court to show that the action of J. D. P. Co. against the customer had not been prosecuted up to the present time with due diligence, and that no order would be made for an interim injunction, except reserving the costs to be dealt with at the trial.

WAITE AND SAVILLE, Ld. *v.* JOHNSON DIE [PRESS Co., Ld., (1901) 18 R. P. C. 1— Byrne, J.

199. *Prosecution with due Diligence—Infringements in the Past and in Future—Costs—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 32.]—In December, 1826, I. sued B. for the infringement of a patent, and in April, 1898, dropped his action. In May, 1898, I. brought a second action against B. for the infringement of the same and another patent, which was dismissed on B.'s application. B., in April, 1899, brought an action against I. and others claiming damages for threats contained in circulars, advertisements, and letters to take proceedings against persons using and selling an alleged invention. On the trial of this action the jury found that the threats were *bonâ fide*, and that although I.'s first action was brought *bonâ fide*, yet it was not prosecuted with due diligence, and they found £80 damages. The jury found that I.'s second action was not brought honestly and *bonâ fide*, and prosecuted with due diligence, and they assessed the damages at £135.

HELD—that with regard to the second action there was evidence to go to the jury of threats within the meaning of sect. 32 of the Patents, Designs and Trade Marks Act, 1883—threats as to something done ; threats as to a condition of things with regard to infringements in the past and with regard to the conditions at present, as also with regard to the future—and that the jury had dealt with the matter properly, and therefore the issue would be found for B.,

Action to Restrain Threats—*Continued.*

who would have the general costs of the action, and the defendants would have the costs of such of the issues as were properly distributable and found in their favour.

BISHOP *v.* INMAN AND OTHERS, (1901) 17 [R. P. C. 749—Bucknill, J.

200. *Prosecution with due Diligence—Interlocutory Injunction—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 32.]—The defendants commenced an action on December 20th, 1899, against the plaintiffs for infringement of a patent which had since expired. The plaintiffs on September 21st, 1901, commenced an action against the defendants to restrain the defendants from threatening any persons with legal proceedings.

Both actions were still pending when the plaintiffs made an application in the infringement action for evidence to be obtained abroad. The plaintiffs applied during vacation for an interlocutory injunction.

HELD—that there had been such an amount of delay as did not amount to "due diligence," as those words applied to the word "prosecute" as well as to "commence," and that an interlocutory injunction would not be granted to the plaintiffs during vacation.

VOELKER INCANDESCENT MANTLE, LD. *v.* [WELSBACH INCANDESCENT GAS LIGHT CO., LD., (1901) 18 R. P. C. 494—Ld. Alverstone, C.J.

201. *Common Law Right—Interlocutory Injunction—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 32.]—The plaintiff claimed an injunction to restrain the defendants from threatening legal proceedings in respect of an alleged infringement of the defendants' rights, patent or otherwise. The plaintiff put her case on two grounds—first of all, threats under the statute, and secondly that of a vexatious and *malâ fide* assertion of a claim of right for the mere purpose of injuring the plaintiff. On the application for an interlocutory injunction, it was agreed that there was a complete conflict of evidence as to whether the defendants had ever threatened.

HELD—that an interlocutory injunction could not be granted, as *malu fides* was an issue that the Court could not try on affidavit; and that, treating the summons for direction as before the Court, an order for pleadings and discovery by both parties should be made.

BARBER *v.* NATHAN AND SOMERS, (1902) 19 [R. P. C. 332—Farwell, J.

202. *No Effective Action—Re-construction of Company — Injunction — Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 32.]—The defendants, the owners of a patent, had threatened several customers of the plaintiffs. The plaintiffs manufactured the articles complained of abroad, and had only an agent in this country. They commenced an action against the defendants to restrain threats, and moved for an interlocutory injunction. There was no effective action in which the question of the validity of the patent was being litigated by the defendants; their excuse was that there had been a reconstruction pending, and that they did not want to bring an action against gentlemen resident abroad. It was not suggested that the plaintiffs had not property in England.

HELD—that under the circumstances an injunction ought to be granted restraining threats.

ENGELS *v.* HUBERT UNCHANGEABLE EYELET [SYNDICATE, LD., (1902) 19 R. P. C. 201 — Byrne, J.

203. *Prosecution with due Diligence—Motion to restrain Circular—Costs—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 32.]—In November, 1901, the plaintiffs commenced an action against the defendants to restrain them from infringing Welch's patent by the sale of "Wapshare" tyres. In April, 1902, the plaintiffs commenced a second action against the defendants on the same patent. About the same time the plaintiffs issued a circular advising the public that the tyre then being sold under the name of the "Wapshare" tyre was an infringement of the letters patent held by them; that an action had been brought against the Clifton Rubber Company, Ld., in respect of their sale of such tyres, and the public were warned that similar actions would be brought against any person found manufacturing, selling, or using such tyres; and that since the above notice first appeared certain cycle dealers had been discovered selling the said tyres, and actions had accordingly been brought against them. Thereupon the defendants served on the plaintiffs a notice of motion to restrain the plaintiffs, until trial or further order, from publishing the circular, or in the alternative, for a writ of sequestration.

HELD—that the defendants had not brought their case within sect. 32, because the plaintiffs had brought the action and they were *bonâ fide* prosecuting it; and that the defendants must pay the costs.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* CLIFTON [RUBBER CO., LD., (1902) 19 R. P. C. 527—Joyce, J.

204. *Undertaking not to threaten — Alleged Breach of Undertaking—Commencing an Action —Answers to Letters — Motion to attach and sequestrate—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 32.]—In an action by the plaintiffs to "restrain threats" the defendants undertook "not to threaten any person . . . with legal proceedings or liability in respect of the manufacture, sale, use, or purchase of," the V. mantle, "and not to allege that such manufacture, use, sale or purchase, is an infringement of" the defendants' patent.

HELD—that the words of this undertaking were not wide enough to prevent the defendants from issuing a writ against the plaintiffs for infringement in making V. mantles; but that

Action to Restrain Threats—*Continued.*

during the currency of such action the undertaking endured, and no threats must be used.

P. & Co., hearing of the new action, wrote to the defendants asking if they were rendering themselves liable by selling V. mantles.

HELD—that under the circumstances it was not a breach of the undertaking to reply that they had commenced an action, as they were entitled to do.

BEVEN AND ALEXANDER *v.* WELSBACH INCANDESCENT GAS LIGHT CO., LD., (1903) 20 R. P. C. 69—Byrne, J.

205. *Agreement to compromise a "Threats" Action — Action claiming that certain Goods were not covered by the Agreement—Interlocutory Injunction refused.*]—By an agreement compromising a previous action the present plaintiff admitted the defendant's right to manufacture "revolving heel pads" according to a provisional specification. He now brought an action to restrain the defendant from selling a different kind of pad, and asked for an interlocutory injunction.

The defendant replied (1) that this heel pad, though different, was covered by the agreement; (2) that, alternatively, it was manufactured according to a patent of his own, the specification of which was included in the terms of the agreement; and (3) that it was not an infringement of the plaintiff's patent.

HELD—that the case was not so clear that an interlocutory injunction ought to be granted.

ROBERTS *v.* GRAYDON, (1903) 20 R. P. C. 548—Eady, J.

206. *Action for Infringement—Threats of Legal Proceedings — Prosecuting Action "with due Diligence"—Motion for Injunction to restrain Threats—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 32.]—On April 19th, plaintiffs issued a writ for infringement of their patented golf balls; their statement of claim was delivered on May 20th, and on June 23rd no defence had been put in, though the time had been extended.

On June 8th the plaintiffs published an advertisement and circulars to the effect that an action had been commenced, and that proceedings would be taken against other infringers. Upon a motion to restrain threats:—

HELD—that the plaintiffs had not shown any lack of "due diligence," and that the advertisement and circulars were not a contempt of Court.

"Due diligence" in sect. 32 means due diligence after the threats, and not after the acts complained of as infringements.

Challenger v. *Royle* ((1887) 4 R. P. C. 363) followed.

HASKELL GOLF BALL CO. *v.* HUTCHINSON AND [MAIN, (1904) 20 T. L. R. 606; 21 R. P. C. 497—Buckley, J.

207. *Owners of Patent commencing Action for Infringement, but not complaining specifically of the Articles referred to in the Threats—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57). *s.* 32.]—In 1903 the defendants, owners of a patent, issued circulars warning persons as to infringements of their patent: subsequently they made threats in respect of three specific articles.

The following month the defendants commenced an infringement action against the present plaintiffs, but did not in their particulars of breaches expressly mention the three specific articles as to which threats had been made.

Six months later the plaintiffs commenced the present action to restrain the defendants from issuing threats in respect of these articles.

HELD—that the infringement action was a defence to the threats action so far as it was founded on sect. 32 of the Patents Act, 1883; that there was no evidence of *mala fides* in the defendant's conduct, and that under the circumstances the question of infringement in respect of the articles should be decided at some stage of the infringement action.

LYCETT SADDLE AND MOTOR ACCESSORIES, LD. [*r.* BROOKS & CO., LD., (1904) 21 R. P. C. 656—Warrington, J.

208. *Commencing Action — Sham Action—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 32.]—The defendant, an owner of a patent, wrote as follows to a firm who had bought certain articles from the plaintiff—"The articles being sold and advertised by you is regarded as an infringement. We therefore request you to cease advertising and selling it."

HELD—that the letter constituted a "threat," justifying the plaintiff in commencing an action; and further that a "sham" infringement action commenced by the defendant could not bar the plaintiff's action.

CRAIG *r.* DOWDING, (1907) 24 T. L. R. 9—[Kekewich, J.

See also No. 229.

XII. PRACTICE.

(1) Costs.

209. *Action for Infringement against Limited Company—Agent applying to be heard for Company.*]—The P. Company, as owners of a patent granted to W. (the validity of which was established in a previous action), brought an action for infringement against the L. Company. On the action coming on for trial, R. appeared as agent of the L. Company for the purpose of conducting their defence. The judge ruled that he was unable to do so, and the trial was postponed to enable the L. Company to instruct counsel. On the action coming on again for trial, the only defence relied upon was non-infringement, all other defences having been withdrawn.

HELD—that the L. Company had infringed, and judgment was given for the plaintiffs, with solicitor and client costs, such costs to include

Practice—*Continued.*

the costs occasioned by the postponement of the trial.

PNEUMATIC TYRE CO., LD. *v.* WEST LONDON [RUBBER AND TYRE CO., LD., (1898) 15 R. P. C. 129—Romer, J.

210. *Validity—Action for Infringement of Two Patents—Infringement—Plaintiffs partly successful.*]—In 1890 a patent was granted to W. for "Improvements in rubber tyres and metal rims or felloes of wheels for cycle or other light vehicles." In the same year a patent was granted to B. for "Improvements in tyres or rims for cycles and other vehicles." In 1897 the D. P. T. Company, in whom both the patents had become vested, commenced an action against the N. I. T. Company for infringement of both patents. The defendants denied infringement and also the validity of both patents. Before the trial, B.'s patent had been upheld and construed by the House of Lords (*The North British Rubber Co., Ld.* v. *The Gormully and Jeffery Manufacturing Co.*, 15 R. P. C. 245), by whom it was held that the first claim was for the method described in the specification and any method substantially the same of connecting the outer cover of a tyre with the rim so that the ends of the cover are gripped. W.'s patent had, before the trial, been upheld and construed in several actions, and in one of them (*The Pneumatic Tyre Co., Ld.* v. *The East London Rubber Co.*, 14 R. P. C. 573) by the Court of Appeal, by whom it was held that the feature of the invention consisted in an arrangement in which an arched tyre was stretched over a convex surface and held in position by wires on its edge without any other support or fastening. Two tyres were complained of as infringements by the plaintiffs, both of them being alleged to infringe B.'s patent, and one of them only being alleged at the trial to infringe W.'s patent. In each there was a rubber tyre with metal bands in pockets at the edges of it; these bands overlapped longitudinally, but the ends were not fastened together. The rim in each case was nearly flat at the bottom, and the bands when lying side by side in the rim met or slightly overlapped. In the alleged infringement of both patents ($J.H._2$) the edges of the rim were turned outwards to some extent, but in the other alleged infringement ($J.H._1$) the edges were somewhat inturned, and in the latter case the pockets were looser than in the former case. The position and action of the bands when the tyres were inflated were in controversy.

HELD—that the questions as to the validity of the patents were concluded as regards this Court by the judgments in the previous actions on the patents, that $J.H._1$ was an infringement of B.'s patent, but that $J.H._2$ was not an infringement of either of the patents.

A special order was made as to costs, and the costs so far as referring to the validity of either patent were directed to be taxed as between solicitor and client.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* NEW [IXION TYRE AND CYCLE CO., LD., (1898) 15 R. P. C. 389—Kekewich, J.

211. *Action for Infringement—Infringement admitted before Action and by Defence—Offer of Damages—Payment into Court.*]—H. wrote to the C. Company complaining of infringement of his patent, and a correspondence ensued. The C. Company admitted certain infringements in 1893 and 1895, stating that they had acted without knowledge of the patent. H. offered to accept a prompt payment of £150 on the company undertaking to publish an apology. The company sent a cheque for £150, but declined to make an apology. The cheque was returned to the plaintiff's solicitors, and an action for infringement was commenced. The defendants paid £150 into Court, which the plaintiff accepted in satisfaction of his claim for damages. The action came on upon motion for judgment.

HELD, that the plaintiff was not entitled to an injunction, as he had not proved that the defendants intended to commit any further infringement; that no costs ought to be given down to the time when the plaintiff accepted the £150 in satisfaction of damages, and that the plaintiff must pay the defendants' costs subsequent to that date.

HUDSON *v.* CHATTERIS ENGINEERING WORKS [CO., (1898) 15 R. P. C. 438—Stirling, J.

212. *Action for Infringement—Leave to amend Particulars and Objections a second time after Issue joined—Terms of granting Leave if Plaintiffs discontinue.*]—In a patent action the defendants put in a defence, and with that defence in the ordinary course they put in certain particulars and objections. After a time the defendants obtained leave to amend their particulars. Issue was joined. Then the defendants were allowed to add a new objection, and ordered that down to the time of the delivery of the second amended objection the plaintiffs were to pay the costs if they elected to discontinue, and the costs after that time were to be borne by the defendants. The plaintiffs appealed.

HELD—that the order was right.

Ehrlich v. *Ihlee* ((1887) 4 R. P. C. 115; 56 L. T. 819) distinguished.

Woolley v. *Broad* ([1892] 2 Q. B. 317; 61 L. J. Q. B. 808; 40 W. R. 596; 67 L. T. 67; 9 R. P. C. 429—C. A.) followed.

WILSON AND WILSON BROTHERS BOBBIN CO., [LD. *v.* WILSON & CO. (BARNSLEY), LD., (1899) 16 R. P. C. 315—C. A.

213. *Action for Infringement—Validity not contested—Solicitor and Client Costs—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 31.]—Where the defendants have used the plaintiffs' patent process (in its equivalent form) to produce the same series of compounds or materials as that produced by the plaintiffs—the same series, and having the same desired attributes, although the constituents of the series are present in different proportions—the plaintiffs are entitled to succeed in their action for infringement against the defendants.

The true meaning of sect. 31 of the Patents, Designs and Trade Marks Act, 1883, is that when once a patentee establishes the

Practice—*Continued.*

validity of his patent, whenever anybody in a "future action, not disputing the validity of the patent at all," infringes, he is doing it with the knowledge that the patent he is infringing is a patent which has been declared to be valid by a court of law, and that, therefore, gives the patentee a *primâ facie* right to solicitor and client costs.

FABRIQUES DE PRODUITS CHIMIQUES DE [THAME AND DE MULHOUSE *v.* LAFITTE & CO. AND OTHERS, (1899) 16 R. P. C. 61—Byrne, J.

214. *Action for Infringement.*]—In an action for infringement judgment was given for the plaintiffs, but as the defendant raised questions as to the extent of the plaintiffs' patent, the Court—though otherwise in favour of the defendant on the question of costs—refused to deprive the plaintiffs of the costs which the law gave them.

DUNLOP PNEUMATIC TYRE CO., LD. AND [OTHERS *v.* WILSON, (1900) 17 R. P. C. 332—Bruce, J.

215. *Action for Infringement of Two Patents—Infringement of One Patent not proceeded with.*]—Plaintiffs brought an action for the infringement of two patents and passing off goods. Before trial the plaintiffs gave notice to the defendants of their intention not to proceed with the action for the infringement of one of the patents. An injunction was granted to restrain the infringement of the other patent, and it was found that there was no passing off.

HELD—that the defendants were entitled to their costs thrown away by reason of the claim for the infringement that was not proceeded with.

LUCAS, LD. *v.* MILLER & CO., (1900) 17 R. P. C. [165—Mathew, J.

216. *Action for Infringement and other Relief—Judgment for Defendants on all Claims—Appeal as to Infringement only — Appeal allowed.*]—The defendants in an action for infringement denied infringement, but did not question the validity of the patent. It was held at the trial that the defendants had not infringed, and they had a judgment on that and all other claims. On appeal only against that part of the judgment that decided there was no infringement:—

HELD—that the patent had been infringed, and that the plaintiffs were entitled to an injunction, but not to the costs of that part of the judgment which had not been appealed from.

MARSHALLS, LD. *v.* CHAMELEON PATENTS [MANUFACTURING CO., LD., (1901) 18 R. P. C. 400—C. A.

217. *Action for Infringement against a Public Authority—Judgment for Public Authority—Costs as between Solicitor and Client—Public Authorities Protection Act*, 1893 (56 & 57 Vict. *c.* 61), *s.* 1.]—The plaintiffs sued the defendants for infringing a patent, which belonged to the plaintiffs, for improvements in electricity meters. The defendants hired the electricity meters from others, and let them to consumers. The defendants were empowered by provisional order sanctioned by an Act to supply electric power, and, among other things, to let out meters for hire. The action was dismissed with costs to be taxed on the higher scale.

HELD—that what was done by the defendants brought them within the words of the first section of the Public Authorities Protection Act, 1893, viz., "where an action is brought for any act done in pursuance or execution or intended execution . . . of any public . . . authority," and that the taxing Master was right in having taxed the defendants' costs as between solicitor and client.

CHAMBERLAIN AND HOOKHAM, LD. *v.* BRAD- [FORD CORPORATION, (1901) 17 R. P. C. 762—Kekewich, J.

218. *Action for Infringement of Patent—Validity not denied—Certificate—Solicitor and Client Costs—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 31.]—The plaintiff company brought an action for infringement against the defendant company. The defendants did not contest the case, and an order was agreed upon except as to costs on the question of costs being mentioned to the judge.

HELD—that as the only issue was infringement or no infringement, and the validity of the patent did not come in question, there would be only party and party costs and not solicitor and client costs.

EDISON-BELL CONSOLIDATED PHONOGRAPH [CO., LD. *v.* WATERFIELD, CLIFFORD & CO., (1902) 19 R. C. P. 329—Farwell, J.

219. *Action for Infringement — Practice — Plaintiffs offering no Evidence at Trial—Costs of Particulars of Objections.*]—The plaintiffs in an action for infringement having had inspection, stated, when the action came on for trial, that they could not bring the alleged infringements within the specifications, and that they offered no evidence. The defendants asked for a certificate that the particulars of objections were reasonable and proper.

HELD—that, as an action should not be tried in order to ascertain whether the costs of the particulars of objections should be allowed, no certificate would be given, and that the action must be dismissed with costs.

AMERICAN STEEL AND WIRE CO. *v.* W. T. [GLOVER & CO., LD., (1902) 50 W. R. 284; 19 R. P. C. 111—Farwell, J.

220. *Action for Infringement—Leave to discontinue—Terms—Costs of Particulars.*]—The plaintiffs in an action for infringement of a patent desired to discontinue their action against the defendants, and this was resisted by the defendants, who desired that leave should only be given on the terms—(1) that the plaintiffs should undertake not to begin any other action against the defendants; (2) that they should pay

Practice—*Continued.*

not only the ordinary costs of the action but also the costs of the defendants' particulars of objections on the ground that they were reasonable and proper.

HELD—that as it was the first occasion upon which the plaintiffs had brought an action against the defendants it would be going too far to impose such a condition; and that justice would be done by making an order that the plaintiffs be at liberty to discontinue on paying the costs of the action, including in the costs of the action the costs (if any) of the particulars which the registrar should certify to have been reasonable and proper.

KERR AND HOEGGER, LD., AND THE BRITISH [COTTON AND WOOL DYERS' ASSOCIATION, LD. *v.* CROMPTON AND HORROCKS, (1902) 19 R. P. C. 9—Palatine Court of Lancaster—Hall, V.-C.

221. *Petition for Revocation—Practice—Consent Order—Charge of Fraud withdrawn.*]—Where a respondent submitted to an order on a petition for revocation of a patent on all imputations of fraud being withdrawn :—

HELD—that the respondent was entitled to his costs of the issue of fraud, and that the petitioner was entitled to all the other costs of the petition, and the one was directed to be set off against the other, and costs to be paid by the person in whose favour the larger amount was found due.

RE SCOTT'S PATENT, (1902) (No. 13,316 of [1890) 19 R. P. C. 280—Buckley, J.

222. *Action for Infringement — View by Counsel for Purposes of Appeal — Witness attending in Court of Appeal—Unnecessary to ask Leave for him to be called—Costs of Witness —R. S. C., Ord.* 58, *r.* 4; *Ord.* 65, *r.* 27 (29).]—If the taxing Master in the exercise of his discretion considers that it was reasonable and proper for counsel to have a view for the purposes of an appeal, he is justified in allowing the costs of such view in taxing the costs of the appeal.

If a witness attends the hearing of an appeal to give evidence upon a point, which, as events turn out, becomes immaterial, and the Court is never asked for the leave, which would in any case be necessary, to adduce his evidence, the Master cannot allow his costs.

LEEDS FORGE CO., LD. *v.* DEIGHTON'S FLUE [AND TUBE CO., LD., [1903] 1 Ch. 475; 72 L. J. Ch. 294; 51 W. R. 380; 87 L. T. 711; 20 R. P. C. 185—Farwell, J.

223. *Infringement—Discontinuance of Action —Whether certain Items Costs of Defence or of Particulars of Objections.*]—An infringement action having been discontinued and no certificate granted as to particulars of objections, the Master in taxing the costs allowed certain charges for perusing specifications and patent agent's report; he did so on the ground that such work was reasonably included in instructions for defence.

HELD—that he had proceeded upon a proper principle.

PIGGOTT & CO. *v.* HANLEY CORPORATION, (1906) [23 R. P. C. 639—Eady, J.

224. *Infringement—Separate Issues—Defence of Invalidity and Denial of Infringement—Particulars of Objections — Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 29 (6)—*R. S. C., Ord.* 65, *r.* 2.]—An infringement action, in which the defendants denied infringement, and impugned the validity of the patent on the ground of want of subject-matter and numerous anticipations, was dismissed with costs on the ground of two anticipations only.

HELD—that the Master must tax the whole of the defendant's costs, disallowing only the costs of those objections in respect of which no certificate had been granted under sect. 29 (6), and must not disallow the costs of other issues upon which the defendants had failed.

HASKELL GOLF BALL CO. *v.* HUTCHISON AND [MAIN, [1906] 1 Ch. 518; 75 L. J. Ch. 270; 54 W. R. 330; 94 L. T. 731—Warrington, J.

225. *Revocation — Petition for — Costs of obtaining the Authority of Attorney-General.*]—Where a patent is revoked upon a petition authorised by the Attorney-General, and the respondent is ordered to pay the costs of the petitioner, it is proper to include in such costs the costs of obtaining the Attorney-General's authority.

IN RE POULTON'S PATENT, (1906) 23 R. P. C. [571—Buckley, J.

See also Nos. 37, 93, 101, 113, 149, 199, 296, 297.

(2) In General.

226. *Infringement—Interrogatories by Plaintiffs—Order for further and better Answer—Appeal.*]—The S. Corporation, Ld., being the owners of several letters patent relating to the manufacture of saccharin, commenced an action for infringement against H., W. & Co., who denied infringement and the validity of the said letters patent. The S. Corporation, Ld., who claimed to be entitled in England to all known processes for making saccharin, delivered interrogatories for the examination of the defendants, of which the first asked (*inter alia* and in effect) whether the defendants had not sold in England certain compounds, and whether the same were manufactured in England, and where, and by whom and how, and from whom did the defendants obtain the compounds so manufactured in England; whether the same were manufactured abroad, and where, and by whom; whether the defendants imported into England the compounds in question, and, if so, how and from whom, and, if not, how and from whom did the defendants obtain the same. The answer by H., who traded as H., W. & Co., stated that he had sold in England the said compounds, that he had no knowledge as to where or by whom the same were manufactured, but he believed on the continent of Europe; that he had no knowledge as to by whom the same were manufactured,

Practice—*Continued.*

and he declined to state his belief on this point, or from whom he obtained the same. An order was made by North, J., for a further and better answer. The defendants appealed.

HELD—that under the circumstances the order appealed from ought not to be disturbed; and the appeal was dismissed with costs.

SACCHARIN CORPORATION, LD. *v.* HAINES, [WARD & CO., (1898) 15 R. P. C. 344—C. A.

227. *Infringement—Motion for Interlocutory Injunction—Motion dismissed—Appeal—Cross-examination.*]—The S. Corporation, Ld., being the owners of several letters patent relating to the manufacture of saccharin, commenced an action for infringement of the same against the C. and D. Co., Ld., and moved for an interlocutory injunction. The motion was dismissed on the ground that the validity of the patent was in dispute. The plaintiffs appealed, and, in the course of arguments on the appeal, applied for leave to cross-examine one of the secretaries of the defendant company, who had made an affidavit, on the ground that it was evasive. Cross-examination was allowed (as an exceptional case) before the Court, by its leave. The appeal was dismissed, with costs.

Affidavits made on information and belief must show what the sources of information are.

SACCHARIN CORPORATION, LD. *v.* CHEMICAL [AND DRUGS CO., LD., (1898); 15 R. P. C. 53 —C. A.

228. *Particulars of Objections — Shorthand Writer's Transcript of Evidence—Costs—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 29, *sub-s.* 6.]—In patent actions the settled practice is that certificates under sect. 29, sub-sect. 6, of the Patents, Designs and Trade Marks Act, 1883, are always granted, so as to secure to the party delivering the particulars the costs of everything reasonable and properly inserted in them, although he may fail to prove the specific objection under which the detailed particulars may be ranged.

CASTNER-KELLNER ALKALI CO. *v.* COMMERCIAL [DEVELOPMENT CORPORATION, LD., [1899] 1 Ch. 803; 68 L. J. Ch. 402; 47 W. R. 534; 80 L. T. 476; 16 R. P. C. 251—C. A.

229. *Action for Infringement—Evidence of Acts done after the Issue of the Writ.*]—Where the action is for infringement, evidence ought not to be admitted to prove acts done after the issue of the writ. In cases where the action is based on the fact, not that the defendant has infringed, but that he threatens or intends to infringe, the plaintiff may claim an injunction to prevent the threatened infringement, and in such cases, in order to prove that the defendant has an intention of infringing, evidence may be given of acts done after the issue of the writ, to show that he has carried out his intention, or is about to carry out the intention that existed prior to the writ.

Shoe Machinery Co., Ld. v. *Cutlan* ([1896] 1 Ch. 108; 65 L. J. Ch. 44; 44 W. R. 92; 73 L. T. 419; 12 R. P. C. 342—C. A.) followed.

WELSBACH INCANDESCENT GAS LIGHT CO., LD. [*v.* DOWLE AND LONDON AND SUBURBAN MAINTENANCE CO., (1899) 16 R. P. C. 391— —Bruce, J.

230. *Action for Infringement — Validity in question — Non-appearance of Defendants — Certificate of Validity.*]—The plaintiffs alleged by their statement of claim that the defendants had infringed their patent, and that the patent was valid and subsisting. The defendants by their defence denied infringement, and alleged that the patent was invalid. On the trial the defendants did not appear, and

Judgment for the plaintiffs, with costs, and an inquiry as to damages given. A certificate that the validity of the patent had come in question was granted.

ACETYLENE ILLUMINATING CO., LD. *v.* MID- [LAND ACETYLENE (PATENT) SYNDICATE, LD., (1900) 17 R. P. C. 534—Farwell, J.

231. *Mechanical Equivalents* — Onus *on Patentee in Action for Infringement.*]—Where the plain object of an invention is to substitute better mechanical equivalents for those already known and used as a means to the same end, the patentee must show that an alleged infringer has adopted the same mechanical device, or a colourable imitation of it, in order to make out an infringement.

TWEEDALE *v.* ASHWORTH, (1900) 17 R. P. C. [621—H. L. (E.).

232. *Action for Infringement—Non-appearance of Defendant at Trial—Certificate of Validity.*] —The plaintiff company owned two patents, one granted in 1886, which was subsisting at the date of the writ, but had lapsed before judgment, and one granted in 1893, for an invention of "an improvement in incandescent gas-burners." The defendant in the action for infringement set up the invalidity of the patent of 1893, but did not appear at the trial.

HELD—that an injunction should be granted with costs; an inquiry as to damages ordered; and certificates given that the validity of the 1893 patent had come in question, and that the particulars of breaches had been proved.

WELSBACH INCANDESCENT GAS LIGHT CO., LD. [*v.* KRUMM, (1901) 18 R. P. C. 211—Channell, J.

233. *Action for Infringement—Validity established by Prior Litigation—Decision adopted.*]—The plaintiffs were assignees of Shchmerdine's Patent of 1893 for "improved, or improvements in connection with, fancy or ornamental bricks, tiles, slabs, wallings, ceilings, and the like," and they claimed relief in respect of an alleged infringement by the defendants. There had been previous litigation over the patent, and in 1896 its validity had been established before Mr. Justice Grantham (see 13 R. P. C. 649).

HELD—that so far as validity was concerned, Mr. Justice Grantham's views should be adopted,

Practice—*Continued.*

there being no substantial difference in the materials before the Court; that the defendants had infringed the patent, and the plaintiffs were entitled to consequential relief.

National Opalite Glazed Brick and Tile [Co., Ld. *v.* Grand Hotel, Birmingham, Ld., (1901) 18 R. P. C. 249—Cozens-Hardy, J.

234. *Action for Infringement—Application to adjourn Trial—Hearing in absence of Defendants.*]—The defendants in action for infringement were small retail traders; there was an action pending in London by the plaintiffs against the manufacturers from whom the defendants had purchased the articles alleged to be made in imitation of those described in the patent; the defendants had purchased these mantles, and were not aware until the writ was served that the plaintiffs claimed any patent right in them: the defendants agreed to abide by the result of the pending action; they undertook not to sell the mantles in the meantime, and asked that the trial should be adjourned.

Held—that as they defended the case and had accepted time to prepare for trial, it was too late for an adjournment, and the case must proceed even in the absence of the defendants.

Held, also, that the plaintiffs' case was established, and it was sufficient that the plaintiffs' patent was for the discovery that two oxides used in certain, and in no other, proportions enhanced the illuminative power of gas from about three candles per cubic foot to nearly twenty, though the cause of it had not yet been explained, nor was it necessary that it should be, as it was sufficient that the combination produced a novel and eminently useful result.

Welsbach Incandescent Gas Light Co., Ld. [*v.* John M'Grady & Co., (1901) 18 R. P. C. 513—Porter, M.R.

235. *Action for Infringement—Leave to discontinue—Terms on which Leave granted.*]—The plaintiffs in a patent action, after the pleadings were closed, applied for leave to discontinue, their immediate reason for so doing being that there was an appeal pending from a decision of Mr. Justice Farwell, who had held that the patent was not infringed.

Held—that the order would be, liberty to discontinue on the terms of paying the costs to be taxed between solicitor and client, such costs to include the costs of the particulars of objections as if they had been certified as reasonable and proper at the trial; and on the undertaking of the plaintiffs not to bring any other action against the present defendants in respect of any infringement alleged in the pleadings in this action, the plaintiffs to have a week within which to say whether they would give that undertaking or not. If they declined, then the summons was dismissed with costs in any event.

Chamberlain and Hookham, Ld. *v.* Mayor [of Huddersfield, (1901) 18 R. P. C. 454—Kekewich, J.

236. *Action for Infringement—Former Action dismissed with Costs—Subsequent Action against different Defendants—Whether Second Action Frivolous and Vexatious—Staying Proceedings in Second Action—Second Defendants not shown to be in the same Position as First Defendants.*]—An action for an infringement of a patent was brought by the plaintiffs against a company other than the present defendants, which after a trial lasting many days was dismissed with costs, and an appeal, it was stated, was about to be brought. Since that action was dismissed the same plaintiffs commenced an action for infringement of the same patent against the present defendants. The points were raised whether the second action should be dismissed as frivolous and vexatious, or whether it ought not to be allowed to go on pending the appeal in the former action, as the present defendants were agents of the defendants in the earlier action.

Held—that the second action could not be held to be frivolous and vexatious when the question whether it was a good or bad claim was still *sub judice* in the Court of Appeal, and that it ought not to be stayed unless it was clearly shown to the Court that the second defendants were in the position of the original defendants in the first action, so that the acts done by the second defendants were really the acts of the original defendants.

Dunlop Pneumatic Tyre Co., Ld. *v.* Riming- [ton Brothers & Co., Ld., (1901) 17 R. P. C. 665—C. A.

237. *Action for Infringement—Particulars of of Objections—Further Particulars.*]—In an action for infringement of two patents the defendants by their defence alleged the invalidity of both patents by reason of the matters in the particulars of objections appearing. The particulars alleged prior publication by deposit in the Patent Office Library of certain specifications, and by the public general knowledge of the matters, and it was stated with reference to each of the specifications mentioned that all parts thereof were relied on. The plaintiffs applied for further and better particulars of objections.

Held—that the application must be refused, as it was for the defendants to say what they relied on, and if at the trial they turned out to be wrong, they would have to pay the costs.

Edison Bell Consolidated Phonograph [Co., Ld. *v.* Columbia Phonograph Co., (1901) 18 R. P. C. 4—Buckley, J.

238. *—Injunction—Refusal by Plaintiffs to give Information—Letters of Request—Delay.*]—The judge at chambers had exercised his discretion by refusing the plaintiffs—owners of letters patent—an interlocutory injunction. The Court on appeal asked the plaintiffs whether they were prepared to give the information which they had successfully avoided giving on a technical point—a good point, as it was held in the Court of Appeal—but having refused to give the information, the result had been that the other parties had been forced to apply for letters of request. The result of that was necessarily a

Practice—*Continued.*

long delay, and the plaintiffs set up mainly as their ground for insisting on the injunction that the delay would be so long, by reason of the defendants' action in applying for letters of request, that they ought to be restrained in the meantime.

HELD—that as the delay was really brought about by the plaintiffs relying on a point, which they were entitled to rely on, but one which, if they relied on, involved delay, the injunction must be refused, but the terms must be imposed on the defendants of keeping an account.

WELSBACH INCANDESCENT GAS LIGHT CO., [LD. *v.* GENERAL INCANDESCENT CO., LD., (1901) 18 R. P. C. 533—C. A.

239. *Action for Infringement—Alleged Prior User by Plaintiff—Application by Defendants for Discovery of Documents—Defence to be delivered before Discovery granted.*]—The plaintiff sued for infringement of a patent and asked for an injunction, damages, delivery up, and so forth. The defendants desired to plead prior use by the plaintiff himself of three machines, as to which they knew approximately the date or time at which they were used by the plaintiff, but they were unable to state at what place they were used. The defendants before delivery of defence applied for discovery of documents.

HELD—that, in accordance with the common practice, the application must stand over until the defence was put in, as it was right and proper that before discovery was given the defendants should define as well as they could that in respect of which discovery was required.

Decision of Kekewich, J., affirmed.

WOOLFE *v.* AUTOMATIC PICTURE GALLERY, [LD., (1902) 19 R. P. C. 161—C. A.

240. *Action for Infringement—Defendant not appearing at Trial—Infringement proved—Injunction granted—Inquiry as to Damages and Certificate of Validity in question refused.*]—In 1895 letters patent were granted for "improved means for preventing water spray in connection with cocks and pumps." The owners of this patent commenced an action against the defendant for infringement, claiming the usual relief. The defendant denied the infringement, and pleaded that "the alleged invention was not new," putting forward eleven prior specifications of divers persons as anticipations in his particulars of objections. The defendant did not appear at the trial. The infringement was proved by the plaintiffs.

HELD—that an injunction to restrain the defendant from infringing must be granted, with the costs of the action; but, on the materials before the Court, there should be no inquiry as to damages or certificate that the validity of the patent came in question.

WEBB LAMP CO., LD. *v.* ATKINSON, (1902) 19 [R. P. C. 599—Buckley, J.

241. *Action for Infringement — Practice — Motion to restore to List—Motion to discontinue—Litigation abandoned by Tacit Agreement.*]—The plaintiffs in 1895 commenced an action against the defendant which they discontinued. In 1897 the plaintiffs commenced a second action which went on for some time and then by agreement was marked to stand out of the list generally, with liberty to either party to restore. In 1899 the plaintiffs purchased the defendant's business and nothing was provided as to what was to be done with the action. The defendant applied that the action should be restored to the list. The plaintiffs applied to discontinue it.

HELD—that the action might be restored at the defendant's peril; that by tacit agreement between the parties the litigation was abandoned; and that the plaintiffs were entitled to leave to discontinue the action without costs.

Decision of Joyce, J. ((1902) 19 R. P. C. 166) affirmed.

T. B. BROOKS & CO., LD. *v.* LYCETT, (1902) 19 [R. P. C. 364—C. A.

242. *Action for Infringement — Claim based on Twenty-three Patents — Combining Separate Causes of Action — Embarrassing Defendant—Plaintiff's Claim limited to Three Patents—R. S. C., Ord.* 18, *rr.* 1, 8, 9; *Ord.* 19, *r.* 27.]—A plaintiff in a patent case is no more entitled than any other plaintiff to call on the defendant to disprove the alleged cause of action.

The plaintiffs, the owners of twenty-three patents for "Saccharin," brought an infringement action against a dealer for selling "Sucramine"; they set out all their patents in the statement of claim, and in effect said: "The article you sold could only be made by one of the twenty-three processes of which we hold the patents; but we cannot tell by which; still you must have infringed one of the patents."

The defendant applied under Ord. 18, rr. 8, 9, and Ord. 19, r. 27, to have the claim limited to a few patents as being embarrassing, especially as it compelled him to investigate the validity of all the patents before defence, in order to decide whether to assail them.

HELD—that this was an attempt by the plaintiffs to unite in one action twenty-three causes of action, and was an abuse of Ord. 18, r. 1; and that they must limit their claim to three patents to be selected by them.

Saccharin Corporation, Ld. v. *Quincey* ([1900] 2 Ch. 246; 69 L. J. Ch. 530; 82 L. T. 792; 17 R. P. C. 337), *see* No. 186, *supra*, and *Saccharin Corporation, Ld.* v. *Dawson* ([1902] 19 R. P. C. 169) distinguished. *See* No. 191, *supra*.

It is only by consent, or under very special circumstances, that a defendant can be asked on interlocutory proceedings to state where he obtained the infringing article; and probably, his answer to such a question must be accepted as conclusive at that stage of the action.

SACCHARIN CORPORATION, LD. *v.* WILD, [1903] [1 Ch. 410; 72 L. J. Ch. 270; 88 L. T. 101; 19 T. L. R. 154; 20 R. P. C. 243—C. A.

Practice—*Continued.*

——*Form of Order—Costs of Objections.*]—In a similar and subsequent case the plaintiffs were limited to two groups of patents, the order of the Court of Appeal being that "The plaintiffs be at liberty to amend their statement of claim and particulars of breaches by discontinuing this action, except as to seven patents, and by alleging as one cause of action infringement of one or other patent out of a group of three patents, and as an additional cause of action infringement of one or other patent out of another group of four patents . . . if the plaintiffs shall not, as to any of the patents so sued upon, open or proceed upon their case sufficiently to enable the judge at the trial to decide whether any particulars or objections . . . are reasonable and proper . . . the plaintiffs shall be taken to admit that they are reasonable and proper . . . and a certificate to that effect shall be granted by the judge."

SACCHARIN CORPORATION, LD. *v.* R. WHITE & [SONS, LD., (1903) 88 L. T. 850; 20 R. P. C. 454—C. A.

243. *Action for Infringement of Twenty-Three Patents — Infringement of some One or More Proved — Injunction Limited to Earliest Patent.*]—It was proved on the hearing of an infringement action that the saccharin sold by the defendant was pure saccharin, and that it must therefore have been made in accordance with one of the plaintiff's twenty-three patents, which cover all known ways of making pure saccharin. The defendant bought his saccharin on the continent and did not know how it was made.

An injunction was granted, but was limited to the patent earliest in date.

SACCHARIN CORPORATION, LD. *v.* JACKSON, [(1903) 20 R. P. C. 611—Buckley, J.

244. *Action for Infringement—Form of Admission in answer to Interrogatories.*]—In an infringement action an order was made in Chambers that "interrogatories are not to be answered, the defendants admitting that they have in fact done those things which the draft interrogatories suggest."

WILSON BROS.' BOBBIN CO., LD. *v.* WILSON [& Co. (BARNSLEY), LD., (1903) 20 R. P. C. 1 —H. L. (E.)

246. *Action for Infringement—Tyres—Order for Plaintiffs to Inspect Defendants' Works—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 30.]—In an action for infringement of a tyre patent, an order was made on the summons for directions that the plaintiffs be at liberty to inspect, by two expert witnesses, the process as well as the machines employed by the defendants in manufacturing their tyres.

SWAIN *v.* EDLIN-SINCLAIR TYRE CO., (1903) 20 [R. P. C. 435—Joyce, J.

247. *Action for Infringement—Specification as Evidence of Public Knowledge.*]—A specification referred to in the particulars of objections can be referred to at the trial on the question of the state of public knowledge.

English and American Machinery Co., Ld., v. Union Boot and Shoe Co., Ld. ((1894) 11 R. P. C. 367) followed.

SUTCLIFFE *v.* ABBOTT, (1903) 20 R. P. C. 50— [Buckley, J.

248. *Action for Infringement — Amended Specification—Form of Order—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 20.]—Where a plaintiff succeeds in an action upon an amended specification, the order may be in the following form: "It appearing to the satisfaction of the Court that the specification, as originally framed, was framed in good faith, and with reasonable skill and knowledge, relief as asked, including an inquiry as to damages, and delivery up."

BROOKS & CO., LD. *v.* LYCETT, LD. (1903) 20 [R. P. C. 390—Buckley, J.

249. *Action for Infringement — Certificate—Action settled upon Terms—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 31.]—Where an infringement action is settled on terms of the defendant submitting to judgment but accepting a royalty licence, the Court will not certify that the validity of the patent came in question.

CLAUGHTEN *v.* FOSTER, (1904) 21 R. P. C. 17— [Byrne, J.

250. *Action for Infringement—Interrogatories—Alleged Prior User and Publication—Interrogatories as to such User and Publication—What Admissible.*]—In their defence to an infringement action the defendants alleged prior user by V. B., and prior publication by J. B. to M. Upon the plaintiffs' application to interrogate—

HELD—that the defendants (stating in Court that the prior user was by machine) must further answer whether any such machine existed, and if so, whether it was in their possession, custody or power, and what was V. B.'s present address; and (they stating the prior publication to be by document) must sufficiently identify the document, and give M.'s present address; but need answer none of the other suggested interrogatories.

GENERAL ELECTRIC CO., LD. *v.* SAFETY LIFT [AND ELEVATOR CO., (1904) 21 R. P. C. 109— Farwell, J.

251. *Action for Infringement—Certificate—Plaintiff discontinuing Action after Defence—Certificate as to Reasonableness of Particulars of Objections—No Power to Grant.*]—After the delivery of defence and particulars of objections in an infringement action an order was made by consent staying the action until after an expected decision in the House of Lords. After such decision the plaintiff discontinued, and the defendants thereupon asked for a certificate that their particulars of objections were reasonable and proper.

Practice—*Continued.*

HELD—that, in the absence of any materials upon which to form a judgment, the Court must decline to certify.

Willcox and Gibbs v. *Janes* ([1897] 2 Ch. 71 : 14 R. P. C. 523—Romer, J.) followed.

ASHWORTH *v.* HORSFALL AND ANOTHER, (1904) [21 R. P. C. 47—Hall, V.-C.

252. *Action for Infringement—Certificate—Judgment on Default of Appearance or Pleading—Certificate as to Reasonableness of Particulars—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 29.]—Where the plaintiff in an infringement action signs judgment in default of appearance or of pleading :—

Quære, whether the Court will, as a matter of course, certify that the particulars of breaches were reasonable and proper.

BROOKS *v.* HALL ; SACCHARIN CORPORATION [LD. *v.* SKIDMORE, (1904) 21 R. P. C. 29, 31 —Joyce, J., Farwell, J.

253. *Action for Infringement — Parties — Action for Infringement against Limited Company—Alleged Infringement prior to Incorporation—Application to Amend by joining Company's Predecessor — Terms — Joinder of Causes of Action—R. S. C., Ord.* 18, *r.* 1.]—The plaintiffs brought an action for infringement against the defendants, a limited company, alleging a certain purchase of saccharin in 1901 as their cause of action.

It transpired subsequently that the company was not incorporated till 1902, but that the sale in 1901 was to the predecessor and promoter of the company, who subsequently became its managing director.

The plaintiffs applied for leave to amend by adding the predecessor, and alleging a purchase by him and a sale by him to the company, and a re-sale by the company.

HELD—that leave ought to be given upon he plaintiffs undertaking to rely only on the joint acts, *i.e.*, the transfer to the company and user by them, and not upon the separate tort committed on the original purchase; to allow them to rely on this would be to join two distinct causes of action against different persons, neither of them connected with the other.

SACCHARIN CORPORATION. LD. *v.* LYLE & SON, [LD., (1904) 21 R. P. C. 604—C. A.

254. *Infringement — Claim for Penalties — Leave to Interrogate refused.*]—The plaintiffs commenced an action for infringement of their registered design, claiming an injunction or delivery up and damages or alternatively penalties. Under an order, they elected to claim penalties and not damages, and amended their claim accordingly. The defendant denied infringement and impugned the validity of the design.

HELD—that the action was substantially one to recover penalties, and that leave to interrogate ought to be refused.

TITUS ASTLE, LD. *v.* MANSFIELD, (1905) 22 [R. P. C. 356—Eady, J.

255. *Infringement—Action discontinued under Order—Second Action commenced immediately after discontinuance—Motion to Stay—Motion to vary Order of Discontinuance.*]—At a time when an infringement action was set down for trial an order was made giving the plaintiffs fourteen days within which they might elect to discontinue, and, if they so elected, ordering certain costs to be paid to the defendants.

The plaintiffs discontinued and at once commenced a second action in respect of infringements of the same patent against the same defendants.

The defendants moved to stay such proceedings so far as they related to articles of the same construction as those in question in the first action, and also to vary the original order of discontinuance.

HELD—that both motions must be dismissed with costs.

HASKELL GOLF BALL CO., LD. *v.* HUTCHINSON, [(1905) 22 R. P. C. 205—Warrington, J.

256. *Infringement — Leave to Discontinue — Intention to Correct Description—No Action to be brought in respect of same Infringement—R. S. C., Ord.* 26, *r.* 1—*Patents, Designs and Trade Marks Acts*, 1883 (46 & 47 Vict. *c.* 57), *ss.* 18, 19, 20 ; *and* 1888 (51 & 52 Vict. *c.* 50), *s.* 5.] —The plaintiff in an infringement action, discovering after the close of the pleadings that he would propably fail unless the description of his patent was corrected, applied for leave to discontinue.

HELD—that leave ought to be granted only upon terms that he should not bring any other action against the defendant in respect of any infringement alleged in the present action, and should pay the costs of the action.

ROBERTSON *v.* PURDEY, [1906] 2 Ch. 615 ; 75 [L. J. Ch. 685 ; 95 L. T. 330 ; 23 R. P. C. 779 —Buckley, J.

257. *Infringement — Discontinuance—Costs — Certificate of Reasonableness of Objections — Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 29.]—The plaintiffs in an infringement action after delivery by defendants of particulars of objections discontinued their action, having failed in a similar action against other defendants.

HELD—that the Court, having no materials before it, could not exercise its discretion and certify that the particulars of objections were reasonable and proper.

New Inverted Incandescent Gas Lamp Co., Ld. v. *General Incandescent Co., Ld.*, ((1905) 2 R. P. C. 614—Buckley, J.) followed.

COOPER PATENT ANCHOR RAIL JOINT CO., LD. [*v.* BRITISH ELECTRIC EQUIPMENT CO., LD., (1906) 95 L. T. 177 ; 23 R. P. C. 606—C. A.

258. *Infringement — Inspection of Machines relied on as Anticipating Plaintiff's Patent.*]—In an action for infringement of a patent it appeared that the defendant had in his possession one of the machines relied on as evidence of the publication of the alleged invention within

Practice—*Continued.*

the realm prior to the date of the plaintiff's patent.

HELD—that an order might be made giving the plaintiff leave to inspect such machine.

VAN BERKEL *v.* BOOTH, [1906] 1 Ir. R. 383—[M.R.

259. *Validity—Action for Declaration that Patent is Invalid—Patent Expired—Ord. 25, r. 5—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57).]—A person who, assuming a patent now expired to have been valid, has rendered himself liable to be proceeded against for infringement of it, is not entitled to bring an action for a declaration of its invalidity. Notwithstanding its expiry he might petition for its revocation.

Decision of Joyce, J. ([1906] 1 Ch. 324; 75 L. J. Ch. 178; 54 W. R. 370; 94 L. T. 56; 22 T. L. R. 178) affirmed.

THE NORTH-EASTERN MARINE ENGINEERING [CO., LD. *v.* THE LEEDS FORGE CO., LD., [1906] 2 Ch. 498; 75 L. J. Ch. 720; 95 L. T. 178; 22 T. L. R. 724; 23 R. P. C. 529—C. A.

See also Nos. 10, 13, 14, 153, 158, 201, 269.

(3) Interlocutory Injunctions.

260. *Action for Infringement — Practice in Case of recently granted Patents.*]—The plaintiffs, as owners of a patent of 1893, the validity of which had not been established by legal process, brought an action for infringement, and moved an interlocutory injunction. The defendants had advertised, but had not begun to sell, any of the alleged infringing articles at the commencement of the action. In opposition to the motion, they challanged the validity of the patent on the ground of anticipation by matters of common knowledge and by a prior patent.

HELD—that an injunction ought not to be granted on the defendants undertaking to keep an account of their sales.

HOLOPHANE, LD. *v.* BEREND & CO., LD., (1897) [15 R. P. C. 18—Kekewich, J.

261. *Action for Infringement — Equitable Assignees — Laches.*]—The plaintiffs, in May, 1899, commenced an action for infringement of letters patent, and moved for an interim injunction. The defendants had been working the patents since 1894. The plaintiffs gave them notice in 1896 that they claimed the patent, on which they were about to commence an action in Germany to secure possession. The litigation went on from 1896 until October, 1898, when judgment was pronounced, establishing the plaintiffs' title to an assignment. An appeal from that judgment was disposed of in January, 1899.

HELD—that as persons who assert legal rights are bound to come promptly to the Court, and *à fortiori* persons who assert only equitable rights upon the defendants' undertaking to keep an account, the proper order to make was no order on the motion—costs to be dealt with at the trial.

ACTIEN GESELLSCHAFT FÜR CARTONNAGEN [INDUSTRIE *v.* TEMLER AND ANOTHER, (1899) 16 R. P. C. 447—Stirling, J.

262. *Action for Infringement—Validity not in question*—Bonâ fide *Purchase.*]—The plaintiffs charged the defendants with selling valves which constituted an infringement of the plaintiffs' rights, being manufactured neither by the plaintiffs themselves nor their licensees under their licence. The defendants met the charge by saying that they bought from Messrs. B.; that they had every reason to suppose that Messrs. B. were selling them nothing but licensed valves. The validity of the patent was not in question.

HELD—that whether defendants bought the valves from Messrs. B. or not, the only question was whether it was an infringing valve; that there was a *primâ facie* case which the defendants had not rebutted; and that an interim injunction was rightly granted by Ridley, J.

Elves v. *Payne* ((1879) 12 Ch. D. 468; 48 L. J. Ch. 831; 28 W. R. 234; 41 L. T. 118—C. A.) distinguished.

DUNLOP PNEUMATIC TYRE CO. *v.* HUBBARD [PATENTS AND TYRE SYNDICATE, LD., (1902) 19 R. P. C. 546—C. A.

263. *Action for Infringement — Motion for —Affidavit—Grounds of Belief—R. S. C., Ord. 38, r. 3.*] — The plaintiffs, manufacturers of chemical dyes in Germany, moved for an interlocutory injunction to restrain infringement of a patent, the validity of which had been certified in a previous action. The plaintiffs filed an affidavit by the chemist at the works of the plaintiffs, which in substance stated that the plaintiffs had for years found their patents were being infringed, and they had made inquiries in this country in order to trace infringers; that as a rule they had not been able to do so, but they had recently been supplied with information which enabled the deponent to make the affidavit. The deponent gave limits of date and a statement of goods ordered, and a statement of the price which had been charged. This affidavit was unanswered.

HELD—that the Court was entitled to infer that the deponent was not making the affidavit without any grounds at all; that the grounds which he was assigning were that he had been so informed by persons who, the Court was entitled to infer, had been making inquiries in the case for the plaintiffs; and that the affidavit was sufficient, and the injunction must be granted.

BADISCHE ANILIN-UND-SODA FABRIK *v.* W. G. [THOMPSON, LD., AND OTHERS, (1902) 19 R. P. C. 502—Buckley, J.

264. *Action for Infringement—Recent Patent not Established by Judgment—Motion Refused.*] —It is not usual for the Court to grant an interlocutory injunction, where the patent alleged to

Practice—*Continued.*

be infringed is quite recent, and has not been established by judgment, and there has been little use of it.

S. obtained a patent in 1902, and at once began to manufacture under it. H. began to manufacture articles stamped "Patent," which were infringements unless H. could defeat the validity of the patent. S. moved in his action for an interlocutory injunction.

Motion refused on H. undertaking to keep an account and discontinue the use of the word "patent." Costs to be costs in the action.

SPENCER *v.* HOLT, (1903) 20 R. P. C. 142—[Byrne, J.

265. *Action for Infringement—Bicycle Saddles—Judgment against Defendant's Predecessors Affirming Validity of Patent—Undertaking.*]—The plaintiffs brought an action for infringements of bicycle saddles; they had succeeded in respect of two of such saddles in a similar action against a company which went into liquidation, and sold its business to the defendant company.

HELD—that, so far as these two saddles were concerned, the plaintiffs were entitled to an interlocutory injunction, or undertaking; but, as to another saddle, which had not previously formed the subject of litigation, an injunction was refused.

J. B. BROOKS & CO., LD. *v.* LYCETT'S SADDLE [AND MOTOR ACCESSORY CO., LD., AND ANOTHER, (1903) 20 R. P. C. 575—Eady, J.

266. *Action for Infringement—Certificate of Validity in previous Action—Effect of.*]—Where the validity of a patent has been established on previous occasions, though it is open to a defendant to dispute it on the actual trial, yet, if the infringement be clear or there be a *primâ facie* case of infringement, the Court will regard the validity as sufficiently established to warrant the grant of an interim injunction, even though the defendant attacks the patent on a ground not raised in any of the earlier proceedings.

HEINE SOLLY & CO. *v.* NORDEN & CO., (1904) [21 R. P. C. 513—Farwell, J.

See also Nos. 194, 200, 201, 205.

(4) On Petition for Revocation.

And see title BANKRUPTCY, No. 46.

267. *Contempt of Court by Petitioners—Conduct of Respondents—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 32.]—Sect. 32 of the Patents, Designs and Trade Marks Act, 1883, was not meant, beyond the threats therein mentioned, to justify any public discussion, on the merits of pending litigation.

Where the petitioners to a petition for revocation of a patent had written a letter which contained something more than a mere threat to deter people from taking proceedings, the Court held that, having regard to the respondents' methods, it would not be justified in granting an injunction restraining the petitioners from issuing any letter, &c., calculated to prejudice or impede the fair trial of the matter, viz., a revocation of the patent.

IN RE DE MARE'S PATENT, (1899) 16 R. P. C. [528—Byrne, J.

268. *Patent not producing Alleged Result—Patent Revoked.*]—In 1896, letters patent were granted to C. for "preparation of ortho-sulphamine benzoic acid," being a method of preparing saccharine. In 1897 the Saccharine Corporation, Ld., presented a petition for revocation of this patent on the ground of want of utility, want of subject-matter, and that the specification did not describe a process by which saccharine could be produced.

On the hearing of the petition it was unopposed, and the patent was revoked.

Practice where respondent is abroad.

IN RE CERCKEL'S PATENT, (1898) 15 R. P. C. [500—Byrne, J.

269. *Petition for Revocation of two Patents—Want of Novelty—Anticipation by Prior User—Admissibility of Evidence—Patents Revoked, subject as to one to Disclaimer.*]—In 1887 and 1889, letters patent were granted to H., which related to "improvements in sifting machines." In 1897 a petition was presented for the revocation of both these patents, on the ground that they were invalid, the petitioner alleging that both inventions had been anticipated by prior user at M. mill. R., the principal witness for the petitioner, asserted that he had used the inventions at M. mill by alterations he had there made in a sifter, and, in cross-examination, stated that he came to do so from having seen sifters so altered at two other mills. Evidence was tendered by the respondent to show that no such sifters as alleged by R. had been at these two other mills; this evidence was objected to on behalf of the petitioner.

HELD—that evidence to contradict R.'s answers in cross-examination as to what he had seen at the two other mills was inadmissible, and that the prior user at M. mill had been established. Both patents were accordingly revoked; but in the case of the earlier patent only if the respondent did not obtain leave to amend the patent by disclaimer, as in *Deeley* v. *Perkes*, 13 R. P. C. 581.

IN RE HAGGENMACHER'S PATENTS, [1898] 2 [Ch. 280; 67 L. J. Ch. 675; 15 R. P. C. 431—Romer, J.

270. *Application for Liberty to apply for Leave to Amend Specification—Liberty Granted on Terms—Discretion—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *ss.* 18, 19, 20.]—In 1887 letters patent were granted to Allison for "improvements in the process of and apparatus for the copying, duplication, and printing of writings, drawings, typewritings, prints, and designs." The complete specification was amended in 1898. There were originally fourteen claims, and all but five were struck out. A. B. D. Co., then the owners of the patent, brought an action for infringement against Ellam's Duplicator Co. The action was

Practice—*Continued.*

tried and the patent was found to be invalid for want of novelty. Ellam's Duplicator Co. presented a petition for revocation of the patent. A. B. D. Co. gave notice for leave to amend the specification. Leave was granted on terms on appeal.

HELD—that it was a question for the discretion of the judge who tried the action, and that it would be wrong to overrule his decision.

Ludington Cigarette Co. v. *Baron Cigarette Co.* (17 R. P. C. 25—C. A., No. 7, *supra*) followed.

Decision of Cozens-Hardy, J. (17 R. P. C. 298) affirmed.

IN RE ALLISON'S PATENT, (1900) 17 R. P. C. 513 [—C. A.

271. *Petition List—Liberty to put Petition in Witness List at or after a named Date.*]—When a petition for revocation comes into the Petition List, as it must, then in the presence of both parties an order should be made giving liberty to either of them to put it into the witness list at or after a date which would be then named, the object being that it should come in when they are ready, and not before.

Where in a case that course had not been followed the petition had been put down in the witness list. Counsel said that it was in the list, but they could not try it.

HELD—that the petition must be struck out of the list, and liberty given to either side to set it down in the witness list on or after a particular day.

IN RE BORROWMAN'S PATENT, (1902) 19 R. P. C. [159—Buckley, J.

272. *Appeal Pending in an Action on the Patent—Patent about to Expire—Postponement of Petition—Undertaking by Respondents.*]—A petition had been presented for the revocation of a patent just about to expire and which had been declared invalid in an action. An appeal against this decision was pending, and the petition was postponed upon the respondents undertaking to take no proceedings against the petitioner in respect of anything done by him after the date of the application.

IN RE HITCHCOCK'S PATENT, (1903) 20 R. P. C. [767—Byrne, J.

273. *Consent Order.*]—A respondent, who consents to an order for the revocation of his patent, should go to chambers (and not into Court), and say that he submits to the order and to pay the costs.

IN THE MATTER OF SCOTT'S PATENT, (1903) [20 R. P. C. 604—Joyce, J.

274. *Held invalid subject to Disclaimer—Form of Order of Revocation—Discretion of Judge—Terms imposed upon Amendment by Disclaimer—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 26.]—In a petition for revocation it was admitted that the patent must be revoked, unless the patentee should within the specified time obtain leave to amend his specification by making certain disclaimers. It was made a term of the order that if the specification was amended, no injunction was to be asked for in any action brought for infringement of the patent by goods made before the date of the judgment, unless the patentee established to the satisfaction of the Court that his original claim was made in good faith and with reasonable skill and knowledge.

HELD, on appeal—that the discretion of the judge who tried the case ought not to be interfered with on this point.

Decision of Buckley, J. ([1903] 2 Ch. 715; 73 L. J. Ch. 47; 52 W. R. 63; 20 R. P. C. 545) affirmed.

IN RE GEIPEL'S PATENT, [1904] 1 Ch. 239; 73 [L. J. Ch. 215; 52 W. R. 339; 90 L. T. 70—C. A.

275. *Court or Chambers—Consent.*]—An order for the revocation of a patent cannot be obtained in chambers even by consent.

IN RE CLIFTON'S PATENT, [1904] 2 Ch. 357; 73 [L. J. Ch. 597; 52 W. R. 629; 91 L. T. 284; 21 R. P. C. 515—Buckley, J.

See also Nos. 12, 57, 70, 131, 134, 221, 225, *supra.*

XIII. COMMITTAL.

276. *Action for Infringement—Interim Injunction—Committal for Breach of Order on Defendant's Admissions—Appeal Dismissed—Release.*]—On November 19th, 1897, an order was made in chambers for an interim injunction restraining the defendant from infringing the plaintiff's patents.

On December 19th, 1899, an order was made committing the defendant to prison for breaches of the above-mentioned order. The defendant appealed.

HELD—that the appeal failed, as by his own admission the appellant had sold, not casually or occasionally, but sold as a practice, mantles made according to the plaintiffs' patent, with burners of their pattern, and that he did that having notice of the restriction placed by the plaintiffs upon the sale of those mantles otherwise than in connection with their own burners. However, on the respondents not objecting, the defendant was released at once.

INCANDESCENT GAS LIGHT CO., LD. *v.* RIEMER, [(1900) 16 R. P. C. 378—C. A.

277. *Injunction—Breach—Aider and Abettor—Proof.*]—A person who though not a defendant in the action, and though not a person against whom the injunction was made, but knowing of an injunction, in breach of it aids and abets the person who was enjoined by that injunction, can be committed for contempt.

Seaward v. *Paterson* ([1897] 1 Ch. 545; 66 L. J. Ch. 267; 45 W. R. 610; 76 L. T. 215—C. A.) approved.

The case, however, must be clearly proved, and

Committal—*Continued.*

the applicant must have all his materials in order before he is entitled to an order.

Incandescent Gas Light Co. *v.* Thomas [Sluce and Sluce & Co., (1900) 17 R. P. C. 173—C. A.

278. *Injunction by Consent—Subsequent Infringement—Terms on which Attachment should not Issue.*]—The defendant, by a consent dated September 23rd, 1899, submitted to an injunction, restraining her, her agents, &c., from selling on any incandescent mantles infringements of the plaintiffs' patent, and further proceedings were stayed. Subsequently a mantle was sold at defendant's establishment which on examination was found to be an infringement of plaintiffs' patent. Thereupon a motion was made for an attachment.

Held—that the defendant being herself the owner of the establishment, and her husband selling goods for her in her shop, was as responsible for his acts as her assistant as for the acts of any other person employed in the establishment; that the defendant must make an affidavit stating what mantles were in her possession which were an infringement, or colourable imitations, of the plaintiffs' patents. If she did that, and gave up all such mantles to the plaintiffs to be destroyed, within a week, and paid the costs of the motion, the attachment should not issue.

Welsbach Incandescent Gas Light Co., Ld. [*r.* Mary Keegan, (1900) 17 R. P. C. 44—Porter, M.R.

279. *Injunction — Breach.*] — An order was made in chambers that the defendant be restrained during the continuance of certain letters patent from manufacturing, selling, or exposing for sale specified "Victoria lamps," and from in any manner infringing the said letters patent. The defendant subsequently sold two "Victoria lamps" of a certain class which he had purchased from a stranger and sold again, for the sale of which damages had been paid to the plaintiffs, and also sold certain lamps which were practically "Victoria lamps."

Held—that the defendant technically had committed a breach of the injunction as to the two lamps, and than an order of committal must be made for the sale of the other lamps.

Brockie Pell Arc Lamp, Ld. *v.* Walter [Claude Johnson, (1901) 17 R. P. C. 697—Kekewich, J.

280. *Undertaking not to Infringe.*] — The plaintiff's patent was for improvements in and relating to life-saving apparatus. Claim (1) was: "In a line-throwing apparatus a ball-and-socket connection between the rocket-trough and its supports substantially as set forth." Claim (4) was: "The line-throwing apparatus constructed substantially as set forth and illustrated in the accompanying drawings," which were very elaborate drawings with the ball-and-socket joint.

Held—that what the defendants had done was not within either claim (1) or claim (4)—it did not produce the same result — by the defendants' machine the trough could not be inclined at any desired angle in any desired direction; and that the motion to commit the defendants for a contempt of Court in breaking their undertaking not to further infringe the patent must be refused with costs.

Schermuly *v.* Pain, (1901) 18 R. P. C. 529—[Joyce, J.

281. *Action for Infringement—Practice—Injunction by Consent—Breach of Injunction.*]—W. consented to an injunction in an infringement action. The Court, being thoroughly satisfied that he had committed a breach of such injunction, made an order for his committal.

E. M. Bowden's Patents Syndicate. Ld. *v.* [Wilson, (1903) 20 R. P. C. 644—Swinfen-[Eady, J.

282. *Action for Infringement—Contempt of Court—Interlocutory Injunction — Unsuccessful Motion to commit for Breach—Renewed Application—Further Evidence of same Acts—Application refused.*]—In April, 1902, an interlocutory injunction was granted in an infringement action. In November, 1903, an application was made unsuccessfully to commit the defendant for having committed a breach of the injunction. In May, 1904 (the action being then in the list for trial), a fresh application was made, based on better evidence of the same alleged offence, but suggesting no other breaches.

Held—that the application ought not to be entertained.

Badische Anilin und Soda Fabrik *v.* W. G. [Thompson & Co., Ld. and Others, (1904) 21 R. P. C. 469—Buckley, J. and C. A.

See also No. 197, *supra*.

XIV. PATENT AGENTS.

283. Person not registered as Patent Agent knowingly describing himself as a Patent Agent —No express description by such Person—"Patent Expert"—Patents, &c., Act, 1888, s. 1, and r. 5, Register of Patent Agents Rules, 1889.

Graham *v.* Eli, Graham *v.* Hughes, Graham [*r.* Barlow, (1898) 15 R. P. C. 259; 14 T. L. R. 370—Div. Ct.

284. *Registration — "Right acquired" — Validity of Register of Patent Agents Rules*, 1889—*Patents, Designs and Trade Marks Act*, 1883 (46 & 47 Vict. *c.* 57), *s.* 101, *and* 1888 (51 & 52 Vict. *c.* 50), *ss.* 1, 27—*Register of Patent Agents Rules*, 1889, 1891—*Patent Rules*, 1890, *r.* 81.]—Sect. 1 of the Patents, Designs and Trade Marks Act, 1888, sub-s. 1, enacts that no person shall be entitled to describe himself as a patent agent unless he is registered as a patent agent in pursuance of the Act. Sect. 27 provides that nothing in the Act shall affect the validity of any "right acquired" before the commencement of the Act.

Patent Agents—*Continued.*

HELD—that a person who had been practising as a patent agent and describing himself as such prior to the passing of the Act is not protected by sect. 27 from the operation of sect. 1, nor from the liability to pay the fees imposed by the Register of Patent Agents Rules, 1889, made in pursuance of the Act.

HELD, also, that the Register of Patent Agents Rules, 1889, are in force, because, assuming they were repealed by rule 81 of the Patent Rules, 1890, they were re-enacted by rule 1 of the Register of Patent Agents Rules, 1891.

STAREY *v.* GRAHAM, [1899] 1 Q. B. 406; 68 [L. J. Q. B. 257; 47 W. R. 392; 80 L. T. 185; 15 T. L. R. 163; 16 R. P. C. 106—Div. Ct.

285. *Duty of, to Pay Renewal Fees—Allowing Patents to Lapse—Action for Damages—Invalidity of Patents no Defence.*]—The plaintiffs sued the defendants for damages, alleging that they were patent agents acting for the plaintiffs in respect of certain patents owned by them, that it was the defendants' duty to notify them when renewal fees became due, and that in breach of such duty they neglected to do so, whereby the patents lapsed.

In their defence the defendants pleaded that the patents in question were invalid for want of novelty, but did not suggest that they had been obtained or used fraudulently.

HELD—that the defence was irrelevant. *Semble*, the validity of a patent can only be challenged by way of reduction, or of defence to an infringement action.

TURNBULL & CO., LD. *v.* CRUIKSHANK AND [ANOTHER, (1905) 22 R. P. C. 363, 521—Ct. of Sess.

XV. MISCELLANEOUS CASES OF INFRINGEMENT.

(1) Colourable Imitations, &c.

286. *Reference to English Patent on goods imported from America — Damages — Costs.*] — In 1892, a patent was granted to B., an American, for "Improvements in rubber stamps," and a patent for a similar invention was granted to him in America. L. sold certain rubber stamps which he imported from America, where he obtained them from H. These stamps bore, by arrangement between B. and H., the following:—"Licensed Buck's Patent"; "Made in America"; "Patented in U.S."; and "Patented in England." The owners of B.'s English patent brought an action against L. to restrain him from infringing their patents and from selling stamps inscribed "Buck's Patent," or with any other words leading to the belief that the stamps were made under their patent, and they claimed an account of profits.

HELD—that the defendant's stamps were not infringements, and that on the defendant undertaking in future to use words showing that the American patent was alone referred to, no injunction would be awarded: that no case of passing off had been made out by the plaintiffs, but that the plaintiffs were entitled to damages for the use by the defendant in the past of the words complained of, which damages were assessed by the judge at 40*s.* A special order as to costs was made.

PNEUMATIC RUBBER STAMP CO., LD. *v.* LINDER, [(1898) 15 R. P. C. 525—Byrne, J.

287. *Chemical Process — Defendant arriving at the same Result by substantially the same Methods, but with some Differences.*]— In an action for infringement of two patents for producing artificial musk (one of which was abandoned at the trial), it was proved that the defendant produced the same result as the plaintiffs' process described in the specification of the patent relied on by them at the trial, and by a process which was substantially the same, although some of the steps were different, and some of the intermediate products different.

HELD—that the defendant had infringed, and an injunction was granted, with costs, except that the defendant was held entitled to the costs so far as the abandoned patent was concerned. A certificate of the validity of their other patent was given to the plaintiffs, and a certificate was given to the defendant that his particulars of objections to the abandoned patent were reasonable and proper.

FABRIQUES DE PRODUITS CHIMIQUES DE [THANN *v.* CASPERS, (1898) 15 R. P. C. 94—Romer, J.

288. *Action for Infringement.*]—The plaintiffs, of whose firm the patentee was a member, owned an invention in flats and in fasteners for securing the card clothing thereon and thereto.

The plaintiffs brought an action against the present defendants in 1889, in which the House of Lords held that the latter had not infringed the former's patent, because the defendants did not by their fastener grip the edges of the selvedge in the manner shown by the plaintiff, and they obtained their stretching of the foundation in a different manner, namely, by the use of an independent instrument like a carpet stretcher. The defendant's fastener was but an ordinary clamp, which performed no part of the important operation of stretching. Subsequently the defendants altered their fasteners, substituting teeth for the notches.

In the present case both the plaintiffs and the defendants had the independent grip, but the plaintiffs had not got the stretching.

HELD—that the defendants had not infringed.

TWEEDALE *v.* ASHWORTH, (1899) 16 R. P. C. [142—Kekewich, J. *See also* 16 R. P. C. 520—C. A.

289. *Action for Infringement — Illuminated Appliance — Fabric Impregnated with Substances Mentioned — Substances Substantially Differing from Substances Mentioned.*]— The patentee claimed the manufacture, substantially as described, of an illuminant appliance, consisting of a hood made of fabric impregnated with the substances mentioned in

Miscellaneous Cases of Infringement—*Continued.*

the specification, and treated as therein set forth.

HELD—that there was no infringement unless the alleged infringer had used substances or ingredients only colourably differing from, or substantially the same as the substances mentioned. Ingredients do not substantially differ merely because they have different chemical names, and only differ in minor or comparatively unimportant respects from the substances mentioned.

WELSBACH INCANDESCENT GAS LIGHT CO., LD. [*v.* THE DAYLIGHT INCANDESCENT MANTLE CO., LD., AND OTHERS, (1900) 17 R. P. C. 141 —C. A.

290. *Action for Infringement—Securing Benefits of Invention by a slight Variation of it.*]—The plaintiffs' system—Welch's patent—was fixing tyres to cycles and other light vehicles by means of endless non-extensible wires. The defendants' "Ostrich" tyre was a tyre in which the wires, instead of being endless, were wires with hooks and slots into which the hooks could engage. The plaintiffs brought an action for infringement against the defendants. The scientific evidence left it in doubt what the action of the defendants' tyre did depend on.

HELD—that there was not sufficient evidence to show that the defendants' tyre depended, in its ordinary application, on a complete engagement of the hook with the end of the slot: that the intention of the inventor of the "Ostrich" tyre was to secure the same benefits as Welch's invention by a slight variation of the same thing; and that the defendants had infringed the plaintiffs' patent.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* OSTRICH [TYRE AND RIM CO., (1902) 19 R. P. C. 365—Wright, J.

291. *Action for Infringement—Securing Benefits of Invention by slight Variation of it.*]—The owners of Welch's patent brought an action for infringement against the defendants. The alleged infringing tyre had in its edges wires, each of which had an overlap of more than half the circumference, and had its ends joined by a spiral spring, thus completing a second convolution. On either side of such spring loops were formed which projected through the canvas pocket, and which could be connected by hooks with the loops in the other wire.

HELD—that in operation the defendants' wires acted as being practically inextensible. When they were hooked together they were practically inextensible, although by a different device from that which was employed by the plaintiffs; and that there had been an infringement.

Dunlop Pneumatic Tyre Co., Ld. v. *Ostrich Tyre and Rim Co.* ([1902] 19 R. P. C. 365—Wright, J., *supra*) followed.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* UNITED [RUBBER WORKS, LD., AND R. S. WOOD, (1902) 19 R. P. C. 406—Wright, J.

292. *Action for Infringement — Pneumatic Tyres.*]—Decision of Byrne, J. (19 R. P. C. 298) affirmed without argument, the appellant not appearing.

BIRMINGHAM PNEUMATIC TYRE SYNDICATE, [LD. *v.* RELIANCE TYRE CO., (1903) 20 R. P. C. 288—C. A.

293. *Action for Infringement—Bicycle Tyre—Wire—Ends of Wire Overlapping.*]—Welch's patent was "a rubber or elastic tyre, having the form of a saddle or arch in section, lined with canvas, in combination with two wires or sufficiently inelastic cores for securing the same to the rim substantially as herein described."

The alleged infringing tyre, for convenience called the "Clifton" tyre, was a saddle-shaped cover with wires in its edges, each wire going completely round the circumference, with overlapping ends, the overlap being 20 to 22 inches. There was a tube of mohair round each wire, and the wire ran inside that tube until the overlap, and then the two parts of the wire were in the one tube. At the ends of the wire, which projected, were little knobs, and outside the mohair tube there was a lashing to the edge of the cover; the edges of the cover had four plies; there were two layers of fabric cemented together and bent over to form a pocket, and within the pocket there was a tape stretched right round: the cover was stiff, being moulded on a frame in a strained state by vulcanising the cover when stretched as though inflated: the overlap in one wire was opposite in position on the circumference to the overlap of the other wire.

The plaintiffs, owners of Welch's patent, brought an action against the defendants for infringement. The defence was that the tyre complained of was a "Wapshare" tyre, and denied infringement generally.

HELD—that the tyre complained of was in several important respects different from the "Wapshare," which had been held not to be an infringement; that the wire of the "Clifton" tyre was really the holding power; and that it held the tyre on to the rim by means of its inextensibility, and that there was an infringement.

Decision of Kekewich, J. (19 R. P. C. 433) reversed.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* CLIFTON [RUBBER CO., LD., (1903) 20 R. P. C. 293 — C. A.

294. *Action for Infringement—Well-known Principle—Difficulty of making Meter a Good Practical Machine — Difficulty Overcome by Different Means, earlier one of which was Patented—No Infringement by User of Later Means—Costs of Appeal on Higher Scale Refused.*]—The owners of a patent for "improvements in electricity meters, parts of which improvements are applicable to dynamo electric generators and motors," sued the defendants for infringement.

HELD—that the principle on which the plaintiffs' electricity meter and also the defendants' meter were subsequently constructed was well known, but to make such a meter as was

Miscellaneous Cases of Infringement—*Continued.*

thus known to the public a good practical machine up to commercial requirements a difficulty had to be overcome—the difficulty of friction. Mr. Hookham, the patentee, surmounted this difficulty chiefly by the use of a special communicator—a very ingenious contrivance. So far as the communicator was concerned the defendants' machine in no wise employed the same means of overcoming the difficulty as those adopted by Mr. Hookham; that the patentee's claim did not extend to cover the defendants' magnet as used on their brake, and that the defendants' machine was no infringement of the patent. Costs of appeal on the higher scale refused.

Decision of C. A. ((1902) 19 R. P. C. 78) affirmed.

CHAMBERLAIN AND HOOKHAM, LD., *v.* BRADFORD CORPORATION, [(1903) 20 R. P. C. 673—H. L. (E.).

295. *Action for Infringement — Pneumatic Tyres.*]—The plaintiffs were the owners of the Welch patent, of which two main features are that the cover is arch-shaped, and is kept in position by having an inextensible strand of wire running along its edge.

The defendants denied infringement, their main contention being that in their tyre the edges were not inextensible, nor fitted with endless wires or cores, but had merely a number of strands of yarn solutioned together so as to strengthen the edge.

HELD—that there was only one difference that could be seriously suggested between the two tyres, viz., the use of yarns instead of wires; that there appeared to be two firmly woven cords of 21 strands, virtually inextensible, and that they kept the defendants' tyre in position in exactly the same way as the wires did the plaintiffs' tyre; and that there was an infringement.

Decision of the Lord Ordinary (19 R. P. C. 384) affirmed.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* NEW [LAMB TYRE CO., (1903) 20 R. P. C. 303—Ct. of Sess. (I. H.).

(2) Exposure Without Intention of Sale.

296. *Action for Infringement — Innocent Vendor—User—Part of Thing exposed being an Infringing Article—Serving useful Purpose—Injunction—Costs.*]—If a person uses an invention to present his goods for sale, and intending the thing exhibited to represent what he is going to sell, and if part of that thing is an article which is an infringement, and is serving a useful purpose during that time by being exhibited as part of the machine, it is a user of the invention.

The defendants, innocently, exposed for five or six days motor cars at the Agricultural Hall, having upon them infringing tyres fully inflated. The defendants would not have sold the motor cars, even if they effected a sale, with these tyres, but would have changed them before actual delivery for "Grapplers," which they were entitled to use.

HELD—that there was a use by the defendants of the invention; that the plaintiffs were entitled to 40*s.* damages and an injunction and costs, but not solicitor and client costs.

DUNLOP PNEUMATIC TYRE CO., LD., AND THE [PNEUMATIC TYRE CO., LD. *v.* BRITISH AND COLONIAL MOTOR CAR CO., LD.; SAME *v.* M. DE BREYNE, (1901) 18 R. P. C. 313—Ld. Alverstone, L.C.J.

297. *Action for Infringement — Action against Successive Vendors of Infringing Article—Costs.*]—M. sold two bicycles to L. L. was a gentleman who made electric light fittings, or fitted them up, and in his shop he had only one of these bicycles, which he kept in the window for three weeks; he had it until R., the plaintiffs' detective agent, came in. It was there because L. wanted to attract people to see if he could do some electric business. R. came and took off the tyres, expecting them to be an infringement, in the presence of L., and took one of the tyres away and marked it. The plaintiff brought an action for infringement against the successive vendors of the infringing bicycle.

HELD—that the machine as delivered to R. was the same machine as delivered by M. to L.; that the tyre sold was sold as delivered, and that it was an infringing tyre; and the matter of damages being left in the judge's hands, he awarded 5*s.* and ordered M. to pay the costs of the action.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* W. FULTON, FAIR & CO. AND OTHERS, [(1902) 19 R. P. C. 318—Ld. Alverstone, L.C.J.

(3) Importation, and Infringement by Foreigner.

298. *Goods manufactured abroad and sent by post to England.*]—A foreign manufacturer, who manufactures goods abroad according to an English patent, and by the direction of a customer, posts a parcel containing such goods at a foreign post office for conveyance to such customer in England, does not thereby infringe the English patent, the sale and delivery having taken place out of this country.

Judgment of the C. A. affirmed.

BADISCHE ANILIN-UND-SODA FABRIK *v.* BÂSLE [CHEMICAL WORKS, BINDSCHEDLER, [1898] A. C. 200; 67 L. J. Ch. 141; 77 L. T. 573; 14 T. L. R. 82; 14 R. P. C. 919; 46 W. R. 255—H. L. (E.).

299. *Process—Use abroad—"Exercise"—Sale and Delivery abroad—No Importation by Defendants—Act done not Unlawful.*]—The plaintiffs commenced an action against the defendants for infringement, and relied in their particulars upon the defendants' transactions with refcrence to certain parcels of saccharin which were ordered by the defendants as commission agents or merchants in 1897 from certain persons on the Continent, and were delivered by the vendors at

Miscellaneous Cases of Infringement—*Continued.*

foreign ports direct to the order of the Chemicals and Drugs Company, Ld., of Manchester, the purchasers. The orders were given by the Chemicals and Drugs Company, Ld., to the defendants in England. The goods were contracted to be delivered, and were in fact delivered to the company at Continental ports. The defendants got their profit as commission agents or merchants in respect of the transactions. One case of saccharin was proved to be manufactured according to the patented process.

HELD (1)—that there was an infringement.

Saccharin Corporation, Ld. v. *Anglo-Continental Chemical Works, Ld.*, (1900) 48 W. R. 444; 17 R. P. C. 307—Buckley, J., No. 78, *supra*) followed.

HELD (2)—that assuming that the importer into this country had infringed, the action wholly failed, as the acts done by the defendants on the Continent were not unlawful here.

SACCHARIN CORPORATION, LD. *v.* REITMEYER [& Co., [1900] 2 Ch. 659; 69 L. J. Ch. 761; 16 T. L. R. 494; 17 R. P. C. 606; 49 W. R. 199—Cozens-Hardy, J.

300. *English Companies — Alleged Infringement in Edinburgh — Jurisdiction of Scotch Courts.*]—The plaintiffs, an English company, owned a patent for pneumatic tyres. The defendants, another English company, exhibited in Edinburgh tyres made by them and alleged to be an infringement of the patent. The plaintiffs brought an action for interdict against infringement in the Scotch Courts: there was no effectual service in Scotland, and it was disputed whether the defendants had a place of business there.

HELD—that the Scotch Court had jurisdiction to interdict a foreigner from repetition of a *quasi*-delict within the territory.

TONI TYRES, LD. *v.* PALMER TYRE, LD., (1905) [22 R. P. C. 369—Ct. of Sess.

301. *Contract in England—Goods Made and Delivered abroad—Infringement of Plaintiff's Patent.*]—The defendant, a commission agent living in England, entered into a contract in England with purchasers there to sell to them dyes.

The goods were manufactured in Switzerland, and in accordance with the terms of the contract were there delivered to the purchasers, who afterwards imported them to England.

The goods were made according to a process protected by the plaintiff's patent in England.

HELD—that the defendant had not infringed the plaintiff's patent by "making, using, exercising or vending" within the United Kingdom, although probably the importation was an infringement.

Saccharin Corporation v. *Reitmeyer & Co.* ([1900] 2 Ch. 659; 69 L. J. Ch. 761; 83 L. T. 397—Cozens-Hardy, J., No. 299, *supra*) followed and approved.

Decision of C. A. ([1905] 2 Ch. 495; 74 L. J. Ch. 669; 93 L. T. 350; 22 R. P. C. 575) affirmed.

BADISCHE ANILIN-UND-SODA FABRIK *v.* HICKSON, [1906] A. C. 419; 75 L. J. Ch. 621; 95 L. T. 68; 22 T. L. R. 641; 23 R. P. C. 433—H. L. (E.).

See also No. 185, *supra*.

(4) Repairs Constituting new Article.

302. *Action for Infringement—Injunction.*]—The plaintiffs brought an action against the defendants for infringement of their Welch Patent granted for "improvements in rubber tyres and metal rims or felloes of wheels of cycles and other light vehicles." The defendant R. purchased from S. and from others with S.'s authority materials which enabled him to manufacture and to sell tyres in infringement of the Welch patent. Old tyres, when they came in to be repaired by R., were ripped to pieces, new canvas was substituted for the old, and when the wires were broken or in bad order, other new wires were taken from the stock and inserted and re-covered in the way in which the Welch patent required that they should be covered.

HELD—that the old tyres were really converted into new merchantable tyres which were put on the market, and that the defendants must be restrained from infringing the Welch patent by repairing so as to make a new article, the injunction to be in the ordinary form, with an inquiry as to damages and costs as between solicitor and client.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* HOLBORN [TYRE CO., LD., (1901) 18 R. P. C. 222—Kekewich, J.

303. *Action for Infringement—Injunction.*]—Old and worn-out Dunlop rubber tyres were repaired. In the case of one of them the old wires were used, everything else was discarded: the whole tyre was destroyed completely, and new canvas and a new tread used with the old wires, so as to make it an absolutely new tyre. In the case of the other tyres the old canvas was kept, but as it was not strong enough to resist the strain, it was covered all over with canvas, surrounding the wires, and was sewn all round the edges of the rim, thereby giving a new resisting material for the tyre. In addition to that the whole of the material was covered with new treads.

HELD—that the patent had been infringed.

DUNLOP PNEUMATIC TYRE CO., LD. *v.* [EXCELSIOR TYRE CEMENT AND RUBBER CO. AND BARKER, (1901) 18 R. P. C. 209—Channell, J.

PAUPERS.

See BAILMENT; COURTS, 26-30: LUNATICS; POOR LAW; TROVER AND CONVERSION, 1.

PAWNBROKERS AND PLEDGES.

1. *False Declaration — Pledge above £10.— Pawnbrokers Act*, 1872 (35 & 36 Vict. *c.* 93), *s.* 29.]—Making a false declaration with reference to a pledge above the value of £10 is not an offence within sect. 29 of the Pawnbrokers Act, 1872.

REG. *v.* TREGONING, (1899) 63 J. P. 504—The [Recorder, C.C.C.

2. *Licence — Justices' Certificate—Exemption — "Successor"—New Premises — Pawnbrokers Act*, 1872 (35 & 36 Vict. *c.* 93), *s.* 39.]—By sect. 39 of the Pawnbrokers Act, 1872, a pawnbroker's licence shall not be granted to any person except on the authority of a certificate of justices, "save that it shall not be necessary for any person being at the commencement of this Act a licensed pawnbroker, or for his executors, administrators, assigns, or successors, to obtain such a certificate."

HELD—that the above exemption, although it gives to a person, not himself licensed at the commencement of the Act, but the "successor" of a pawnbroker who was so licensed, the right to carry on that pawnbroker's business without taking out a certificate of justices, does not permit him to open a new business without such certificate.

R. v. *Commissioners of Inland Revenue* (*Ohlson's Case*) ([1891] 1 Q. B. 485; 60 L. J. Q. B. 376; 55 J. P. 117; 64 L. T. 57; 39 W. R. 317—Div. Ct.) discussed.

THE KING *v.* COMMISSIONERS OF INLAND [REVENUE; EX PARTE SILVESTER. [1907] 1 K. B. 108; 76 L. J. K. B. 41; 71 J. P. 86; 96 L. T. 201; 23 T. L. R. 83—Div. Ct.

3. *Loss of Pledge — Neglect to Deliver — "Reasonable Excuse"—Pawnbrokers Act*, 1872 (35 & 36 Vict. *c.* 93), *s.* 31.]—The respondent pledged a sewing machine with the appellants, who, while acting honestly in the matter, lost the respondent's sewing machine, and being no longer in possession of it neglected to give it up to the respondent on her tendering the principal sum and profit within one year of the date of the pledge.

HELD—that the appellants were not without reasonable excuse for their failure to deliver up the pledge and that, therefore, they had committed no offence against sect. 31 of the Pawnbrokers Act, 1872.

ALLWORTHY & WALKER *v.* CLAYTON. [1907] [2 K. B. 685; 76 L. J. K. B. 934; 71 J. P. 20; 96 L. T. 31—Div. Ct.

4. *Pawning Stolen Chattel — Conviction of Pawner of Larceny of the Chattel—Subsequent Remedy of Pawnbroker—Pawnbrokers Act*, 1872 (35 & 36 Vict. *c.* 93), *s.* 33.]—Where a person steals a chattel and unlawfully pawns it with a pawnbroker, and is subsequently prosecuted for larceny of the chattel and is convicted, the pawnbroker does not thereby lose the remedy given by sect. 33 of the Pawnbrokers Act, 1872, because the pawner has been convicted of larceny of the chattel by the owner of the chattel.

PICKFORD *v.* CORSI, [1901] 2 K. B. 212; 70 [L. J. K. B. 710; 65 J. P. 628; 49 W. R. 537; 84 L. T. 627; 19 Cox, C. C. 712—Div. Ct.

5. *Person Pawning without Authority—Pawnbroker may Prosecute under sect. 33 of Pawnbrokers Act*, 1872.]—By sect. 33 of the Pawnbrokers Act, 1872, it is enacted that if a person knowingly pawns with a pawnbroker anything being the property of another person, the pawner not being employed or authorised by the owner thereof to pawn the same, he shall be guilty of an offence against the Act.

HELD—that the pawnbroker is entitled to prosecute under this section.

FAUCETT *v.* BIERMAN, (1898) 14 T. L. R. 148— [Div. Ct.

6. *Purchase at Auction — Absolute Title — Pawnbrokers Act*, 1872 (35 & 36 Vict. *c.* 93), *s.* 19.]—A purchase by a pawnbroker under sect. 19 of the Pawnbrokers Act, 1872, does not give him an absolute title as against all the world.

BURROWS *v.* BARNES, (1900) 82 L. T. 721— [Div. Ct.

7. *Restitution Order—Stolen Property—Order, on Application of Police, for Return to Owners by Pawnbroker of Stolen Goods on Payment of Amount advanced to Thief—Action of Detinue against Pawnbrokers—Whether Barred—Pawnbrokers Act*, 1872 (35 & 36 Vict. *c.* 93), *s.* 30.]—An agent of the plaintiffs for the sale of jewellery pawned certain of their goods with the defendant, a pawnbroker, and was subsequently convicted of larceny as a bailee. After the conviction, on the application of the police the justices made an order under sect. 30 of the Pawnbrokers Act, 1872, for the delivery up of the goods by the defendant to the plaintiffs on their paying to the defendant the amount of money advanced on the stolen goods. The plaintiffs did not ask for the order, and, though represented, did not object to its being made, but subsequently obtained judgment in an action of detinue against the defendant in the county court for the return of the goods.

HELD—that the plaintiffs were not debarred from their action of detinue by the order made under sect. 30 of the Pawnbrokers Act, 1872.

LEICESTER & CO. *v.* CHERRYMAN, [1907] 2 [K. B. 101; 76 L. J. K. B. 678; 71 J. P. 301; 96 L. T. 784; 23 T. L. R. 444—Div. Ct.

PAYMENTS, APPROPRIATION OF.

See BANKERS AND BANKING; CONTRACTS; MORTGAGES; SHIPPING, 6.

PAYMENT INTO COURT.

See PRACTICE.

PEDIGREE.

See EVIDENCE; SALE OF LAND.

PEDLARS.

See MARKETS AND FAIRS.

PENALTY.

See CRIMINAL LAW AND PROCEDURE; DAMAGES.

PENSION.

See BANKRUPTCY AND INSOLVENCY.

PERJURY.

See CRIMINAL LAW AND PROCEDURE.

PERPETUATING TESTIMONY.

See EVIDENCE, 3.

PERPETUITIES.

I. ACCUMULATIONS 1207
II. PERPETUITIES 1212

And see CHARITIES, 28, 30, 38, 39; COMPANIES, 6; LANDLORD AND TENANT, 43, 193; WILLS, 296–305.

I. ACCUMULATIONS.

1. *Application of Rents to effect Policy of Insurance—Securing Replacement of Capital—Accumulations Act*, 1800 (39 & 40 Geo. 3, *c.* 98).]—A testator directed his trustees to set apart during the residue of the term (thirty-three years) upon which he held certain leasehold houses a yearly sum out of the rents, which he directed his trustees to pay and apply in or towards effecting and keeping on foot a policy of insurance to secure the replacement at the termination of the said term of the capital that would be lost through not selling the leaseholds.

HELD—that the direction was not void under the Accumulation Act, 1800, as all the testator did was to direct that the property should not be diminished.

IN RE GARDINER; GARDINER *v.* SMITH, [1901] [1 Ch. 697; 70 L. J. Ch. 407—Buckley, J.

2. *Contingent Life Interest—Accumulations of Surplus Income during Minority—Held for the "Benefit of the Person who Ultimately Becomes Entitled to the Property from which the Same Arise"—Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. *c.* 41), *s.* 43, *sub-s.* 2.]—A testator by his will directed his trustees to hold a portion of his residuary trust funds (resulting from conversion of his estate) upon trust for his children, who being daughters should attain twenty-one or marry, to be divided between them in equal shares, and to retain the share of each daughter upon trust to pay the income to the daughter for life, and after her death for her children. The testator died in 1890, and his two daughters respectively attained twenty-one on February 10th, 1899, and October 21st, 1901. During the infancy of those daughters accumulations of income arose from those shares. The two daughters took out an originating summons for the determination of the question whether they were respectively entitled to these accumulations.

HELD—that under the gift the income was accessory to the capital, and belonged contingently to the legatees in whose favour the contingent gift was made; that the accumulations were to be held for the benefit of the persons who "in the events which happened" became entitled to the "income" from the accumulation of which the accumulations arose, and this was the way in which the words of sub-sect. 2 of sect. 43 of the Conveyancing and Law of Property Act, 1881, were to be read; and that the plaintiffs who in the events which had happened were entitled to income, were entitled to the accumulated sums.

IN RE SCOTT, SCOTT *v.* SCOTT. [1902] 1 Ch. 918; [71 L. J. Ch. 475; 50 W. R. 454; 86 L. T. 348; 18 T. L. R. 470—Buckley, J.

3. *Debts paid out of Capital—Provision for Recoupment out of Accumulated Fund—Accumulations Act*, 1800 (39 & 40 Geo. 3, *c.* 98), *s.* 2.]—A provision for accumulating income to recoup a capital fund applied in payment of debts is not a provision for payment of debts within the meaning of sect. 2 of the Accumulations Act, 1800.

Tewart v. *Lawson* ([1874] L. R. 18 Eq. 490; 43 L. J. Ch. 673; 22 W. R. 822) followed.

IN RE HEATHCOTE. HEATHCOTE *v.* TRENCH, [1904] 1 Ch. 826; 73 L. J. Ch. 543; 90 L. T. 505—Eady, J.

4. *Direction to Accumulate Surplus Income beyond Twenty-one Years—Income of Accumulations—Residue—Tenant for Life—Accumulations Act*, 1800 (39 & 40 Geo. 3, *c.* 98).]—A testator

Accumulations—*Continued.*

devised two freehold houses specifically, and he directed the income of these two houses to go to the extent which his trustees thought fit for the maintenance of a daughter of unsound mind, with an accumulation of the surplus income. The residuary property of the testator was given to trustees upon trust to convert all excepting lands and houses, and to invest and pay the income to the tenant for life with remainders over.

HELD—that the accumulation of the surplus income of the two houses was bad beyond twenty-one years, and that the surplus income so let loose fell into the residue by reason of the Thellusson Act (Accumulations Act, 1800), and was to be invested by the trustees, and only the income arising therefrom was to be paid to the tenant for life.

Crawley v. *Crawley* ((1835) 7 Sim. 427; 40 R. R. 170) and *O'Neil* v. *Lucas* ((1838) 2 Keen, 313) followed.

In re Phillips ((1880) 49 L. J. Ch. 198; 28 W. R. 340—Malins, V.-C.) disapproved.

IN RE POPE, SHARP v. MARSHALL, [1901] [1 Ch. 64; 70 L. J. Ch. 26; 49 W. R. 122—Farwell, J.

5. *Partial Accumulation of Income—At the End of Ten Years' Accumulation to be invested in Real Estate—"Land"—Accumulation Act*, 1892 (55 & 56 Vict. *c.* 58)—*Interpretation Act*, 1889 (52 & 53 Vict. *c.* 63), *s.* 3.]—A testator devised his mining property upon trust, after paying certain charges, to invest the rents and annual income thereof in the parliamentary stocks or funds of the United Kingdom for the period of ten years, to be computed from his death, and during that period to pay the interest arising from such investments to his nephew A. B. He then directed "that at the expiration of that period the whole of such investments be transferred or paid to my nephew, A. B., if he be living; but if he be dead at such expiration, then the same shall be invested in the purchase of real estate, so as to go along with my estate at Whittle."

HELD — that the direction to lay out the investments at the expiration of ten years, if A. B. be then dead, in the purchase of real estate was bad, and that A. B. took the rents so directed to be accumulated.

In order to ascertain the meaning of the words "for the purchase of land only" in the Accumulations Act, 1892, recourse must be had to the Interpretation Act, 1889, s. 3, which does not confine the meaning of the word "land" to corporeal hereditaments.

Dictum of Chitty, J., in *In re Danson* ((1895) 13 R. 633) questioned.

IN RE CLUTTERBUCK, FELLOWES *v.* FELLOWES, [1901] 2 Ch. 285; 70 L. J. Ch. 614; 49 W. R. 583; 84 L. T. 757—Byrne, J.

6. *Period Allowable—Minority of Person who, if of Full Age, would be entitled to Rents and Profits—Person Born after Testator's Death—Accumulations Act*, 1800 (39 & 40 Geo. 3, *c.* 98), *s.* 1.]—A direction in a will to accumulate the income of property during the minority of a living person's child who is not born or *en ventre sa mère* at the death of the testator, but who if born and of a full age would for the time being be entitled to the income so directed to be accumulated, is valid under the Accumulations Act, 1800. The fact that the person during whose minority the accumulations are directed to be made takes only a defeasible title to part thereof does not affect the question.

Haley v. *Bannister* ((1819) 4 Madd. 275) and *Jagger* v. *Jagger* ((1883) 25 Ch. D. 729; 53 L. J. Ch. 201; 49 L. T. 667; 32 W. R. 284—Kay, J.) discussed.

IN RE CATTELL, CATTELL *v.* CATTELL, [1907] [1 Ch. 567; 76 L. J. Ch. 242; 96 L. T. 612; 23 T. L. R. 331—Neville, J.

7. *Remoteness—Portions—Gift to Children as a Class—Period of Ascertainment—Period of Division — Accumulations Act*, 1800 (39 & 40 Geo. 3, *c.* 98), *s.* 2.]—S., who died in 1888, directed his trustees to set aside a yearly sum of £24 out of the income of his residuary estate "while and so long as there shall be a child of my daughter S. A. for the time being under the age of twenty-one years," to invest the same and accumulate the income, and hold the accumulated funds in trust for such of S. A.'s children as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, in equal shares, the shares to be vested interests and to be payable to sons at twenty-one, and to daughters at twenty-one or upon marriage.

Subject as aforesaid, he directed the trustees to pay the income of his residuary estate to S. A. for life, and after her death to H., her husband, for life; but if S. A. should survive H., the trustees were to pay to her for the rest of her life the whole income of the residuary estate, and were to no longer set apart the annual sums.

S. A. and H. survived the testator, and had three children born in his life-time and two born after his death: the eldest child was already twenty-one, the youngest was born in 1896.

HELD — (1) that, apart from the possibility of H. dying in S. A.'s life-time or other children being born, the period of aggregation and accumulation was to continue so long as any one of the five children (whenever born) was under the age of twenty-one. (2) That, as the accumulated fund was a "portion," the direction to accumulate was valid.

Beech v. *Lord St. Vincent* ((1850) 3 De G. & Sm. 678) followed.

(3) That the class of children was not closed when the eldest attained twenty-one, and that the fund was not divisible until the end of the period of accumulation.

Watson v. *Young* ((1885) 28 Ch. D. 436; 54 L. J. Ch. 502—Pearson, J.) followed.

IN RE STEPHENS, KILBY *v.* BETTS, [1904] 1 Ch. [322; 73 L. J. Ch. 3; 52 W. R. 89; 91 L. T. 167—Buckley, J.

Accumulations—*Continued.*

8. *Accumulation of Income — Remoteness — Discretionary Trust for Maintenance—Construction.*]—B. left certain real and personal property to trustees upon trust to apply the income in such proportions and such manner as they should in their absolute discretion deem best for the support of "my son W. B. and his wife and children or any of them," or to accumulate the same or any part thereof for the benefit of the children of W. B. who should become entitled in the *corpus* of the trust property under the trust thereinafter declared. Subject to such discretionary trust, the trustees were directed to pay the income to W. B. for life, and to his widow during her life or widowhood, and after the death of the survivor or the widow's remarriage to hold the *corpus* and income in trust for W. B.'s children who should attain twenty-one.

HELD—(1) that the discretionary trust for maintenance was limited to W. B.'s life-time; and (2) that, if not so limited, it was void for remoteness.

The headnote to *Goeding* v. *Read* ((1853) 4 D. M. & G. 510) does not correctly represent the effect of that decision.

In re Watson ([1892] W. N. 192—Chitty, J.) and *In re Wise* ([1896] 1 Ch. 281; 65 L. J. Ch. 281; 44 W. R. 310; 73 L. T. 743—North, J.) not followed.

IN RE BLEW, BLEW v. GUNNER, [1906] 1 Ch. [624; 75 L. J. Ch. 373; 54 W. R. 481; 95 L. T. 382—Warrington, J.

9. *Trust to accumulate Surplus Income beyond Twenty-one Years—Devolution of Accumulations —Intestacy—Accumulations Act*, 1800 (39 & 40 Geo. 3, *c.* 98).]—A testator directed that his trustees should hold his trust estate upon trust to pay out of the clear income thereof an annuity to his niece during her life, and directed that the surplus income of his trust estate should accumulate and be invested until the death of his said niece, and, subject and without prejudice to the trusts and provisions aforesaid, his trust estate should be held upon trust for all and every the children or child of his said niece living at his decease, or born afterwards, who should attain the age of twenty-one years, or who dying under that age should leave issue living at his or her decease, to be divided between or amongst such children, if more than one, in equal shares as tenants in common; and in case there should be no child of his said niece who should attain twenty-one or who dying under that age should leave issue living at his or her decease, then, subject and without prejudice to the trusts and provisions aforesaid, his trust estate should, after the death of his niece, and the failure of issue, be held in trust as to one-third part for his seven named cousins and as to the remaining two-thirds upon trust for the trustees of Oldham Blue Coat School.

HELD—that the testator's cousins and the trustees of the school were not entitled to the surplus income from the expiration of the twenty-one years to the death of the niece, but that it devolved as on an intestacy, the Thellusson Act being applicable.

Weatherall v. *Thornburgh* ((1878) 8 Ch. D. 261; 47 L. J. Ch. 658; 26 W. R. 593; 39 L. T. 9—C. A.) followed, as it was not overruled by *Wharton* v. *Masterman*, [1895] A. C. 186; 64 L. J. Ch. 369; 43 W. R. 449; 72 L. T. 431; 11 R. 169—H. L. (E.).

HELD, also, that the testator intended that the accumulations of the surplus income should form part of the trust estate and go to the persons who would ultimately take the capital of the estate.

IN RE TRAVIS, FROST *v.* GREATOREX, [1900] [2 Ch. 541; 69 L. J. Ch. 663; 49 W. R. 38; 83 L. T. 241—C. A.

10. *Will made before* 1892—*Testator Dying after* 1892—*Whether Accumulations Act*, 1892, *applies*—"*Dispose of*"—*Accumulations Act*, 1892 (55 & 56 Vict. *c.* 58).]—In construing the Accumulations Act, 1892, a "disposition" of property by will means a disposition by will coupled with and made operative and irrevocable by the testator's death.

Therefore the Act applies to a will made before 1892, if the testator dies after that date, and a trust for accumulation in such will is void if it contravenes the limitations prescribed by the Act.

IN RE BARONESS LLANOVER. HERBERT *v.* [FRESHFIELD, [1903] 2 Ch. 330; 72 L. J. Ch. 729; 51 W. R. 615; 88 L. T. 856; 19 T. L. R. 524—Farwell, J.

II. PERPETUITIES.

11. *Absolute Gift of Personalty—Subsequent Gift over after Death—Doctrine of Perpetuities —Splitting up Gift—Intestacy.*]—A testator by his will gave his residuary estate, which consisted wholly of personalty, to trustees upon trust for investment and payment of the income to his wife during her life, and after her death "upon trust to be divided into five equal portions which I allot in the manner following": To S. D. (a married woman) he gave two of such portions, and the remaining three portions he gave to other persons: "but it is my will and mind that the two-fifth portions allotted to the said S. D. shall remain in trust, and that she shall be entitled to take only the interest and annual proceeds of the shares so bequeathed to her, during her natural life and for her sole and separate use, independent of her present or any future husband, but without power of anticipation; and from and after her decease in trust for the benefit of any child or children born unto her . . . upon his, her or their attaining the age of twenty-five years if a son or sons, or if a daughter or daughters upon her or their attaining the age of twenty-one years or upon her or their marriage . . . but in default of any such issue, then and in that case the said two-fifths . . . shall go and be divided . . . among the children of my brother C. . . . to be equally divided among such children payable,

Perpetuities—*Continued.*

if a son or sons, upon their attaining the age of twenty-five years, and if a daughter or daughters upon her or their attaining the age of twenty-one years or upon her or their marriage."

S. D. died without ever having had any children.

HELD—that the gift over of the two-fifths was obnoxious to the doctrine of perpetuities, and it could not be split up into component parts or alternatives.

Evers v. *Challis* ((1859) 7 H. L. C. 531; 29 L. J. Q. B. 121) distinguished.

HELD, also, that the gift of the two-fifths to S. D. was absolute in the first instance and that all the other trusts of it disappeared because they were invalid, and therefore the two-fifths belonged to S. D. absolutely, and did not pass to the testator's next of kin as on an intestacy.

Lassence v. *Tierney* ((1849) 1 Mac. & G. 551) distinguished.

Decision of C. A. [1901] 1 Ch. 482; 70 L. J. Ch. 114; 84 L. T. 163, affirmed.

IN RE HANCOCK, WATSON *v.* WATSON, [1902] [A. C. 14; 71 L. J. Ch. 149; 50 W. R. 321; 85 L. T. 729—H. L. (E.).

12. *Charity—Gift to Officer's Regimental Mess to maintain a Library—General Public Purpose—Plate—Gift for old Officers*—43 Eliz. *c.* 4.]—A soldier testator gave the residue of his personalty upon trust for the officers' mess of his regiment, to be invested and the income applied in maintaining a library for the mess for ever, any surplus to be expended in the purchase of plate. He also directed that two houses (leaseholds and part of the residue) should be for the use of old officers of the regiment at a small rent for their lives.

HELD—(1) that the first was a good charitable gift as being for a general public purpose tending to increase the efficiency of the army and aid taxation.

Semble, also, it might be supported as a "setting out of soldiers" within the meaning of 43 Eliz. c. 4.

(2) That the gift of the houses was void for perpetuity, and

(3) that they did not fall back into residue, but were undisposed of.

IN RE GOOD, HARRINGTON *v.* WATTS, [1905] [2 Ch. 60; 74 L. J. Ch. 512; 53 W. R. 476; 92 L. T. 796; 21 T. L. R. 450—Farwell. J.

13. *Contract to Convey Land—Rule against Perpetuities—Charity—Specific Performance—Damages for Breach of Contract.*]—The owner of land demised it to a local authority for the term of thirty years at a rent, the land to be used solely as a public park, and the lease contained a covenant in the form of a declaration that if the local authority should be desirous at any time during the term of purchasing the fee simple they could do so upon giving six months' notice and paying a certain sum. About one year before the lease expired the local authority gave notice to purchase the fee. The executors and devisees under the will of the owner, who had died, refused to convey upon the ground that the covenant purported to create an interest in land which was void for remoteness. The local authority brought an action for specific performance or for damages for breach of covenant.

HELD—that though the purpose for which the land was to be assigned was charitable, as the interest of the charity did not become effective until the happening of a future event which might happen at a period of time more distant than a life or lives in being and twenty-one years afterwards, the limitation was void for remoteness, and specific performance would not be granted; but that the contract to convey the land was not void either at common law or in equity, and that therefore the local authority were entitled to damages for breach of it.

WORTHING CORPORATION *v.* HEATHER, [1906] [2 Ch. 532; 75 L. J. Ch. 761; 22 T. L. R. 750; 4 L. G. R. 1179; 95 L. T. 718—Warrington, J.

14. *Exercise of Power — Power to Appoint among Children—Appointment of Income to Two Children Equally and to Survivor for Life—Contingent Remainder.*] — In 1844 by G.'s marriage settlement realty was settled to her use for life, and after her death to her children in such shares and manner as she might devise the same. G. died in 1877, having by her will devised the yearly income of the settled realty to be equally divided between L. and A., her only two children born in 1846 and 1852 respectively, "during their respective lives," directing that "in the event of the death of either, the survivor shall receive the whole income"; on the survivor's death the estate was to be sold, and the proceeds divided between the children of L. and A.

HELD—that the gift was void as infringing the rule against perpetuities, because the gift to the survivor was only a contingent one, and the survivor might be a person not ascertainable within twenty-one years from G.'s death.

WHITBY *v.* VON LUEDEEKE, [1906] 1 Ch. 783; [75 L. J. Ch. 359; 54 W. R. 415; 94 L. T. 432—Buckley, J.

15. *Gift of Minerals under Devised Farm "if they should be worked"—Rule as to Perpetuities.*]—You cannot have an executory interest to arise on a future event if the event be one which may not happen within the limit of the rule as to perpetuities.

Under the will of a testator, who died in 1858, a freehold farm was given to his wife for life, to his son for life, with remainder to his grandson in fee. The wife died in the lifetime of the testator. Under a codicil the son and two of his sisters were to take equal shares, and he directed that "if the minerals under the devised property" were worked, then the proceeds were to go in a certain way.

HELD—that there was no present gift at all, but an attempted future gift of money which would arise if somebody—namely, the owner of

Perpetuities—*Continued.*

the estate for the time being or the absolute owner—worked the minerals; that there was no gift of minerals; that it was a pure creation of an estate in the land to take effect at a future time beyond the period of perpetuities; and that the gift was void.

THOMAS *v.* THOMAS. (1902) 87 L. T. 58—C. A.

16. *Legal Contingent Remainder—Life Tenants—Gift after last Survivor to a Class, ascertainable within due limits, as Life Tenants—Estate Tail to last Survivor of Class.*]—The rule against perpetuities applies to legal contingent remainders as well as to equitable limitations.

By her will the testatrix devised her real estate to trustees and their heirs upon trust to divide the rents and profits in each year into three equal parts, and pay the same to her three children and the survivors or survivor of them during their lives and the life of the survivor, "and from and immediately after the decease of the longest liver of my said three children" (naming them), "I direct my said trustees for the time being . . . to pay and divide the said rents and profits of the said farm half-yearly . . . into and equally amongst all such of the children born in my lifetime, or within twenty-one years after my death, of" her said three children "who shall be living on the Lady Day or Michaelmas Day preceding such payment and division. And after the death of all such children of" her said three children, "except one, I devise my said farm and all my said real estate to such surviving child and the heirs of his or her body in tail, with remainder to the right heir of" a named person.

HELD—that the rule against perpetuities applies to legal contingent remainders, and that the limitation in tail was void for remoteness.

IN RE ASHFORTH'S TRUSTS, ASHFORTH *v.* [SIBLEY, [1905] 1 Ch. 535; 74 L. J. Ch. 361; 53 W. R. 328; 92 L. T. 534; 21 T. L. R. 329—Farwell, J.

17. *Limitations void for Remoteness—Application of Doctrine of* Cy-près.]—A testator devised freeholds to F. G. for life, then to the issue of F. G. upon various limitations which were void for remoteness, and finally to F. G. in fee. F. G. died a bachelor. The limitations to the issue of F. G. left out his sons' sons' daughters.

HELD—that the doctrine of *cy-pres* does not apply when simple estates tail cannot be framed to exclude and include the classes of persons designated by the testator for exclusion and inclusion. To attain this result contingent limitations are not to be introduced in the course of the estates tail. *Dictum*, that the doctrine of *cy-près* may be invoked on behalf of an ultimate remainder.

Doctrine of *cy-près* discussed.

Monypenny v. *Dering* ((1852) 2 De G. M. & G. 145—Ld. St. Leonards) followed.

Decision of Farwell, J., 53 W. R. 394; 92 L. T. 452, affirmed.

IN RE MORTIMER, GRAY *v.* GRAY, [1905] 2 Ch. [502; 74 L. J. Ch. 745; 93 L. T. 459—C. A.

18. *Married Women—Restraint upon Anticipation—Severance of Class.*]—A testator directed his trustees to stand possessed of and invest a certain sum and to pay the income to his daughter S. S. half-yearly during her life, and "after her death upon trust for such child or children of the said S. S., or such child or children of a son or daughter of the said S. S. who shall die before her as shall if a son attain the age of twenty-one years or if a daughter attain that age or marry . . . and as to the share or shares of any girl or girls for her or their separate use without power of disposing of the income or capital thereof otherwise than by will."

The testator died in 1871, and S. S. died in 1906, leaving two married daughters, both born before 1871.

HELD—that the restraint upon anticipation was "severable," and bound the shares of these two daughters, since they were born in the testator's lifetime.

Herbert v. *Webster* ((1880) 15 Ch. D. 610; 49 L. J. Ch. 620) and *In re Ferneley's Trusts* ([1902] 1 Ch. 543; 71 L. J. Ch. 422; 83 L. T. 413; 50 W. R. 346—Eady, J., *see* WILLS, 302) followed.

In re Ridley ((1879) 11 Ch. D. 645; 48 L. J. Ch. 563) not followed.

In re Russell ([1895] 2 Ch. 698; 64 L. J. Ch. 891; 73 L. T. 195; 44 W. R. 100—C. A.) applied.

IN RE GAME, GAME *v.* TENANT, [1907] 1 Ch. [276; 76 L. J. Ch. 168; 96 L. T. 145—Warrington, J.

19. *Proviso for Redemption of Rent-charge—Rent-charge—Charged on Leaseholds—Terms of Five Hundred Years—Proviso for Redemption at Fixed Price—Remoteness.*]—J. granted a rent-charge of £30 a year, for a term of five hundred years, to trustees upon certain trusts, and charged the same on leasehold premises, with a proviso that it should be lawful for the grantor, his executors, administrators, or assigns, at any time during the five hundred years, to purchase or redeem the rent-charge at the price of £300.

HELD—that the proviso of redemption did not infringe the rule against perpetuities, and was not void for remoteness.

SWITZER *v.* ROCHFORD, [1906] 1 Ir. R. 399—[M.R.

20. *Power of Appointment — Remoteness — Special Power of Appointment— Exercise—Rule against Perpetuities.*]—A. left property in trust for his widow for life, and after her death in trust for his brother C. T. and his present and future issue as the widow should appoint.

The widow appointed the property to C. T. for life, and then for all his children who if born in her lifetime had attained or should attain twenty-five, or if born after her death should attain twenty-one.

C. T. had nine children all born in A.'s lifetime, and who all attained twenty-five before the widow died.

HELD—that upon the appointment taking effect it was certain that within the proper limit

Perpetuities—*Continued.*

not only would all persons to take be ascertained, but their shares would be vested and fixed; and that therefore the appointment was valid.

In re Thompson, Thompson *v.* Thompson, [1906] 2 Ch. 199; 75 L. J. Ch. 599; 54 W. R. 613; 95 L. T. 97—Joyce, J.

21. *Special Power—Exercise by Will.*]—H. was entitled under his marriage settlement to a life interest in lands with a power of appointment to child or children after his death. By his will in 1896 he appointed all such lands to one daughter upon her attaining twenty-five: he died in 1901, when the daughter in question was fifteen.

Held—that the appointment was not void for remoteness, as the daughter must attain twenty-five within twenty-one years of H.'s death.

Von Brockdorff v. *Malcolm* ((1885) 30 Ch. D. 172; 55 L. J. Ch. 121; 33 W. R. 934; 53 L. T. 263—Pearson, J.) followed.

In re Hallinan's Trusts, [1904] 1 Ir. R. 452 [—C. A.

PERSONAL PROPERTY.

For Sale, *see* Limitation of Action, No. 7.

1. *Equitable Assignment of Reversionary Interest—Notice to Trustees in Existence—Notice to New Trustee—Priority.*]—He who gives notice has a better equitable right than a prior incumbrancer who has given no notice, for any other decision would facilitate fraud by the *cestui que trust*, and cause loss to those who might have used every precaution that was possible to ascertain, before parting with their money, that the title they were taking was a valid one, and who might have done everything they could to render that title secure.

An assignee of an equitable reversionary interest in personalty who has given notice to all the trustees in existence at the time of his assignment is not bound to give notice to every new trustee, and is entitled to priority over a subsequent assignee — without notice of the prior assignment—who has taken his assignment after the death or retirement of all the original trustees, and given notice to the new trustees.

Timson v. *Ramsbottom* ((1837) 2 Keen, 35) and *In re Hall, Nolan* v. *O'Brien* ((1880) 7 L. R. Ir. 180) distinguished.

In re Wasdale, Brittin *v.* Partridge, [1899] 1 Ch. 163; 68 L. J. Ch. 117; 47 W. R. 169; 79 L. T. 520; 15 T. L. R. 97—Stirling, J.

2. *Equitable Assignment of Reversionary Interest in Funds in Court by* cestui que trust—*Subsequent Assignment by her Legal Personal Representative—Stop Order.*]—A Jewess, who was entitled upon the death of her mother to share in £10,000, married a Jew in Morocco and signed a marriage contract or "ketoobah." After her death her husband, as administrator, assigned her reversionary interest, and the assignees obtained a stop order on the fund which had been paid into Court at a date prior to her marriage, and on which no other stop order had been placed.

Held—that, even assuming the "ketoobah" to operate as a good equitable assignment of the wife's reversionary interest in favour of children of the marriage, yet the assignees obtained priority by their stop order.

In re Freshfield's Trusts ((1879) 11 Ch. D. 198; 27 W. R. 375; 40 L. T. 57) followed.

Decision of Byrne, J. reversed on a new point.

Montefiore *v.* Guedalla, [1903] 2 Ch. 26; [72 L. J. Ch. 442; 88 L. T. 496; 19 T. L. R. 390—C. A.

PETROLEUM.

See Explosives.

PHYSICIANS.

See Medicine and Pharmacy; Trade.

PIERS.

See Shipping and Navigation; Waters and Watercourses.

PILOTS.

See Shipping and Navigation.

PLANS.

See Builders, &c.; Metropolis; Public Health.

PLAY.

See Copyright, &c.; Theatres, &c.

PLEADING.

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And see title Practice and Procedure.

I. MISCELLANEOUS.

And see title Judgment, No. 4.

1. *Amendment — Change of Character — Adding Parties.*]—An action being brought by

Miscellaneous—*Continued.*

the plaintiffs, owners of certain trust property at Dartmouth, for the purpose of establishing as against the Lords Commissioners of the Admiralty and the Director-General of Naval Works, that they were not entitled to enter upon, or take possession of, or to acquire by way of compulsory purchase, the land of the plaintiffs, for the purpose of establishing there a training college for cadets, and the statement of claim containing allegations of certain acts of trespass by the defendants, their servants and agents, for which damages and an injunction were claimed, the defendants made the preliminary submission that the Court had no jurisdiction to entertain the action for tort brought against them in their official capacity. The plaintiffs had also taken out a summons to amend the action by suing the defendants in their individual as well as in their official capacity, and by adding the names of two marines and a civil engineer, who had committed the alleged trespass, as co-defendants.

HELD—that without prejudicing any just claims of the plaintiffs, the action was misconceived and would not lie, and that no leave to amend should be given to the plaintiffs, as it would be changing one action into another of a substantially different character.

RALEIGH *v.* GOSCHEN, [1898] 1 Ch. 73; 67 [L. J. Ch. 59; 77 L. T. 429; 14 T. L. R. 36; 46 W. R. 90—Romer, J.

2. *Counter-Claim in Reply—Judicature Act*, 1873 (36 & 37 Vict. *c.* 66), *s.* 24, *sub-ss.* 3, 7—*R. S. C., Ord.* 19, *r.* 3; *Ord.* 21, *rr.* 10-17.]—The plaintiffs claimed for a balance of money due to them for work done for and materials supplied to the defendants. The defendants admitted that something was due, and they counter-claimed on an agreement made by them with Robert Renton Gibbs, who carried on the business before the defendants, and they set up a claim for damages for breach of the agreement. The plaintiffs denied that they ever came within the obligations and rights arising under the contract, and they further said in effect that if the contract was found to be binding on them they had a counter-claim for unliquidated damages against the defendants arising out of the contract, and that to the extent of the damages that they would recover they were entitled to set them off against anything the defendants might recover under their counter-claim. Upon an application to strike out the counter-claim in the reply:—

HELD—that looking at the wide language of sub-sect. 3, sect. 24 of the Judicature Act, 1873, and sub-sect. 7 of the same section, it was impossible to say that a matter upon which, if well founded, the plaintiff was clearly entitled to relief as against the defendant's counter-claim was not within the words and the spirit of the enactment, or to hold that such a matter was not properly brought forward at the only stage and in the only manner in which it could be raised, and that it would be unjust to the plaintiffs to make them set up as a claim that which they only wanted as a defence and a shield to the defendant's counter-claim.

Toke v. *Andrews* ((1882) 8 Q. B. D. 428; 51 L. J. Q. B. 281; 30 W. R. 659—Div. Ct.) approved.

RENTON, GIBBS & CO., LD. *v.* NEVILLE & CO., [1900] 2 Q. B. 181; 69 L. J. Q. B. 514; 48 W. R. 532; 82 L. T. 446—C. A.

3. *Reliance on Judgment by Consent against Joint Contractor — Co-defendants — Effect as regards Proceeding against the Other.*]—Where two joint contractors are sued in the same action for the same debt, a judgment recovered by consent against one is a bar to the plaintiff proceeding against the other for the same cause of action in the same way as if separate actions had been brought against the two. A defendant who relies on such a judgment as a bar ought to state in his pleadings that he does so.

MCLEOD *v.* POWER, [1898] 2 Ch. 295; 67 L. J. [Ch. 551; 79 L. T. 67; 47 W. R. 74—Byrne, J.

4. *Statutory Powers—Compensation—Damage sustained by reason or in consequence of such Powers — Negligence — Burden of Proof—Telegraph Act*, 1863 (26 & 27 Vict. *c.* 112), *ss.* 6, 7—*Telegraph Act*, 1868 (31 & 32 Vict. *c.* 110), *s.* 2.]—A public body was empowered by statute to carry out certain works, and in the same statute there was a provision for the payment of compensation to any person sustaining damages by reason or in consequence of the exercise of such power.

To a claim for compensation the public body pleaded that the damage was due to its contractors' negligence; and that therefore a claim for compensation was not the proper remedy.

See Brierley Hill Local Board v. *Pearsall* ((1884) A. C. 595; per Ld. FitzGerald)—H. L.

HELD—that the onus was on the public body to prove such negligence.

ST. JAMES'S AND PALL MALL ELECTRIC LIGHT [CO., LD. *v.* REX, (1904) 73 L. J. K. B. 518; 68 J. P. 288; 90 L. T. 344—Farwell, J.

5. *Right to Begin — Proceedings in lieu of Demurrer—R. S. C.*, 1883, *Ord.* 25, *r.* 2.]—The party who raises the objections in proceedings in lieu of demurrer begins.

STEVENS *v.* CHOWN, STEVENS *v.* CLARK, [1901] 1 Ch. 894; 70 L. J. Ch. 571; 65 J. P. 470; 49 W. R. 460; 84 L. T. 796; 17 T. L. R. 313—Farwell, J.

6. *Writ of Summons — Indorsement — Sufficiency of Address.*]—The plaintiffs, who in fact represented the Honorable Society of the Middle Temple, sued in their own names to recover possession of a set of chambers in the Temple. The address of the plaintiffs was given in the indorsement on the writ as "The Treasury, Middle Temple Lane, in the City of London."

HELD—that this was sufficient.

HAWKINS *v.* BLACK, (1898) 14 T. L. R. 398—[Div. Ct.

II. STRIKING OUT PLEADINGS.

7. *Abuse of Process of Court—Frivolous and Vexatious Defence — Admissions in Correspondence—Judgment for Plaintiff—R. S. C.*, 1883, *Ord.* 25, *r.* 4 ; *Ord.* 32, *r.* 6.]—In an action for specific performance of an agreement to purchase leasehold property. the Court, upon the pleadings and correspondence, having come to the conclusion that the defence was a dishonest one, and put in for the purpose of gaining time, ordered it to be struck out under Ord. 25, r. 4, and gave immediate judgment for the plaintiffs.

MACKELLAR *v.* HORNSEY, (1901) 49 W. R. 301—[Buckley, J.

8. *Abuse of Process of Court—Indorsement on Writ.*]—Where several claims in the indorsement on a writ are an abuse of the Court's process, the better course is to strike out not only those claims, but the whole writ, leaving the plaintiff to take such further steps as he may be advised.

The testator, who owned estates in Scotland, left the residue of his property to certain persons other than the plaintiff, his daughter. The plaintiff took proceedings in the Court in Scotland for a declaration that the testator was a domiciled Scotsman, and claiming *legitim*. The Courts decided that the testator was a domiciled Englishman, and the plaintiff appealed to the House of Lords, which appeal was pending. The testator in his lifetime had granted a lease of one of the estates, with a house on it, in Scotland to the plaintiff at a nominal rent, and at the expiration of the lease she claimed from him repayment of the sums spent by her on permanent improvements, and this claim was pending at his death. The trustees of the testator's will agreed to sell another of the estates in Scotland. The plaintiff thereupon issued a writ in the Chancery Division in England against the trustees of the testator's will, claiming administration of the testator's real and personal estate, and in paragraphs 2 and 3 a declaration that until her claim for *legitim* was satisfied the defendants were not entitled to sell any of the real or personal assets of the testator, and an injunction ; and in paragraphs 4 and 5 a declaration that she was entitled to a lien on the Scotch estates of the testator for the moneys spent on permanent improvements, and an injunction to prevent the defendants from selling the estates ; and the plaintiff registered the action as a *lis pendens*. The defendants applied to strike out paragraphs 2 to 5, and to vacate the registration of the action as a *lis pendens*.

HELD—that as the claim to *legitim*, even if it might ultimately be supported as against the personal estate. could not be maintained as against the real estate ; and as the claim to a lien for improvements could only, if at all, justify the claim to a lien on the particular estate, and as the claims were deliberately put forward in the form in which they were, the writ must be struck out altogether as being an abuse of the process of the Court.

Decision of Kekewich, J. (93 L. T. 297 ; 21 T. L. R. 752) affirmed with variation.

THE MARCHIONESS OF HUNTLY *v.* GASKELL, [1905] 2 Ch. 656 ; 75 L. J. Ch. 66 ; 93 L. T 785 ; 22 T. L. R. 20—C. A.

9. *Affidavit in Support of Application—Admissibility—R. S. C., Ord.* 25, *r.* 4.]—In an action by shareholders the defendants applied under the inherent jurisdiction of the Court to strike out the statement of claim as showing no cause of action, and tendered an affidavit in support showing that the company had ceased to exist.

HELD—that the affidavit was admissible.

VINSON *v.* PRIOR FIBRES CONSOLIDATED, LD. [(1907) 51 Sol. Jo. 81—Kekewich, J

10. *Defendant not Party to Agreement, but having Notice of it—Agreement giving Plaintiff sole Right to Sell Patented Article—Claim for Declaration—Case fit for Argument.*]—A plaintiff by agreement with A. & B. had the sole right to sell and advertise one of their patented articles. He alleged that A. and B. were allowing the S. Co. to sell and advertise these articles, and he brought an action against them all for a declaration and injunction.

The S. Co. applied to strike out the claim against them on the ground that they were not parties to the agreement.

HELD—that, as the plaintiff had alleged that they had notice of the agreement, there was clearly a case to be argued, and the application must be dismissed with "costs in any event."

HODGSON *v.* SPEEDWELL, &C., CO., LD. AND [OTHERS, (1903) 20 R. P. C. 559—Farwell, J

11. "*Frivolous and Vexatious*"—*R. S. C., Ord.* 25, *r.* 4.]—For an application to strike out a statement of claim as frivolous and vexatious to succeed, the statement must be "worse than demurrable" : there must be nothing to argue.

ROBERTS *v.* CHARING CROSS, EUSTON AND [HAMPSTEAD RY. CO., (1903) 87 L. T. 732 ; 19 T. L. R. 160—Farwell J.

12. *Gaming Transactions — Disclosing no reasonable Cause of Action.*]—In an action to recover a sum of money the defendant, before putting in a statement of defence, applied to strike out the statement of claim endorsed on the writ as disclosing no reasonable cause of action, and to dismiss the action as being frivolous and vexatious, and made an affidavit that the claim was in respect of bets made between him and the plaintiff. The plaintiff admitted that the transactions were gaming transactions.

HELD—that the action, being one which was forbidden by the Gaming Acts, ought not to be allowed to proceed.

KERSHAW *v.* SIEVIER, (1905) 21 T. L. R. 40—[C. A.

13. "*Interlocutory Matter or Thing*"—*Application by Defendant for further Directions to*

Striking out Pleadings—*Continued.*

Strike out Statement of Claim as Frivolous and Vexatious — Jurisdiction — R. S. C., Ord. 30, *rr.* 1, 2, 4, 5.]—The plaintiff applied to discharge an order made in chambers dismissing his action as frivolous and vexatious. The question was raised as to the jurisdiction of the Court to make an order upon the application of the defendant, on notice under rule 5 of Ord. 30 for subsequent directions under the summons for directions.

HELD—that as there were no merits, and no substance in the plaintiff's case beyond this application, and finding as the Court did that there was a well-established practice in both Divisions under which orders similar to the present had been made upon an application for further directions under the summons for directions, the application failed.

PEPPERELL *v.* HIRD, [1902] 1 Ch. 477; 71 L. J. [Ch. 282; 50 W. R. 491—Byrne, J.

14. *Judgment obtained by Fraud—Action to set aside Judgment by Default—Payment into Court of amount of Judgment—Malicious Bankruptcy Proceeding—Special Damage—R. S. C.* 1883, *Ord.* 25, *r.* 4, *and Ord.* 27, *r.* 15.]—Notwithstanding the provisions of Ord. 27, r. 15, which provide a short method of setting aside a judgment by default, an action to set aside such a judgment on the ground of fraud is still, subject to the discretion of the Court as to costs, maintainable without leave. The Court will not, therefore, strike out as frivolous the statement of claim in an action for that purpose, though it may order the plaintiff to pay into Court the amount of the judgment impeached. Nor will the Court strike out as frivolous a statement of claim in an action for damages in respect of bankruptcy proceedings maliciously taken, on the ground that it does not contain an allegation that the plaintiff has sustained special damage.

WYATT *v.* PALMER, [1899] 2 Q. B. 106; 68 L. J. [Q. B. 709; 47 W. R. 549; 80 L. T. 639—C. A.

15. *Letters admitting Liability—Defence denying Liability.*]—A foreigner, residing abroad, commenced an action for damages for negligence against a railway company, and was ordered to (and did) give security for costs. The defendants delivered a defence denying liability and paid money into Court. With such defence their solicitor delivered a letter saying that the denial of liability was a technical plea, that the company undertook not to contest liability, but merely pleaded the denial in order that the money might be retained in Court unless taken out on full satisfaction.

HELD—that the defence was a sham one and an abuse of the Court's process, and must be struck out.

Remmington v. *Scholes* ([1897] 2 Ch. 1; 66 L. J. Ch. 526; 76 L. T. 667; 45 W. R. 580—C. A.) applied.

CRITCHELL *v.* LONDON AND SOUTH WESTERN [RY. CO., [1907] 1 K. B. 860; 76 L. J. K. B. 422; 96 L. T. 603—C. A.

16. *Motion to strike out Defence—Motion for Judgment in default of Defence—Joinder of Motions—Ord.* 27, *r.* 11—*Ord.* 31, *r.* 21.]—Where a plaintiff moves, under Ord. 31, r. 21, to have a defendant's defence struck out for non-compliance with an order to answer interrogatories, there is no objection to his joining with such motion a motion for judgment as upon his statement of claim in default of defence, but such motion for judgment must be set down, and two separate orders should be made.

SALOMON *v.* HOLE, (1905) 53 W. R. 588—[Warrington, J.

17. *Reasonable Cause of Action — Agreement not to be performed within a Year—Statute of Frauds* (29 Car. 2, *c.* 3), *s.* 4—*Ord.* 25, *r.* 4.]—The plaintiff sued for breach of an oral agreement which, as appeared upon the statement of claim, was one not to be performed within one year from the working thereof, there being no allegation of any memorandum or note thereof in writing within sect. 4 of the Statute of Frauds. The defendant applied, under Ord. 25, r. 4., to strike out the statement of claim, on the ground that it disclosed no reasonable cause of action.

HELD—that the statement of claim disclosed a cause of action, sect. 4 of the Statute of Frauds being merely a provision as to evidence, which the defendant might or might not set up in his defence.

FRASER *v.* PAPE, (1904) 91 L. T. 340; 20 T. L. R. [798—C. A.

III. RAISING POINTS OF LAW.

18. *Principle on which Court acts—Striking out or raising Point of Law—Ord.* 25, *rr.* 2, 4.]—Ord. 25 abolished demurrers and substituted a more summary process for getting rid of pleadings which show no reasonable cause of action or defence. Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief: (1) To raise the question of law as required by Ord. 25, r. 2, appropriate to cases directing argument and careful consideration; (2) To apply to strike out the statement of claim under Ord. 25, r. 4, a more summary procedure only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks.

HUBBUCK & SONS *v.* WILKINSON, HEYWOOD [AND CLARK, [1899] 1 Q. B. 86; 68 L. J. Q. B. 34; 79 L. T. 429; 15 T. L. R. 29—C. A.

19. *Principle on which Court acts—Striking out or raising Point of Law—R. S. C., Ord.* 25, *rr.* 2, 4.]—Ord. 25 abolished demurrers and substituted a more summary process for getting rid of pleadings which show no reasonable cause of action or defence. Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be

Raising Points of Law —*Continued.*

proved, it entitles the plaintiff to relief: (1) To raise the question of law as required by Ord. 25, r. 2, appropriate to cases requiring argument and careful consideration; (2) To apply to strike out the statement of claim under Ord. 25, r. 4, a more summary procedure only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved to entitle the plaintiff to what he asks. In dealing with these applications the statement of claim must not be construed so strictly as under the old procedure by demurrer.

Hubbuck & Sons v. *Wilkinson, Heywood, and Clark* ([1899] 1 Q. B. 86; 68 L. J. Q. B. 34; 79 L. T. 429; 15 T. L. R. 29—C. A., *supra*) principle acted on.

WORTHINGTON & Co., LD. *v.* BELTON AND [OTHERS, (1902) 18 T. L. R. 438—C. A.

IV. DEFAULT OF DEFENCE.

20. *Motion for Judgment — Delivery of Minutes—R. S. C., Ord.* 27, *r.* 11.]—On motion for judgment in default of appearance, a copy of the minutes of the proposed judgment must be delivered, or the notice of motion must show its exact terms.

CHAPMAN *v.* BROOKE, [1902] 46 Sol. Jo. 215— [Byrne, J.

21. *Motion for Judgment—Statement of Claim dispensed with in order to enable Defendant to Plead—R. S. C., Ord.* 20, *r.* 1; *Ord.* 27, *r.* 11; *Ord.* 30.]—In an action for money lent the plaintiff claimed principal and interest by specially endorsed writ, and in the alternative claimed an order that the defendant complete his security. The master on summons for directions ordered that no further statement of claim be delivered, but directed the defendant to deliver his defence within a certain time. On failure to deliver defence, the plaintiff moved for judgment.

HELD—that the application must be refused, the statement of claim having been dispensed with for the purpose of enabling the defendant to plead and not to enable the plaintiff to move for judgment in default of defence.

HELD, further, that the writ might be amended by striking out the claim for alternative relief. Leave granted to re-serve the notice of motion.

MILBANK *v.* FRANCIS, [1901] W. N. 91; 111 [L. T. Jo. 9; 45 Sol. Jo. 466; 36 L. J. N. C. 239—Byrne, J.

22. *No General Summons for Directions — No Defence—Judgment in Default — Irregularities —Ord.* 27, *r.* 11; *Ord.* 30, *rr.* 1 (b), 8.]—The plaintiff delivered a statement of claim for an injunction without taking out a general summons for directions under Ord. 30, r. 1. The defendant, who had appeared, failed to deliver a defence within the limited time. The plaintiff moved for judgment in default of defence under Ord. 27, r. 11.

HELD—that the plaintiff was entitled to judgment, the order not to be drawn up for ten days, and if the defendant delivered a defence within seven days, the action to proceed. The defendant should have applied for dismissal of the action on the ground that no summons for directions had been taken out as required by Ord. 30, or have applied to have the notice of motion struck out as irregular.

HELD, also, that rule 11 of Ord. 27, was overlooked by the Rule Committee when they framed Ord. 30.

KEMP *v.* COLMAN, (1899) 80 L. T. 54—Div. Ct.

23. *Statement of Claim Filed — Writ subsequently Amended—Necessity for Refiling Statement of Claim—R. S. C., Ord.* 20, *r.* 4.]—The endorsement on the writ in an action to restrain breaches of restrictive covenants erroneously described the crucial indenture as dated in 1891, instead of 1901. The defendant being served, and not appearing, a statement of claim was filed; in it the indenture was correctly described.

Subsequently the writ was amended by substituting 1901 for 1891 in the endorsement, and the writ, as amended, together with a copy of the filed statement of claim, was personally served on the defendant.

HELD—that in consequence of the amendment of the writ, it was necessary for the plaintiff to file another statement of claim before moving for judgment in default of appearance.

SOUTHALL DEVELOPMENT SYNDICATE, LD. *v.* [DUNSDON, (1907) 96 L. T. 109—Kekewich, J.

V. PARTICULARS.

24. *Affidavit of Documents — Privilege — R. S. C., Ord.* 19, *rr.* 6, 7; *Ord.* 31, *rr.* 15, 19A (2).]—The plaintiff claimed an estate to which the defendants said she was not entitled, and they were. They said in their defence that some mortgagees, whose mortgage was created in 1883, and was in no way disputed, had, in the valid exercise of their statutory power of sale, sold and conveyed the estate to the first defendant. The plaintiff wanted particulars of that transaction.

HELD—that the defendants ought not to be allowed to maintain such a plea without giving particulars. As the authorities stand, privilege can be claimed for a number of deeds which are simply described as a bundle of documents. The Court has been a little lax in opening the door to defendants to obtain protection for documents for which, if they described them properly, they might not be entitled to protection.

Decision of Kekewich, J. reversed.

MILBANK *v.* MILBANK, [1900] 1 Ch. 376; 69 [L. J. Ch. 287; 82 L. T. 63—C. A.

25. *Claim to Ownership — Old Deed referred to—Intermediate Title not set out—Embarrassing R. S. C. Ord.* 19, *rr.* 4, 21.]—The plaintiffs, admittedly owners of a mill, and entitled to some rights over a watercourse to it, claimed to be owners in fee of the watercourse.

Particulars—*Continued.*

They alleged that by a lease and release of 1805 the mill and watercourse were granted to their "predecessor in title," and that the watercourse had ever since belonged to the mill.

HELD—that their statement of claim was not embarrassing, and that for the present no further particulars need be delivered.

PLEDGE & SONS *v.* POMFRET, (1905) 74 L. J. Ch. [357 ; 92 L. T. 560—Joyce, J.

26. *Contributory Negligence — Inevitable Accident.*] — In an action for damages for negligence, the defendants pleaded in general terms inevitable accident and contributory negligence.

HELD—that they must give particulars.

MARTIN *v.* M'TAGGART, [1906] 2 Ir. R. 120— [K. B. Div.

27. *Libel—Fair Comment—Effect of Plea.*]— The plaintiff advertised in a newspaper for a partner with £250 to complete the promotion of a colliery syndicate, and in answer to an applicant he sent him certain documents relating to the matter, which the applicant forwarded to the defendants, the proprietors of a financial newspaper. The defendants in an article purported to summarise the contents of the documents and commented upon them. In an action by the plaintiff for libel, the defendants pleaded that "in so far as the words complained of consisted of statements of fact they were in their natural and ordinary signification true in substance and in fact, and in so far as they consisted of comment they were fair and *bonâ fide* comment upon a matter of public interest"; and they gave particulars which stated that the statements of fact in the words complained of were true statements of matters appearing in the documents, and that the comments were fair comments upon the said facts and upon the plaintiff's public invitation for money. The plaintiff applied for further and better particulars as to whether the defendants alleged that any of the statements made in the documents were untrue, and, if so, which of them. The master and judge made an order for "further and better particulars of justification."

HELD—that the plea was not a plea of justification, but was only a plea of fair comment, and that the plaintiff was not entitled to the particulars asked for.

DIGBY *v.* "FINANCIAL NEWS," LD., [1906] 2 [K. B. 502 ; 76 L. J. K. B. 321 ; 96 L. T. 172 ; 23 T. L. R. 117—C. A.

28. *Libel imputing Insolvency to Bank—Run on Bank—Liquidation.*] — The plaintiffs were ordered to give particulars of the branches on which the run was made, and the period of the continuance of the run, but not particulars as to whether the run was made by depositors or ordinary customers, nor as to the *quantum* of damages claimed and how it was made.

LONDON AND NORTHERN BANK, LD. *v.* GEORGE [NEWNES, LD., (1900) 16 T. L. R. 432—C. A.

29. *Plea of Lost Grant—Date of Grant.*]— To a claim for damages for trespass the defendants pleaded a lost grant by the plaintiff's predecessors in title, and a similar grant made with the concurrence of the freeholders and copyholders of the manor.

It appeared that by a release in 1775 the *locus in quo* had been assured to the plaintiff's predecessors in trust for such freeholders and copyholders, and that in 1778 a statute had been passed for the appointment of trustees.

HELD—that the defendants must state whether they alleged the grants to have been made before 1775, between that year and 1778, or subsequently.

Hendy v. *Stephenson* ((1808) 10 East, 55) not followed.

PALMER *v.* GUADAGNI, [1906] 2 Ch. 494 ; 75 [L. J. Ch. 721 ; 95 L. T. 258—Eady, J.

30. *Proper Subject Matter for Interrogatories —Claim on Fire Insurance Policy—Defence of Earthquake—Particulars of Cause of Fire.*]— The plaintiffs sued upon a fire insurance policy. The defendants pleaded that the loss was due to an earthquake, and relied upon a condition in the policy that it should not cover loss or damage by fire occasioned by earthquake. They asked that the plaintiffs should give particulars as to the cause of the fire.

HELD—that such information ought to be obtained, if at all, by interrogatories and not by particulars.

YOUNG & CO., LD. *v.* NORTH BRITISH AND [MERCANTILE INSURANCE CO., (1907) 24 T. L. R. 73—C. A.

31. *Untrue Statements in Company's Prospectus — "Reasonable Ground to believe" that statement was true—Directors' Liability Act*, 1890 (53 & 54 Vict. *c.* 64), *s.* 3 — *R. S. C., Ord.* 19, *r.* 6.]—Where in an action brought by holders of mortgage debentures issued by a company against directors of a company, claiming compensation under the Directors' Liability Act, 1890, in respect of alleged untrue statements contained in the prospectus of the company on the faith of which the plaintiffs had applied for their debentures, the defendants plead that they believed the statements in the prospectus to be true, and had reasonable grounds for such belief, the defendants ought to be ordered to give particulars of the grounds of their belief.

ALMAN *v.* OPPERT, [1901] 2 K. B. 576 ; 70 [L. J. K. B. 745 ; 84 L. T. 828 ; 17 T. L. R. 620 ; 8 Manson, 316—C. A.

PLEDGE.

See PAWNBROKERS AND PLEDGES.

POACHING.

See GAME.

POISONS, SALE OF.

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V. VAGRANCY AND OTHER OFFENCES .

I. IN GENERAL.

1. *Injury to Pauper—Pauper set to Work by Guardians — Injury caused by Negligence of Guardians' Officer—Right of Action against Guardians—Common Employment.*]—An action will not lie by a pauper against the guardians of the poor in their corporate capacity for negligence of the officers or servants of the workhouse in an act done in discharge of the ministerial duties of the guardians.

A pauper inmate of a workhouse was set to work on a scaffold in connection with an electrical installation at the workhouse infirmary, and was injured owing to the defective condition of the scaffold, for which the head engineer of the infirmary was responsible.

HELD—that the guardians in employing the pauper upon work suited to his capacity were discharging a ministerial duty imposed upon them by the Poor Law Acts and regulations, and that an action by the pauper against them for damages for personal injuries sustained through the negligence of their officer was not maintainable; but held that, assuming that an action would lie, the doctrine of common employment did not apply.

Brennan v. *Limerick Guardians* ((1878) 2 L. R. Ir. 42) and *Dunbar* v. *Ardee Guardians* ([1897] 2 Ir. R. 76) followed.

Lerington v. *Lurgan Guardians* ((1868) Ir. R. 2 C. L. 202) distinguished.

Decision of Div. Ct. ([1906] 1 K. B. 538; 75 L. J. K. B. 353; 70 J. P. 134; 54 W. R. 532; 94 L. T. 486; 22 T. L. R. 300; 4 L. G. R. 411) reversed.

TOZELAND *v.* WEST HAM UNION, [1907] 1 [K. B. 920; 76 L. J. K. B. 514; 96 L. T. 519; 71 J. P. 194; 23 T. L. R. 325; 5 L. G. R. 507—C. A.

2. *Pauper Lunatic — Summary Reception Order—Jurisdiction of Justice—"Place where Pauper resides"—Union where Workhouse belongs —Poor Law Amendment Act*, 1844 (7 & 8 Vict. *c.* 101), *s.* 56—*Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 14, 24.]—A pauper became chargeable to the City of London union, and was admitted to the City of London union workhouse at Homerton and afterwards transferred by an order of the guardians to the infirmary at Bow. While there he became a lunatic. Bow is situated outside the boundaries of the City of London. The question arose whether in such a case, within sect. 14 (2) of the Lunacy Act, 1890, "a justice having jurisdiction in the place where the pauper resides" is an alderman of the City of London, or whether it is a magistrate of the administrative county of London, who would be the magistrate having jurisdiction where the workhouse is, to make a summary reception order with regard to the lunatic.

HELD—that an alderman of the City of London had jurisdiction to grant such an order, because he came within the proper meaning of the words "a justice having jurisdiction in the place where the pauper resides"—that is to say, though the pauper lunatic was actually in a workhouse outside the City of London, yet by virtue of sect. 56 of the Poor Law Amendment Act, 1844, that workhouse must be considered as situate in the union to which he was chargeable.

REG. *v.* BELL, [1900] 2 Q. B. 391; 69 L. J. Q. B. [622; 64 J. P. 789; 82 L. T. 711—Div. Ct.

3. *Relief—"Sudden and Urgent Necessity"—Able-bodied Men—Wilful Neglect and Refusal to Work—Wives and Children—Immediate Need —Strikes—Poor Relief Act*, 1601 (43 Eliz. *c.* 2), *s.* 1 — *Vagraney Act*, 1824 (5 Geo. 4. *c.* 83), *s.* 3—*Poor Law Amendment Act*, 1834 (4 & 5 Will. 4, *c.* 76), *ss.* 15, 52, 54—*Poor Law Audit Act*, 1848 (11 & 12 Vict. *c.* 91), *s.* 4—*R. S. C., Ord.* 25, *r.* 5.]—The payment by poor law guardians out of the poor rates of any money for setting to work or for the relief of able-bodied men, who are at the time able to obtain and perform work at wages sufficient to support themselves (and their wives and families, if any), is unlawful, and ought to be disallowed by the auditor on auditing the guardians' accounts. But this statement of the law does not include relief

In General—*Continued.*

given to or for the wives and children of such men; and it is also without prejudice to, and is in no way to affect, the power of the Local Government Board to remit such disallowed payments, even although unlawfully made under the Poor Law Audit Act, 1848, s. 4, or any other statute enabling them so to do.

It is not, however, lawful for guardians to refuse relief to those who are in immediate need of it, and are at the time unable to obtain and perform work, on the ground that such persons have reduced themselves to their present incapacity to obtain and perform work by their own wilful neglect and refusal to work in the past.

The machinery provided by sects. 32—36 of the Poor Law Amendment Act, 1844, is inadequate for the protection of the ratepayers in cases in which the poor law guardians propose improperly to grant relief, and the Attorney-General is accordingly justified, on the relation of any ratepayer who considers himself aggrieved, in coming to the Chancery Division and asking for an injunction to restrain the proposed improper expenditure.

Decision of Romer, J. (63 J. P. 536; 80 L. T. 618) reversed.

Attorney-General *v.* Merthyr Tydfil [Union, [1900] 1 Ch. 516; 69 L. J. Ch. 299; 64 J. P. 276; 48 W. R. 403; 82 L. T. 662; 16 T. L. R. 251—C. A.

4. *School District — Incorporated Board of Managers—Dissolution by Order of Local Government Board—Sale of Property and Investment of Proceeds of Sale in Consols — Postponement of Dissolution by subsequent Order — Transfer of Consols—Powers of Managers after Dissolution of District—Vesting Order—Orders of Local Government Board — Poor Law Amendment Act*, 1844 (7 & 8 Vict. *c.* 104), *ss.* 42, 43, 45 — *Metropolitan Poor Amendment Act*, 1869 (32 & 33 Vict. *c.* 63). *s.* 1 — *Dissolved Boards of Management and Guardians Act*, 1870 (33 & 34 Vict. *c.* 63), *ss.* 1, 12—*National Debt Act*, 1870 (33 & 34 Vict. *c.* 71), *s.* 22.]— Where a school district constituted under the Poor Law Amendment Act, 1844, is dissolved by an order of the Local Government Board under the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 45, the board of management continues to exist, being a body separate from the dissolved district, and the property of the district is not, under the Dissolved Boards of Management and Guardians Act, 1870 (33 & 34 Vict. c. 2), s. 12, automatically vested in the last acting managers, but such last acting managers have a right, *qua* board of management, to pass such property under their seal as a body incorporate. It is doubtful whether, when the Local Government Board has once dissolved a district under the Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), s. 1, it has power to continue the managers in power for more than a period of twelve months, except for a certain definite purpose specified on the face of the order.

It is also doubtful whether, when a school district has been dissolved by the Local Government Board under the last-named Act, and a date for dissolution has been fixed, the Local Government Board has power to postpone such date of dissolution by subsequent orders.

Morton *v.* Bank of England, [1904] 1 Ch. 664; 73 L. J. Ch. 503; 68 J. P. 268; 52 W. R. 393; 90 L. T. 375; 20 T. L. R. 230; 2 L. G. R. 734—Farwell, J.

5. *Union—Separation of Parish from Union—Apportionment of "Other Property"—Parliamentary Annuities—Poor Law Amendment Act*, 1834 (4 & 5 Will. 4, *c.* 76), *s.* 32.]—The Local Government Board made an order for the separation of a parish from a union under sect. 32 of the Poor Law Amendment Act, 1834, and were required under that section to ascertain the proportionate value of every parish of the union of the workhouse "or other property" held or enjoyed by the union for the use of the poor, and to fix the amount to be received or paid by every parish affected by the separation. Under sect. 26 of the Local Government Act, 1888, there became payable by the county council to the unions in their county, Parliamentary annuities of a certain amount, "until Parliament otherwise determine." When the separation took place the parish and the remainder of the union could no longer be jointly interested in anything; and the property of the old union had to be divided between the union which remained in existence and the parish which had ceased to form part of it.

Held—that the Parliamentary annuities were "other property" within the meaning of sect. 32 of the Poor Law Amendment Act, 1834, and that the section contemplated the capitalisation once and for all of the respective interests of the separated parish and the union at a ready-money value with reference to the state of things at the date of the separation, on the same principle as that on which the proportion of the value of a workhouse which is to be paid or secured by the union retaining the workhouse to a separated parish.

Appeal from Div. Ct. ((1900) 64 J. P. 516; 82 L. T. 385; 16 T. L. R. 338) allowed.

Reg. *v.* Local Government Board and [Willesden Guardians, [1901] 1 K. B. 210; 70 L. J. Q. B. 272; 65 J. P. 36; 49 W. R. 226; 83 L. T. 648; 17 T. L. R. 120. —C. A.

II. MAINTENANCE.

(a) Recovery of Relief.

(i.) *From Pauper.*

6. *Infant — Property of Pauper — Right of Guardians to Recover more than One Year's Maintenance—Poor Law Amendment Act*, 1849 (12 & 13 Vict. *c.* 103), *s.* 16.]—The common law right of the guardians of a union to recover from a pauper six years' maintenance has not been cut down to one year's maintenance by sect. 16 of the Poor Law Amendment Act, 1849. Therefore, where an infant pauper had become chargeable to a union, the Court ordered the executor of a will, under which the pauper

Maintenance—*Continued.*

became entitled to a legacy and a share of the residue, to pay to the guardians six years' maintenance expended by them.

In re Clabbon, [1904] 2 Ch. 465; 73 L. J. [Ch. 853; 53 W. R. 43; 91 L. T. 316; 20 T. L. R. 712; 68 J. P. 588—Farwell, J.

7. *Relief to Pauper of Contractual Capacity — Expenses of Maintenance — Common Law Liability.*] — Expenses incurred in the maintenance of a pauper constitute a debt due from the pauper to the guardians who have relieved him, notwithstanding the fact that the pauper was of contractual capacity during the period he received the relief in question, and did not accept it as a loan or agree to repay it.

Birkenhead Union *v.* Brookes, (1906) 70 [J. P. 72, 406; 95 L. T. 359; 22 T. L. R. 583; 4 L. G. R. 988—Div. Ct.

(ii.) *From Persons Liable.*

8. *Father—Married Woman having Separate Estate—Poor Relief Act*, 1601 (43 Eliz. *c.* 2), *s.* 7 *—Married Women's Property Act*, 1882 (45 & 46 Vict. *c.* 75), *ss.* 1, 21.]—A married woman, though possessed of separate estate, is not, while her husband lives, liable to contribute towards the maintenance of her father under the Poor Relief Acts.

Pontypool Union *v.* Buck, [1906] 2 K. B. [896; 76 L. J. K. B. 66; 71 J. P. 5; 95 L. T. 795; 23 T. L. R. 17; 4 L. G. R. 1148—Div. Ct.

9. *Maintenance Order — How Enforceable— Civil Debt Procedure—Poor Relief Act*, 1601 (43 Eliz. *c.* 2), *s.* 6—*Summary Jurisdiction Act*, 1879 (42 & 43 Vict. *c.* 49), *ss.* 6, 35.]—An order under sect. 6 of the Poor Relief Act, 1601, for the maintenance of a pauper relation, *e.g.*, a father, is only enforceable by the civil debt procedure under sects. 6 and 35 of the Summary Jurisdiction Act, 1879, unless the justices are satisfied that the person making default had the means to pay since the date of the order.

In re Gamble, [1899] 1 Q. B. 305; 68 L. J. [Q. B. 195; 63 J. P. 101; 79 L. T. 642; 15 T. L. R. 123—Div. Ct.

10. *Pauper Lunatic — Order on Husband— Application against Son — Further Contribution —Poor Relief Act*, 1601 (43 Eliz. *c.* 2), *s.* 6— *Poor Law Amendment Act*, 1850 (13 & 14 Vict. *c.* 101), *s.* 5.]—The fact that guardians have obtained an order on the husband of a pauper lunatic, under the Poor Law Amendment Act, 1850, sect. 5, to contribute 2*s.* a week towards the cost of her maintenance, is no answer to a summons under the Poor Relief Act, 1601, s. 6, against a son of the lunatic for an order to contribute to her maintenance.

Cole *v.* Brown, [1907] 2 K. B. 301; 76 L. J. [K. B. 847; 71 J. P. 335; 96 L. T. 710; 5 L. G. R. 727—Div. Ct.

11. *Son—Assignment of Estate by Father to Avoid Liability—"Sufficient Ability" to Relieve and Maintain—Poor Relief Act*, 1601 (43 Eliz. *c.* 2), *s.* 6.]—The appellant was the father, by his first wife, of a son who became chargeable to a union; and, in order to avoid a prospective claim for maintenance of such son, the appellant purported by a post-nuptial settlement to convey his entire property to his second wife. The justices ordered him to pay 7*s.* 6*d.* a week.

Held—without determining whether the deed could be set aside as being fraudulent, that the justices were entitled to draw the inference from all the circumstances of the case that the appellant was of "sufficient ability" to relieve and maintain his son under sect. 7 of the Poor Relief Act, 1601, although he had purported to convey away all his property.

Coulson *v.* Davidson, (1907) 71 J. P. 17; 96 [L. T. 20; 5 L. G. R. 56—Div. Ct.

(iii.) *In General.*

12. *Appeal to Quarter Sessions — Order for Maintenance of Pauper — Sum adjudged to be paid more than £3—Metropolitan Police Courts Act*, 1839 (2 & 3 Vict. *c.* 71), *s.* 50.]—There is no appeal to quarter sessions from an order of justices against relatives for the maintenance of a pauper.

An order by a metropolitan police magistrate against the relative of a pauper that he should pay 2*s.* 6*d.* a week towards the maintenance of such pauper is not an order "in which the sum or penalty adjudged to be paid" is "more than three pounds" within sect. 50 of the Metropolitan Police Courts Act, 1839.

Reg. *v.* London Justices, Ex parte Green- [wich Union, [1900] 1 Q. B. 438; 69 L. J. Q. B. 364; 64 J. P. 357; 48 W. R. 319; 82 L. T. 296—Div. Ct.

13. *Maintenance of Pauper wrongfully Removed—Order Abandoned — Time for Claim — Poor Law (Payment of Debts) Act*, 1859 (22 & 23 Vict. *c.* 49), *s.* 1.]—Where a pauper was wrongfully removed to the workhouse of the West Ham parish, alleged in the order of removal to be the place of settlement, but the pauper was afterwards removed back to the workhouse of the removing union, and the order of removal subsequently abandoned:—

Held—that a claim for the maintenance of the pauper during the period he was maintained in the West Ham workhouse was not barred by the Poor Law (Payment of Debts) Act, 1859, the same having been made within three months of the half-year during which the order was abandoned, though not within three months of the half-year during which the pauper was removed back.

West Ham Union *v.* Kingston-on-Hull [Corporation, (1901) 65 J. P. 170—French, J. Cy. Ct.

14. *Trade Union—Relief to Member—Reimbursement of Guardians—Trade Union Act*, 1871 (34 & 35 Vict. *c.* 31), *s.* 4—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 Vict.

Maintenance—*Continued.*

c. 61), *s.* 23.]—A member of a trade union having become chargeable to the parish of St. M. I.,

HELD—that the trade union could not be compelled to pay to the guardians the weekly sums which in the ordinary course would have been paid to the member if he had not become chargeable.

ST. MARY ISLINGTON GUARDIANS *v.* AMALGAMATED SOCIETY OF ENGINEERS, (1902) 66 J. P. 665—North London Police Court.

(b) Pauper Lunatics.

See also other sub-headings, and title LUNATICS, 35, 36.

(i.) *Recovery of Relief.*

15. *Annuity—Balance—Intestacy — Trust — Claim of Administrator—Statute of Limitations —The Poor Law (Payment of Debts) Act*, 1859 (22 & 23 Vict. *c.* 49), *s.* 1.]—A pauper lunatic became chargeable to the guardians of I. parish in 1879, and remained chargeable till her death in 1890. During that period an annuity to which she was entitled was paid to the guardians. In each of the first four years the annuity exceeded the sum expended on the lunatic's maintenance by about £7. There was not at any time a separate account kept in respect of the lunatic's estate. The plaintiff took out letters of administration in 1902. On a summons by the plaintiff to recover the balance of the sums received in respect of the annuity from the guardians :—

HELD — that the guardians received the annuity as trustees for the lunatic, and that the plaintiff's claim was not barred by the Statute of Limitations ; and further, that the claim was not a "debt, claim, or demand" within the meaning of sect. 1 of the Payment of Debts Act, 1859.

SMITH *v.* ISLINGTON GUARDIANS, (1902) 66 [J. P. 664—Judge Edge, Cy. Ct.

16. *Arrears of Maintenance—Limitation Act*, 1623 (21 Jac. 1, *c.* 16).]—W., a lunatic not so found, was maintained by the guardians of the S. Union in a pauper lunatic asylum from 1882 until her death in 1898. In 1894 W. became entitled to a share of a fund, and in 1895 a person was appointed to exercise the powers of a committee of W., but the fund was not in fact paid into Court to the credit of W. until after W.'s death.

In 1895 the guardians gave notice to the Master in Lunacy of their claim in respect of the past and future maintenance of W.

After the death of W. this action was commenced by the guardians against the administratrix of W., claiming arrears of maintenance.

HELD—that the expenses of maintenance were a debt of the lunatic, and that arrears of maintenance could only be recovered in respect of six years prior to the commencement of the action.

Stedman v. *Hart* ((1854) Kay, 607 ; 23 L. J. Ch. 908 ; 2 W. R. 462 ; 18 Jur. 744 ; 2 Eq. R. 816) distinguished.

In re Newbegin's Estate ((1887) 36 Ch. D. 477 ; 56 L. J. Ch. 907 ; 36 W. R. 69 ; 57 L. T. 398 — C. A.) followed.

IN RE WATSON, STAMFORD UNION *v.* BARTLETT, [1899] 1 Ch. 72 ; 68 L. J. Ch. 21 ; 47 W. R. 359 ; 79 L. T. 462 ; 7 Manson, 97—Stirling, J.

17. *Arrears of Maintenance — Decease of Lunatic — Action against Representatives of Lunatic—Payments by Receivers in Lunacy on Account of Maintenance—Statute of Limitations.*]—A pauper lunatic was maintained by the guardians of a union, and the income of the lunatic was under a lunacy order paid by the receivers of the lunatic to the guardians for the lunatic's support and maintenance. The income did not cover the cost of maintenance, and there was a large sum owing to the guardians at the date of the lunatic's death. The guardians had appropriated each payment of the receiver as a payment on account of the arrears due at the date of each payment.

HELD—in an action to recover the arrears, brought against the personal representative of the deceased lunatic—that the Statute of Limitations might be pleaded, but that the same answers to such a plea were open to the guardians as were open to an ordinary creditor.

HELD, further, that under the particular circumstances, the payments made by the receivers under the lunacy orders were payments on account, and that the guardians could recover the balance of arrears, notwithstanding that some of the amount was for maintenance more than six years before action.

WANDSWORTH UNION *v.* WORTHINGTON, [1906] [1 K. B. 420 ; 75 L. J. K. B. 285 ; 70 J. P. 191 ; 54 W. R. 422 ; 95 L. T. 331 ; 22 T. L. R. 284 ; 4 L. G. R. 320—Farwell, J.

18. *Arrears of Maintenance—Lunatic's Estate —Funds in Court.*]—A., B. and C. were paupers in receipt of relief and chargeable on the C. Union, and, being of unsound mind, orders were made for their respective reception into the county lunatic asylum as pauper lunatics. The treasurer of the asylum at various times demanded from the guardians payment for the maintenance and expenses of the lunatics, and the guardians duly paid the amounts so demanded.

The lunatics having become entitled under a will to certain moneys, which were paid by the executors and trustees of the will into Court under the provisions of the Trustee Act, 1893, the guardians took out a summons asking for recoupment of the cost of the past maintenance of the three lunatics, and also to have provision made for future maintenance out of the funds in Court belonging to each.

HELD—that an order should be made for payment annually to the guardians of the sum certified to have been expended by them in each year, such payments to be deemed to be so made on account of arrears as well as future maintenance.

RE WILLIAMS' TRUST, (1907) 71 J. P. 209 ; 96 [L. T. 563 ; 5 L. G. R. 542—Parker, J.

Maintenance—*Continued.*

19. *Money in Industrial Society—Payment to Lunatic's Wife on his Behalf—Claim of Guardians against Society for Maintenance of Lunatic—Industrial and Provident Societies Act*, 1893 (56 & 57 Vict. *c.* 39), *ss.* 29, 30—*Lunacy Act*, 1890 (53 Vict. *c.* 5), *s.* 300—*County Court—Appeal—Defect of Parties.*]—At the time of the removal of a pauper lunatic to an asylum there was standing to his credit in the books of a co-operative and industrial society the sum of £70. Upon the application of the lunatic's wife, who had also a fund standing to her credit in the books of the society, various payments were made to her out of the lunatic's fund. The society then received notice from the guardians of a claim against this fund for the maintenance of the lunatic; but, notwithstanding this notice, the society, purporting to act under the provisions of sects. 29, 30 of the Industrial and Provident Societies Act, 1893, transferred the balance of £55 to the wife's account in their books. Thereupon the guardians presented a petition in the county court against the society under sect. 300 of the Lunacy Act, 1890, for reimbursement out of the £55 of the cost of removal of the lunatic to the asylum, and of the expenses of his past and future maintenance.

HELD—that the transfer by the society of the £55 to the wife's account was not a good payment on the lunatic's behalf within the meaning of sect. 29 of the Industrial and Provident Societies Act, 1893, and that the guardians were entitled to be reimbursed the expenses in question.

HELD, also, that although the wife ought to have been made a party to the petition, yet inasmuch as the objection as to want of parties had not been taken in the county court, and was not put forward as a ground of appeal in the notice of appeal to the Divisional Court, the point was not open to the society in the Court of Appeal.

Decision of Div. Ct. (74 J. P. 297; 4 L. G. R. 1087) reversed.

GLOUCESTER UNION *v.* GLOUCESTER CO-[OPERATIVE AND INDUSTRIAL SOCIETY, (1907) 71 J. P. 169; 96 L. T. 168; 5 L. G. R. 493—C. A.

20. *Receiver—Death of Lunatic—Administration Action by Guardians—Six Years' Arrears.*] There is no jurisdiction in lunacy to bind a creditor in any proceedings in the High Court.

The lunacy jurisdiction prefers the present and future comfort of the lunatic to the claim of any creditor.

A pauper lunatic was maintained by guardians of a union from November 1st, 1889, until her death on June 22nd, 1899. On October 14th, 1895, she became entitled as next of kin to £261. On January 31st, 1891, a Master in Lunacy appointed a receiver of the £261, and directed him to pay £95 14*s.* due to the guardians for maintenance of the lunatic from October 14th, 1895, to February 14th, 1899, and to apply the balance in future maintenance of the lunatic. At the death of the lunatic intestate there remained a balance of over £100. The guardians brought a creditor's administration action to obtain payment of the sum due for past maintenance.

HELD—that the claim of the guardians in respect of the rest of the six years for past maintenance was capable of being enforced after the lunatic's death.

IN RE TAYLOR; EDMONTON UNION *v.* DEELY, [1901] 1 Ch. 480; 70 L. J. Ch. 332; 84 L. T. 35—C. A.

(ii.) *Weekly Sum.*

21. *Expenses of Maintenance at Asylum—Lunatics sent from other Counties—Weekly Sum fixed by Visiting Committee—Limit—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *s.* 283.]—By sect. 283 of the Lunacy Act, 1890: (1) "Every visiting committee shall fix a weekly sum, not exceeding 14*s.*, for the expenses of maintenance and other expenses of each pauper lunatic in the asylum. . . " (3) "A committee may fix a greater weekly sum, not exceeding 14*s.*, to be charged in respect of pauper lunatics other than those sent from or settled in a parish or place within the county or borough to which the asylum belongs."

In a case where a visiting committee had fixed a weekly sum of 21*s.* in respect of an out-county lunatic pauper, purporting to be as to 12*s.* 3*d.* under sub-sect. (1) and as to 8*s.* 9*d.* under sub-sect. (3):—

HELD—that the committee had only power under sub-sects. (1) and (3) to fix a total weekly sum of 14*s.* in respect of such a pauper, as the "greater weekly sum not exceeding 14*s.*" mentioned in sub-sect. (3) is not an extra charge over and above the sum not exceeding 14*s.* fixed under sub-sect. (1).

Decision of the Div. Ct. ([1904] 2 K. B. 709; 73 L. J. K. B. 985; 68 J. P. 538; 53 W. R. 153; 91 L. T. 655) affirmed.

FITCH *v.* BERMONDSEY GUARDIANS, [1905] 1 [K. B. 524; 74 L. J. K. B. 250; 69 J. P. 102; 53 W. R. 308; 92 L. T. 343; 21 T. L. R. 206; L. G. R. 300—C. A.

(c) Bastards.

22. *Marriage of Mother to Man able to Maintain—Order against Putative Father—Poor Law Amendment Act*, 1834 (4 & 5 Will. 4, *c.* 76), *s.* 57—*Bastardy Laws Amendment Act*, 1873 (36 & 37 Vict. *c.* 9), *s.* 5.]—When the mother of a bastard has married a man able to maintain it, but, on its becoming chargeable, the putative father is summoned to "show cause" why he should not contribute to its maintenance, the justices may make an order against him, but (*semble*) they may consider the facts of the marriage and the husband's means in deciding whether cause has been shown.

A child may be "chargeable," although its mother's husband is able to maintain it.

PLYMOUTH GUARDIANS *v.* GIBBS, [1903] 71 [K. B. 177; 72 L. J. K. B. 33; 67 J. P. 61; 51 W. R. 157; 87 L. T. 685; 19 T. L. R. 113; 1 L. G. R. 48—Div. Ct.

III. **OVERSEERS.**

See also PUBLIC AUTHORITIES; RATES AND RATING.

23. *Assistant Overseer—Appointment—Collection of Rates—Right to Rate and other Books—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 5 (1).]—By sect. 5 (1) of the Local Government Act, 1894, the power and duty of appointing and revoking the appointment of an assistant overseer for every rural parish having a parish council is transferred to and vested in the parish council. The overseers of a parish kept the rate and other parish books from an assistant overseer, elected by a resolution of a parish council.

HELD—that the assistant overseer was entitled to have delivered up to him the rate and other books of the parish for the purpose of enabling him to perform the duties of his office.

Reg. v. *Overseers of Christchurch* ((1857) 27 L. J. M. C. 23; 21 J. P. 533) considered.

REG. *r.* POWELL; EX PARTE WILLIAMS, [1899] [1 Q. B. 396; 68 L. J. Q. B. 274; 63 J. P. 84; 80 L. T. 184; 15 T. L. R. 157—Div. Ct.

24. *Assistant Overseer—Illegal and excessive Distraint for Poor Rate—Bailiff instructed by Assistant Overseer—Whether Overseer liable for acts of Assistant Overseer and Bailiff—Poor Relief Act*, 1819 (59 Geo. 3, *c.* 12), *s.* 7.]—Overseers are not liable *virtute officii* for illegal acts (*e.g.*, an illegal distraint) on the part of the assistant overseer, for he is an independent officer appointed under statutory authority by, and as the servant of, the parish.

BAKER AND WIFE *r.* WICKS AND OTHERS, [1904] 1 K. B. 743; 73 L. J. K. B. 410; 68 J. P. 263; 52 W. R. 556; 90 L. T. 706; 20 T. L. R. 382; 2 L. G. R. 1155—Ld. Alverstone, C.J.

IV. **SETTLEMENT AND REMOVAL.**

(a) Derivative Settlement.

25. *Derivative Settlement—Divided Parishes Act*, 1876 (39 & 40 Vict. *c.* 61), *s.* 35.]—Where an inquiry is made into the settlement of a pauper who has not acquired a settlement, and it appears that the settlement of the parent of the pauper was derivative, the inquiry is not to be pursued further, and the pauper is to be deemed to be settled in the place of his birth.

A pauper was born in the appellant union, and became chargeable to it. She had never acquired a settlement of her own, and was the illegitimate daughter of a woman who was a legitimate child, born in the respondent union, who had never acquired any other settlement of her own.

HELD (affirming the judgment of the Court below)—that the pauper must be deemed to be settled in the appellant union.

PLYMOUTH UNION *r.* AXMINSTER UNION, [1898] A. C. 586; 62 J. P. 612; 67 L. J. Q. B. 871; 79 L. T. 4; 14 T. L. R. 533; 47 W. R. 33—H. L. (E.)

(b) Divided Parishes.

26. *Alteration of Parish—Addition of part of Parish to another Parish—Whether Settlement destroyed—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 Vict. *c.* 61), *s.* 1; *Poor Law Act*, 1879 (42 & 43 Vict. *c.* 54.]—By an Order of the Local Government Board made under the Divided Parishes Act, 1876, and the Poor Law Act, 1879, part of the parish of Wanstead was added to and amalgamated with the parish of West Ham.

HELD—that the identity of the parish of West Ham was not destroyed, and that therefore a settlement required in that parish before the Order was made continued to exist.

Reg. v. *Inhabitants of Tipton* ((1842) 3 Q. B. 215) discussed.

Decision of C. A. ([1902] 1 K. B. 562; 71 L. J. K. B. 299; 66 J. P. 356; 50 W. R. 275; 86 L. T. 134; 18 T. L. R. 275) affirmed.

WEST HAM UNION *r.* LONDON COUNTY COUNCIL, [1904] A. C. 40; 73 L. J. K. B. 85; 68 J. P. 145; 52 W. R. 465; 89 L. T. 614; 20 T. L. R. 127; 2 L. G. R. 301—H. L. (E.).

27. *Division of Parish into separate Parishes—Loss of Settlement—Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 1, *sub-s.* 3.]—Where a parish, which is partly within and partly without a rural sanitary district, is divided into separate parishes under sect. 1, sub-sect. 3 of the Local Government Act, 1894, a settlement acquired in the undivided parish before its division is extinguished; and a person does not by reason of such previous settlement in the undivided parish, acquire a settlement in either of the separate parishes.

Reg. v. *The Inhabitants of Tipton* (3 Q. B. 215) followed.

Decision of the Divisional Court (61 J. P. 708; 66 L. J. Q. B. 739; 77 L. T. 466; 13 T. L. R. 558) affirmed.

DORKING UNION *r.* ST. SAVIOUR'S UNION, [1898] 1 Q. B. 594; 62 J. P. 308; 67 L. J. Q. B. 408; 78 L. T. 29; 14 T. L. R. 213; 46 W. R. 309—C. A.

Overruled. *See West Ham Union* v. *Edmonton Union*, No. 33, *infra*.

28. *Division of Parish—County Council Order—Three Years' Residence—Local Government Act*, 1888 (51 & 52 Vict. *c.* 41), *s.* 57.]—By an order of the Local Government Board confirming an order of a county council under sect. 57 of the Local Government Act, 1888, after dividing an existing parish into two new separate parishes, it was provided that any person who should have acquired a status of irremovability in the existing parish should be deemed to have acquired a status of irremovability in that one of the new parishes in which he was residing at the time when the order came into operation.

HELD—that this provision did not operate to give a settlement in either of the new parishes to a pauper who had at the date of the coming into operation of the order acquired not merely a status of irremovability in the existing parish, but also a settlement there by three years' resi-

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dence, which settlement was extinguished by the division of the existing parish.

CALNE UNION *v.* ST. MARY, ISLINGTON, (1900) [69 L. J. Q. B. 400; 64 J. P. 246; 82 L. T. 121—Div. Ct.

29. *Divided Parish—Preservation of Settlement—County of Southampton (South Stoneham and Eastleigh) Confirmation Order*, 1893.]—By the County of Southampton (South Stoneham and Eastleigh) Confirmation Order, 1893, a new parish of Eastleigh was constituted out of the parish of South Stoneham. By sect. 12 it was declared that "as between the parish of Stoneham and Eastleigh every person who has acquired or shall on or before March 25th, 1894, acquire a settlement in the existing parish of South Stoneham shall be deemed to have acquired such settlement in South Stoneham or in Eastleigh, according as the acts or circumstances conferring such settlement shall have been done or taken place in South Stoneham or Eastleigh, or (if such acts or circumstances shall have been done or taken place partly in South Stoneham or partly in Eastleigh) then according as his last place of residence in the existing parish of South Stoneham at the time of acquiring such settlement shall have been South Stoneham or in Eastleigh, except where any such person shall have ceased to reside in South Stoneham or Eastleigh, as the case may be, after March 25th, 1894, and before becoming chargeable. The provisions of this clause shall have effect unless or until the settlement of such person shall be duly determined to be in such parish other than South Stoneham or Eastleigh."

HELD—that all settlements of paupers in the divided parish of South Stoneham were preserved notwithstanding the division of the parish.

Worcester Union v. *Birmingham Union* ((1887) [then unreported but now reported 65 J. P. 771—C. A. (*see infra*)]) followed.

SOUTH STONEHAM UNION *v.* RICHMOND UNION, [(1901) 65 J. P. 760—Surrey Qr. Sess.

30. *Divided Parish—Preservation of Settlement—Worcester Extension Act*, 1885 (48 & 49 Vict. *c.* clxiv.), *s.* 101.]—A pauper had a settlement in the parish of Claines, near Worcester, by the year 1880. In 1885 the Worcester Extension Act, 1885, was passed enlarging the boundary of the borough and taking a portion of Claines into that boundary and leaving a portion of the parish out. The parish was thus divided into North Claines and South Claines. By sect. 101 of that Act it was enacted that "as between the parishes of North Claines and South Claines, and as between the Droitwich Union and the Worcester Union, every person, &c." (words similar to those in the case above).

HELD—that the settlement of the pauper was preserved in South Claines, the part of the old parish of Claines in which she resided when she acquired her settlement in that parish.

WORCESTER UNION *v.* BIRMINGHAM UNION, [(1901) 65 J. P. 771—C. A.

31. *Division of Parish by virtue of Local Government Act*, 1894 (56 & 57 Vict. *c.* 73)—*Subsequent Division and Amalgamation of Parishes—Provisional Order—Restoration of Settlement.*]—C. E. L. had by residence from 1886 to 1891 acquired a settlement in the parish of B. By virtue of the operation of the Local Government Act, 1894, the parish of B. was divided into two parishes, which were thereafter known as the parishes of W. and B. respectively. The residence of C. E. L. had been in that part of the parish of B. which after the division became the parish of W.

In 1902, by a Provisional Order of the Local Government Board (duly confirmed), the parish of W., a part of the then parish of B., a part of the parish of W. T., and the parish of H. were formed into the new parish of W.; and certain other divisions and amalgamations of parishes were made by the same Order.

Article xxxi. of the Order made provision for the preservation of settlements and of *status* of irremovability that had been acquired in the existing parishes affected by the Order; and further provided that "for all purposes of settlement and removal residence prior to the commencement of this Order in any part of the existing parishes of B., H., W. T., or W. shall be deemed to have been residence in the parish in which the part is included by this Order."

HELD—that the settlement that C. E. L. had acquired in the old parish of B., and which was destroyed by the operation of the Local Government Act, 1894, was not restored by the Provisional Order, and that C. E. L. was not settled in the parish of W.

EAST PRESTON UNION *v.* LEWISHAM UNION, [(1904) 68 J. P. 404; 91 L. T. 418—Div. Ct.

32. *Division of Parish—Order by Joint Committee of County Councils under Local Government Acts*, 1888 *and* 1894—*Article providing for Settlements in Divided Parish to continue in New Parishes—Validity—Local Government Acts*, 1888 (51 & 52 Vict. *c.* 41), *ss.* 57, 59, *and* 1894 (56 & 57 Vict. *c.* 73), *ss.* 36, 42, 69.]—At the passing of the Local Government Act, 1894, a parish was situate in two urban districts. Such parish was divided, and an Order relating to such division was made by a joint committee of county councils under the Local Government Acts, 1888 and 1894, and confirmed by the Local Government Board. The Order contained, *inter alia*, articles of the common type preserving settlements and status of irremovability.

HELD—that whether or not there was power to include in the Order the articles in question, such Order must, by reason of sect. 42 of the Act of 1894, at the expiration of six months after confirmation by the Local Government Board be presumed to have been duly made and to be within the powers of sect. 57 of the Act of 1888, and no objection to its validity could be entertained.

Semble, the articles were in fact *intra vires*.

Decision of Div. Ct. ([1906] 2 K. B. 365; 75

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L. J. K. B. 784; 70 J. P. 385; 95 L. T. 419; 4 L. G. R. 873) affirmed.

REX *v.* MIDDLESEX JJ.; EX PARTE WALSALL [UNION, [1907] 2 K. B. 581; 76 L. J. K. B. 839; 71 J. P. 393; 96 L. T. 798; 23 T. L. R. 524; 5 L. G. R. 1232—C. A.

33. *Division of Parish—Effect on Settlement—Divided Parishes Act*, 1876 (39 & 40 Vict. *c.* 61), *ss.* 1, 6—*Local Government Act*, 1894 (56 & 57 Vict. *c.* 73), *s.* 1, *sub-s.* 3.]—Where a parish is divided under the Local Government Act, 1894, into two parishes so that each part becomes a separate parish, the settlements gained by the paupers in the original parish are not destroyed, but the settlement remains in the particular place where it was originally gained.

Reg. v. *Tipton* ((1842) 3 Q. B. 215) and *Dorking Union* v. *St. Saviour's Union* (No. 27, *supra*) overruled.

WEST HAM GUARDIANS *v.* EDMONTON GUARDIANS, [1908] A. C. 1; 77 L. J. K. B. 85; 72 J. P. 9; 6 L. G. R. 39; 98 L. T. 1; 24 T. L. R. 108—H. L. (E.).

(c) Husband and Wife.

35. *Capacity of Deserted Wife to acquire a Settlement different from that of her Husband—Poor Law Settlement (Scotland) Act*, 1898 (61 & 62 Vict. *c.* 21), *s.* 1.]—When a husband deserts his wife, she cannot, until the dissolution of the marriage, acquire a settlement different from that which was her husband's at the time he deserted her.

Gray v. *Fowlie* ((1847) 9 D. 811) affirmed.

Decision of Ct. of Sess. ((1901) 3 F. 705) reversed.

RUTHERGLEN PARISH COUNCIL *v.* GLASGOW [PARISH COUNCIL, [1902] A. C. 360; 51 W. R. 65; 86 L. T. 607—H. L. (Sc.)

36. *Deserted Wife—Evidence—Admissibility of Separation Order—Effect of Separation Order on Desertion — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 Vict. *c.* 39)—*Poor Removal Act*, 1861 (24 & 25 Vict. *c.* 55), *s.* 3—*Poor Law Amendment Act*, 1866 (29 & 30 Vict. *c.* 113), *s.* 17.]—In October, 1899, C. S. T., the wife of F. W. T., left her husband, and shortly after went to reside in the parish of P., where she remained until June, 1902. On that date she for the first time became chargeable, and was subsequently removed to a county lunatic asylum. In November, 1905, an order of justices was obtained adjudicating her place of settlement to be in the parish of B. in the B. Union, wherein her husband was settled. The guardians of the B. Union appealed against this order upon the ground that at the time of her becoming chargeable to the guardians of the parish of P., C. S. T., being a "deserted" woman, was irremovable from the parish of P. by reason of a year's residence therein; and in support of their appeal the guardians of the B. Union proposed to adduce in evidence a separation order which she had obtained on October 23rd, 1899, under the Summary Jurisdiction (Married Women) Act. 1895, upon the ground of the persistent cruelty to her of her husband, causing her to leave him and to live separately and apart from him.

HELD—(1) that the separation order was admissible as evidence of desertion.

And (2) that, assuming that F. W. T. had deserted C. S. T. prior to the date of the separation order, the intervention of the separation order did not prevent her from acquiring a status of irremovability as a deserted woman.

BRISTOL UNION *v.* PADDINGTON UNION, (1906) [70 J. P. 447—Qr. Sess.

37. *Deserted Wife—Misconduct of Wife—Desertion, what is—Poor Removal Act*, 1861 (24 & 25 Vict. *c.* 55), *s.* 3.]—Where a married woman is, whether rightfully or wrongfully, sent away by her husband so as to be left as a free woman, she is deserted by him within the meaning of sect. 3 of the Poor Removal Act, 1861, and she can so reside as to acquire a status of irremovability apart from him, unless he returns to cohabit with her.

The pauper, a married woman, who was living with her husband in the Lambeth Union, had, previously to October, 1895, given way to intemperance, and on the 12th of that month her husband told her that they must part for a time; that she would have to find other lodgings, and he would allow her 8*s.* per week as long as she kept straight, and that if she reformed they could live together again, and that she might take sufficient furniture to furnish a room. The wife thereupon left the house and the allowance of 8*s.* per week was paid her for eleven months. The husband then discovered that she had committed adultery, and stopped the allowance, and thenceforward never saw his wife nor contributed to her maintenance. The wife then went to reside with another man in the appellant union and lived with him until, in July, 1903, she was found a wandering lunatic in the respondent union and was removed to an asylum.

HELD—that the pauper had been deserted by her husband within the meaning of sect. 3 of the Poor Removal Act, 1861, and that, therefore, her residence in the appellant union had rendered her irremovable therefrom.

R. v. *Maidstone Union* ((1880) 5 Q. B. D. 31; 49 L. J. M. C. 25; 44 J. P. 440; 41 L. T. 586—Div. Ct.) followed.

Decision of Div. Ct. (69 J. P. 265; 93 L. T. 134; 3 L. G. R. 568) affirmed.

SOUTHWARK UNION *v.* CITY OF LONDON UNION, [1906] 2 K. B. 112; 75 L. J. K. B. 559; 70 J. P. 449; 54 W. R. 547; 94 L. T. 763; 22 T. L. R. 568; 4 L. G. R. 730—C. A.

38. *Husband having no Settlement — Husband absent, but intending to return—Acquisition of status of Irremovability by Married Woman during Coverture.*]—The pauper was the wife of a foreigner with no settlement of his own. They were married on July 6th, 1890. They had four

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children—D., born in August, 1892, in America: R., in January, 1898, in the parish of West Bromwich; H., born in October, 1899, in the parish of West Bromwich; and C., born in April, 1902, in the workhouse infirmary in the parish of Birmingham. The pauper and her husband came to reside in the parish of Birmingham in January, 1901, and continued so to reside till June 20th, 1901, when her husband went to America to work for his brother-in-law, intending to send for his wife and children when he got settled. The pauper heard from him several times, but he said he was not able to get work and had made up his mind to return. He had not returned at the date of the order of removal, but it was found as a fact that he had not deserted his wife, and had an *animus revertendi*. The pauper continued to reside with her children in the parish of Birmingham until March 27th, 1902, when she removed with them to the Birmingham Workhouse, where the youngest child was born, April 20th, 1902. She remained till September 9th, 1902, when she went out with all her children and had not returned. The pauper was born in 1869, and at the time she had attained the age of sixteen years had a derivative settlement by residence with her father in the parish of Bredon, in the Tewkesbury Union. The justices made an order for the removal of the pauper to the Tewkesbury Union. The Recorder, on appeal, quashed the order of removal ((1903) 67 J. P. 160).

HELD—the Recorder was right. That the panper was irremovable from the parish of Birmingham, by reason of her continuous residence there for more than one year prior and up to the date of the order of removal.

R. v. *St. George in the East* ((1870) L. R. 5 Q. B. 364; 39 L. J. M. C. 90; 34 J. P. 409) followed.

TEWKESBURY UNION *v.* BIRMINGHAM UNION, [1904] 2 K. B. 395; 73 L. J. K. B. 797; 68 J. P. 397; 90 L. T. 787; 20 T. L. R. 499; 53 W. R. 268—Div. Ct.

39. *Husband Living in England and having Settlement there—Wife born in France—Wife living apart in Scotland and becoming Chargeable—No Power to Remove Wife to Husband's Settlement in England—Poor Law (Scotland) Act*, 1845 (8 & 9 Vict. *c.* 83), *s.* 77—*Poor Removal Act*, 1862 (25 & 26 Vict. *c.* 113), *s.* 2.]—There is no power to remove to England a person becoming chargeable in Scotland, unless such person was actually born in England, except in the case of a wife, or child, removed together with the husband, or parent. It is not sufficient that such person has a settlement in England in right of her husband, who was born, and is still living, there.

IN RE ALSTON'S APPLICATION, (1904) 68 J. P. 80 [—Ct. of Sess.

40. *Husband passing under Assumed Name—Non-Disclosure — Grounds of Removal — Sufficiency—Settlement by Renting and Payment of Rates and Taxes.*]—An order of justices adjudicated the settlement of a pauper, B. C., a married woman, to be in the parish of St. B., in the St. A. Union, and directed her removal to that union accordingly. The grounds of removal were that B. C. was the wife of T. C., and that T. C. had acquired a settlement in the parish of St. B. by renting and payment of rates and taxes.

The guardians of St. A. appealed on the ground that T. C. had never acquired such a settlement. In fact, as they discovered after serving notice of appeal, T. C. had so acquired a settlement in the parish of St. B., but whilst living in that parish had always passed under the assumed name of L. M., and had paid his rates and rent in that name.

HELD—that the non-disclosure of the assumed name of T. C. in the grounds of removal did not vitiate the order.

ST. AUSTELL UNION *v.* ST. MARYLEBONE [GUARDIANS, (1905) 69 J. P. 416—Qr. Sess.

(d) Settlement by Residence.

41. *Break of Residence — Servant* — Animus Revertendi *to House of Mistress — Determination of Mistress not to receive her again—No Knowledge of such Determination by Pauper.*]—A pauper lunatic, who had been deserted by her parents, was sent by the Great Yarmouth Union to a home for feeble-minded girls at Ipswich. She afterwards went into service at Weeley, in the appellant union, and acquired a status of irremovability in that union. Her malady becoming more pronounced, she desired to return to the home. Her mistress had determined to get rid of her, but did not communicate this decision to the servant. The servant, on leaving Weeley, expressed a desire to return there to the service of her former mistress after being cured at the home. On arrival at the home, she became incurably insane and incapable of exercising any choice as to her residence.

HELD—that there was such a break of residence as to destroy her status of irremovability in the Tendring union.

TENDRING UNION *v.* IPSWICH UNION, (1903) [67 J. P. 304; 1 L. G. R. 574—Div. Ct.

42. *Break of Residence—Loss of Status of Irremovability—Intention of being sent to another Workhouse.*]—An old woman had a settlement in the Cambridge Union, and she had an invalid son who also had the same settlement. By residing in the Union of Edmonton she became irremovable there, and ultimately both she and her son went into the Edmonton Workhouse, and in the end her son was removed to the Cambridge Workhouse as being his place of settlement. His mother, being anxious to join him, got discharged from the Edmonton Workhouse and went to a relative at West Ham for a week for the purpose of breaking her irremovability in the Edmonton Union, and then returned to Edmonton Workhouse for the purpose of being sent to join her son in the Cambridge Workhouse.

HELD—that the quarter sessions were right in

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affirming the order sending her back to her original settlement at Cambridge.

CAMBRIDGE UNION *v.* EDMONTON UNION, [1900] [2 Q. B. 111; 69 L. J. Q. B. 584; 64 J. P. 532; 48 W. R. 558; 82 L. T. 494—Div. Ct.

43. *Break of Residence—Illegally procuring Removal—Evidence—Poor Removal Act*, 1846 (9 & 10 Vict. *c.* 66), *ss.* 1, 3, 6.]—Two unemancipated children and their mother, a widow, became chargeable to the P. Union in November, 1901, the mother being then irremovable from P. by reason of one year's residence without interruption or relief. In the same month the mother ceased to have relief except on account of the said children, who remained in the P. Union schools and were still there when the mother went to her own home in P. In February, 1902, the mother removed to W. H. Union leaving her said children still chargeable to P. Union.

HELD—that the mother lost her status of irremovability from P. when she went to W. H., notwithstanding that the relief, through her children, was uninterrupted.

HELD, further, that an order for the removal of the children to W. H. was good, because the mother's irremovability from P. having gone, the children were removable to the parish of their last settlement.

HELD, further, that a statement by the relieving officer of the P. Union made to the mother, to the effect that her removal to W. H. from P. would not make any difference to her children, was not sufficient to prevent the irremovability from lapsing on the ground of fraud.

Cf. *Reg.* v. *St. Marylebone*, (1853) 16 Q. B. 299; 15 Jur. 289; 20 L. J. M. C. 173.

WEST HAM UNION *v.* POPLAR UNION, (1902) [66 J. P. 504 — Loveland, K.C., London County (Qr.) Sess.

44. *Break of Residence—Residence in Consecutive Years—Compulsory Absence on Military Service*—Animus revertendi—*Poor Removal Act*, 1846 (9 & 10 Vict. *c.* 66), *s.* 1—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 Vict. *c.* 61), *s.* 34.]—The absence from a parish of a reservist on military service abroad constitutes a break in the residence required to obtain a settlement under sect. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, although such service is compulsory, and although the reservist throughout such service retains an *animus revertendi*, and did, in fact, after such service, return to his parish.

The three years' residence required to obtain a settlement under sect. 34 must be consecutive.

St. Olave's Union v. *Canterbury Union* ([1897] 1 Q. B. 682; 66 L. J. Q. B. 471; 61 J. P. 371; 45 W. R. 529; 76 L. T. 517—Div. Ct.) followed.

MAIDSTONE UNION *v.* NEWARK UNION, (1905) [69 J. P. 413; 3 L. G. R. 1005; 93 L. T. 602 —Div. Ct.

45. *Break of Residence—Widow in Receipt of Relief—Poor Law Amendment Act*, 1834 (4 & 5 Will. 4, *c.* 76), *s.* 5—*Poor Removal Act*, 1846 (9 & 10 Vict. *c.* 66), *s.* 1.]—A person who has acquired a status of irremovability does not lose that status by changing his residence if he is, and continues to be, in receipt of relief from the union in which he acquired such status.

A woman and her husband resided in the West Ham Union from September 12th, 1894, to February, 1901, and acquired a settlement in such union, and two children were born there during such residence. In February, 1901, the family went to reside in the Poplar Union, and remained there till June, 1902, when the woman's husband died. The woman continued to reside in the Poplar Union till June 8th, 1904. She had, previously to the death of her husband, acquired a status of irremovability from such union. On the last-mentioned date the woman left the Poplar Union for the purpose of looking for employment, and went with a third child to reside in the West Ham Union. During her residence in the Poplar Union the woman had been since the death of her husband constantly in receipt of outdoor relief, and her other two children had been taken into the parochial schools and boarded and educated at the expense of the guardians, where they remained up to the date of an order of removal which was obtained as to these two children when the mother ceased to live in the Poplar Union as aforesaid.

HELD—that as by 4 & 5 Will. 4, c. 76, s. 56, the woman, owing to the relief given to her children, must be deemed to have been herself in receipt of relief from the Poplar Union, she could not whilst in receipt of such relief break her residence in the Poplar Union, and must be deemed to be irremovable from that union, and that the order of removal was therefore wrongly made.

Hartfield v. *Rotherfield* ((1852) 17 Q. B. 746; 21 L. J. M. C. 65; 16 J. P. 181) applied and followed.

Decision of Qr. Sess. (69 J. P. 256) affirmed.

WEST HAM UNION *v.* POPLAR UNION, (1906) [70 J. P. 255; 94 L. J. 769; 4 L. G. R. 512—Div. Ct.

46. *Emancipation—Residence of Child over Sixteen in different Union from Parents—Absence from Parents at time of reaching Sixteen Years of Age—Breaks of Residence—Emancipation for Purposes of Removability—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 Vict. *c.* 61), *s.* 35; *Poor Removal Act*, 1846 (9 & 10 Vict. *c.* 66), *s.* 1, *and Amending Acts—Lunacy Act*, 1890 (53 Vict. *c.* 5), *ss.* 287, 294.]—A child over sixteen years of age, having no other settlement than a parentage settlement, not residing in the same union as its parent, is emancipated as much for the purposes of removal and acquiring irremovability by statute as for the purpose of acquiring a settlement in its own right.

E. S., a pauper lunatic, was born at M. in 1884; her father lived in the township of L. for a term of three years and upwards up to 1896, in such manner, &c., as to acquire a settlement pursuant to sect. 34 of the Divided Parishes

Settlement and Removal—*Continued.*

Act, 1876, and, when E. S. reached sixteen, on July 25th, 1900, this was her father's last legal settlement. E. S. was sent to service in B. at about fourteen years old, and remained there until August, 1900, when she was over sixteen. Meanwhile her father had come to reside in St. A., more than twelve months before July 25th, 1900, and he continued to reside there until the lunatic was removed to an asylum in June, 1903. In August, 1900, E. S. came to her father's house in St. A., and remained a short time; then went to service in London, and subsequently went to hospitals, homes, and different places of service up to May, 1903, when she became chargeable to the parish of S. M. L., after one day's residence, and was subsequently removed therefrom to an asylum on June 6th, 1903.

HELD—that an order of justices adjudging the lunatic to be chargeable to the township of L. was good; she was not irremovable from St. A. union in right of her father, because she became emancipated on attaining sixteen years of age.

LANCASTER UNION *v.* ST. MARY, ISLINGTON [(1904) 67 J. P. 443—Qr. Sess.

47. *Illegitimate Children Residing with Mother and Reputed Father—Mother Married Woman Living Apart from her Husband—Death of Mother—Irremovability of Children*—9 & 10 Vict. *c.* 66, *ss.* 1, 3; 11 & 12 Vict. *c.* 111, *s.* 1.]—F. P., the mother of the three pauper children, had married W. P. on April 11th, 1895, at Y., in the Maidstone Union. On September 17th, 1895, she left her husband and cohabited with a man named T. M. at Battersea, in the Wandsworth Union. Between October, 1895, and March 25th, 1903, the three pauper children were born in Battersea, and in the case of the two elder children the father's name was registered as T. M., but was left blank in the register of the birth of the third child. On October 15th, 1900, F. P. returned to her husband at Y., but left him on December 28th, 1900, and returned to T. M. On December 13th, 1901, she was admitted to the Wandsworth Union and certified as a lunatic, and on January 3rd, 1902, an order was made adjudging her settlement to be in the Maidstone Union, being that of her husband, and she was removed to the Kent County Asylum. On April 2nd, 1902, she was discharged, and returned to cohabitation with T. M. On February 28th, 1905, she died in Battersea. The children remained with their reputed father, T. M., till March 2nd, 1905, when they and he were admitted to the workhouse and became chargeable to the Wandsworth Union. On March 3rd, 1905, T. M. died in the workhouse of the Wandsworth Union.

HELD—that the children were residing with their reputed father, T. M., and as he was irremovable from the Wandsworth Union, the children were also irremovable.

Semble, as he was the head of the household, they were so "residing with" him even while their mother was alive and in the same house: but at any rate they resided with him for a day and a half before he and they became chargeable.

Decision of Qr. Sess. (70 J. P. 7) reversed.

MAIDSTONE UNION *v.* WANDSWORTH UNION, [(1906) 70 J. P. 403; 95 L. T. 125; 4 L. G. R. 1052—Div. Ct.

48. *Illegitimate Child under Sixteen—Residence with Mother—Settlement by Residence—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 Vict. *c.* 61), *ss.* 34, 35.]—An illegitimate child under the age of sixteen, and residing with its parents, can acquire an independent settlement under sect. 34 of the Divided Parishes and Poor Law Amendment Act, 1876.

An order of justices adjudged the pauper, an illegitimate child aged about two years, to be settled in the West Ham Union. E. N., the mother of the pauper, herself an illegitimate child, M. A. C., the mother of E. N., and A. F. C., who married M. A. C. after the birth of E. N., had all resided together in the parish of West Ham in the West Ham Union for three years, in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render them irremovable. During the whole period of such residence E. N. was under the age of sixteen years.

HELD—that E. N., although under the age of sixteen years, had acquired an independent status of irremovability, and consequently, under sect. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, was deemed to be settled in the parish of West Ham; that the pauper took the settlement of his mother, E. N., under sect. 35 of the above-mentioned Act; and that the order of justices must stand.

Per Ld. Macnaghten—E. N. had a statutory (and not a derivative) settlement in West Ham in right of her mother.

R. v. *Elvet* ((1859) 2 E. & E. 266) and *Highworth & Swindon Union* v. *Westbury-on-Severn Union* ((1890) 14 App. Cas. 465; 59 L. J. M. C. 29; 53 J. P. 580; 61 L. T. 733—H. L.) followed.

Decision of C. A. ([1904] 2 K. B. 121; 73 L. J. K. B. 607; 68 J. P. 412; 52 W. R. 513; 91 L. T. 304; 20 T. L. R. 439) affirmed.

WEST HAM UNION *v.* HOLBEACH UNION, [1905] [A. C. 450; 74 L. J. K. B. 868; 69 J. P. 442; 93 L. T. 557; 21 T. L. R. 713; 3 L. G. R. 1179; 54 W. R. 137—H. L. (E.).

49. *Illegitimate Child under Sixteen—Residence with Parent—Reputed Parent—Power to acquire Independent Settlement during such Residence—Poor Law Amendment Act*, 1834 (4 & 5 Will. 4, *c.* 76), *s.* 71—*Poor Removal Act*, 1846 (9 & 10 Vict. *c.* 66), *ss.* 1, 3—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 Vict. *c.* 61), *ss.* 34, 35.]—An illegitimate child under the age of sixteen can acquire an independent settlement under sect. 34 of the Divided Parishes and Poor Law Amendment Act, 1876.

Five illegitimate children lived with their mother and reputed father in the parish of Lambeth without a break and without relief for a period exceeding three years. The husband of

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the mother was resident in the Woolwich Union during that time, and acquired a settlement therein. The mother and children became chargeable in the parish of Fulham, where they had resided not quite one year.

HELD—that the children were settled in the parish of Lambeth, for, as they were living with their reputed father, their residence was irremovable residence although their mother was removable.

Semble—the proviso to sect. 1 of the Poor Removal Act, 1846, applies to all children even though illegitimate.

Decision of C. A. ([1906] 2 K. B. 240; 75 L. J. K. B. 675; 70 J. P. 321; 95 L. T. 337; 22 T. L. R. 579; 4 L. G. R. 1021) affirmed on other grounds.

FULHAM UNION *v.* WOOLWICH UNION, [1907] [A. C. 255; 76 L. J. K. B. 739; 71 J. P. 361; 97 L. T. 117; 23 T. L. R. 483; 5 L. G. R. 801 —H. L. (E.).

50. *Pauper over Sixteen Years of Age residing with Parents—Absence from Home at Frequent Intervals "Tramping the Country" for Indefinite Periods—Unfailing Return to Parents' Home—Intention to Return—Constructive Residence—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 Vict. *c.* 61), *s.* 34.]—A person, now become chargeable, was born at B. in 1852, and moved to S. with his parents in 1864, and continued to reside with them in S., without going away, until about 1866. Since that year he had gone away every year from S. for periods varying between six weeks and three months, and having no fixed abode while away, but frequently sleeping in casual wards. He, however, returned to his parents' home at the end of every tramp, and was always permitted to remain until he began another journey.

HELD—that the pauper gained a settlement by residence in S. under the circumstances.

BINGHAM UNION *v.* SHEFFIELD UNION, (1903) [67 J. P. 212—Sheffield Qr. Sess., S. C. Macaskie, K.C., Recorder.

51. *Railway Guard of Night Goods Train—Settlement by Residence—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 Vict. *c.* 61), *s.* 34.]—X., a guard on a night goods train running regularly between London and Great Yarmouth from 1871 to 1897, resided at St. Peter's Street, N.E., within the respondents' district, and during that time rented a furnished room at Yarmouth, where on alternate days he lived and slept. In 1897 he married again and went to reside at Yarmouth, but retained a furnished room in the house he formerly rented at St. Peter's Street. In 1906 he met with an accident and became chargeable to the respondents' union, having resided at Great Yarmouth for upwards of three years under such circumstances as would render him irremovable. The respondents obtained an order adjudging the parish of Great Yarmouth to be the last legal settlement of the pauper.

HELD—that the order was rightly made; the inference to be gathered from the facts being that the pauper after 1897 regarded Yarmouth as his permanent residence.

Decision of Qr. Sess. (71 J. P. 422) affirmed.

GREAT YARMOUTH UNION *v.* BETHNAL GREEN [UNION, (1907) 97 L. T. 440; 5 L. G. R. 1105 —Div. Ct.

52. *"Resided"—Place where Pauper lived—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 Vict. *c.* 61) *s.* 34.]—A pauper lunatic, T. J., slept from Sunday to Saturday at the place of his employment in the parish of M., in the appellant union, where he had all his belongings and took his meals. On Saturday, after work was finished, he used to go to his brother's house in the parish of T., in the respondent union, where he slept on Saturday nights and had his meals on Sundays, and paid 3*s.* weekly for these privileges. He returned to M. on Sundays about 7.30 p.m. in time for work.

HELD—that M. was the parish where he must be said to have "resided," for the purpose of acquiring a settlement.

RICHMOND UNION *v.* BRENTFORD UNION, (1899) [63 J. P. 118—Middlesex Qr. Sess.

53. *Residence in Hospital — Child under Sixteen—Parents Unknown—Convalescent Home for Children—"Hospital"—Poor Removal Act*, 1846 (9 & 10 Vict. *c.* 66), *s.* 1.]—In September, 1896, E. P., being then about five years of age, was sent to a convalescent home for children, situate in the parish of P. (which parish was subsequently amalgamated with others to form the parish of B.) in the C. Union. E. P. remained at the home till January, 1901.

The children received in the home were of delicate health and came for fresh air treatment. There were about fourteen in the home at any one time, and they remained for periods varying from one month to five years. Two nurses were attached to the home, and a doctor called once a week to see if any children required attention. The children were sent to the home by various charitable institutions, who made payments to the proprietor for their maintenance.

Inquiries had been made with respect to the parents of E. P., but the parents could not be traced.

HELD, that the convalescent home was a "hospital" within the meaning of sect. 1 of the Poor Removal Act, 1846.

HELD, also, that even if it were not a "hospital," E. P. had not acquired a settlement in B.

CHRIST CHURCH UNION *v.* ST. MARY, ISLINGTON, [(1906) 70 J. P. 247—Qr. Sess.

54. *Residence in "Hospital"—Institution for Paying Patients—Poor Removal Act*, 1846 (9 & 10 Vict. *c.* 66), *s.* 1—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 Vict. *c.* 61), *s.* 34.]—A home for epileptics had a small endowment, but was mainly supported by donations,

Settlement and Removal—*Continued.*

subscriptions, and payments from patients; there was a medical staff and nurses, and the home was intended to combine medical care with outdoor life on a farm and recreation; the patients' contributions varied according to their means.

HELD—that it was a "hospital" within the Poor Removal Act, 1846, and that the period of residence there must be excluded for the purposes of irremovability, and that therefore no settlement was acquired by residence there for ten years.

ORMSKIRK UNION *v.* CHORLTON UNION, [1903] [1 K. B. 19; 71 L. J. K. B. 989; 51 W. R. 190; 67 J. P. 28; 19 T. L. R. 1; 68 J. P. 42—Div. Ct.

On appeal, HELD, that whether the character of the house or the character of the pauper's residence be looked at, the decision of the Div. Ct. was correct.

[1903] 2 K. B. 498; 72 L. J. K. B. 721; 89 L. T. 256; 19 T. L. R. 622—C. A.

55. *Residence in Reformatory—Exclusion of Time—"Prison"—Poor Removal Act*, 1846 (9 & 10 Vict. *c.* 66), *s.* 1.]—The time during which a person resides in a reformatory which is maintained partly out of the public funds and partly by charges on the public authorities from whose localities the inmates have been sent, must be excluded in the computation of the time of residence necessary for exemption from removal under sect. 1 of the Poor Removal Act, 1846, and the amending Acts.

GLOUCESTER UNION *v.* WHEATENHURST UNION, [(1907) 71 J. P. 519—Qr. Sess.

56. *Scotland—Residence for Three Years—Maintenance in Charitable Institution—Incapacity for Self Maintenance—Mental and Physical Weakness—Poor Law (Scotland) Act*, 1898 (61 & 62 Vict. *c.* 21).]—Sect. 1 of the Poor Law (Scotland) Act, 1898, provides that "no person shall be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall . . . have resided for three years continuously in such parish, and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief. . . ."

HELD—that a person who has resided for three years continuously in a parish as an inmate of a charitable institution, without having had recourse to begging or received or applied for parochial relief, acquires a settlement in the parish under that section, notwithstanding that, owing to mental and physical weakness, he has during that period been incapable of maintaining himself.

Decision of the Ct. of Sess. (6 Fraser, 457) affirmed.

THE PARISH COUNCIL OF KILMALCOLM *v.* THE [PARISH COUNCILS OF GLASGOW AND OTHERS, [1906] A. C. 344; 94 L. T. 826; 22 T. L. R. 602—H. L. (Sc.).

(e) In General.

57. *Adoption of Child by Guardians—Effect of—Removability of Child—Poor Law Act*, 1899 (62 & 63 Vict. *c.* 37), *s.* 1.]—By sect. 1, subsect. 1, of the Poor Law Act, 1899, "where a child is maintained by the guardians of a poor law union and . . . (iv.) a parent of the child has been sentenced to imprisonment in respect of any offence against any of his or her children," the guardians may "resolve that until the child reaches the age of eighteen years all the rights and powers of such parent . . . in respect of the child shall . . . vest in the guardians."

The above section does not affect the removability of a pauper child; and therefore where the guardians of a union, to which a child had become chargeable, resolved to adopt the child under the provisions of the section, the child not being settled in the union and not being irremovable therefrom:—

HELD—that the guardians were not thereby prevented from applying for an order removing the child to her place of settlement, even though the resolution adopting the child had not been rescinded.

WANTAGE UNION *v.* BRISTOL UNION, [1907] 1 [K. B. 68; 76 L. J. K. B. 25; 71 J. P. 54; 96 L. T. 118; 23 T. L. R. 54; 5 L. G. R. 33—Div. Ct.

58. *Order of Adjudication as to Pauper Lunatic—Appeal—Grounds of Appeal—Service—Lunacy Act*, 1890 (53 Vict. *c.* 5), *s.* 306.]—Upon an appeal against an order of adjudication of the settlement of a pauper lunatic, the statement of the grounds of appeal was not sent with the notice of appeal, nor was the statement sent within fourteen days of the first day of the sessions to which the notice of appeal related.

HELD, nevertheless, that the Court might enter and respite the appeal.

BATH UNION *v.* WOOLWICH UNION, (1904) 68 [J. P. 240—Qr. Sess.

59. *Order of Adjudication as to Pauper Lunatic—Evidence to Upset—Expenses of Maintenance in Asylum—Action to Recover Expenses of Maintenance—Admission of Evidence as to Order of Adjudication being Bad, and as to Acquisition of Settlement since such Order—Lunacy Act*, 1890 (53 & 54 Vict. *c.* 5), *ss.* 287, 289, 314.]—In 1891 a pauper lunatic was by an order under sect. 289 of the Lunacy Act, 1890, adjudicated to be settled in the defendant union.

In 1904 an order was made by justices under sect. 314 for the payment of the pauper's maintenance expenses by the defendant union. In an action upon such order, the county court judge refused to admit evidence that the pauper had, since the order of adjudication, acquired a fresh settlement or that the order of adjudication was bad, holding that his Court was not the proper tribunal to decide the question of settlement, and that he must act upon the order of adjudication.

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HELD—that this decision was right.

SUFFOLK COUNTY ASYLUM VISITING COMMITTEE *v.* NOTTINGHAM UNION, (1905) 69 J. P. 120; 3 L. G. R. 362—Div. Ct.

60. *Settlement by Estoppel—Former Order confirmed on Appeal on Technical Grounds—Effect of former Order so confirmed as against all the World.*]—E. L., a pauper, was by order of two justices of the county of Devon, on March 3rd, 1896, adjudged to be last legally settled in the parish of N. in the U. Union. The guardians of the U. Union appealed to quarter sessions against the said justices' order, but the appeal was dismissed on technical grounds, and the order was confirmed. E. L. subsequently became chargeable to the W. Union as a lunatic, and an order of justices was obtained, on November 13th, 1903, against the U. Union, the grounds of which order set up the before-mentioned order of March 3rd, 1896.

HELD—that though the appeal against the earlier removal order was dismissed "not upon the merits," the order was nevertheless conclusive evidence of the settlement adjudged by it.

UXBRIDGE UNION *v.* NEW WINCHESTER UNION. [(1904) 68 J. P. 190—Qr. Sess.; 68 J. P. 525; 91 L. T. 533—Div. Ct.

V. VAGRANCY AND OTHER OFFENCES.

See also title CRIMINAL LAW (VAGRANCY).

61. *Casual Paupers — Tasks of Work — "Breaking" of Stones—"Pounding" Stones—General Order of Local Government Board, December 18th, 1882—Pauper Inmates Discharge and Regulation Act*, 1871 (34 & 35 Vict. *c.* 108), *ss.* 6, 7 (4).]—Among the tasks of work, prescribed by the General Order of the Local Government Board, dated December 18th, 1882, for male casual paupers detained for more than one night is the following task: For each entire day of detention the breaking of 7 cwt. of stone, or such other quantity not less than 5 cwt. nor more than 13 cwt. as the guardians, having regard to the nature of the stone, may prescribe; the stone to be broken to such a size as the guardians, having regard to the nature thereof, may prescribe.

HELD—that this task of work does not include the task of pounding a bushel of stones of the estimated weight of one cwt., and that the conviction of a casual pauper for refusing to perform such a task must be quashed accordingly.

REX *v.* BADDELEY, EX PARTE MOORE, (1906) 70 [J. P. 346—Div. Ct.

62. *Desertion of Children—Children already Chargeable—Children "becoming Chargeable"—Continuing Offence—Variance between Information and Evidence—Vagrancy Act*, 1824 (5 Geo. 4, *c.* 83), *s.* 4—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 Vict. *c.* 61), *s.* 19—*Summary Jurisdiction Act*, 1848 (11 & 12 Vict. *c.* 43), *s.* 1.]—In 1899 the respondent ran away, leaving his three children chargeable, and they were maintained in the appellant's union, and in 1900 the respondent was convicted and sentenced to one month's hard labour. On his release he failed to take the children out of the workhouse, and, in January, 1903, a warrant was granted for the apprehension of the respondent for running away and leaving his children chargeable on December 15th, 1902. In December, 1903, the respondent was arrested, and the information alleged that the respondent on December 15th, 1902, had run away, leaving his three children, "whereby they have become and are now actually chargeable."

HELD—that, notwithstanding the earlier conviction, the respondent could have been convicted of the offence on the evidence before the magistrate, and that the information could have been amended, if necessary, under sect. 1 of the Summary Jurisdiction Act, 1848.

BANNISTER *v.* SULLIVAN, (1904) 68 J. P. 390; [91 L. T. 380; 20 Cox, C. C. 685—Div. Ct.

63. *Idle and Disorderly Person—Wilful Refusal and Neglect of Person to Maintain Himself—Person suffering from* Delirium Tremens *—Chargeability to Union—Vagrancy Act*, 1824 (5 Geo. 4, *c.* 83), *s.* 3.]—A person at the time he was brought to the workhouse infirmary was suffering from *delirium tremens*, and was in such a condition as to be dangerous to himself and others, and at that time he was in fact unable to maintain himself.

HELD—that the illness from which he was then suffering was produced by his own voluntary act of intoxication: his omission to maintain himself was not a wilful refusal or neglect so to do within the meaning of sect. 3 of the Vagrancy Act, 1824.

ST. SAVIOUR'S UNION *v.* BURBRIDGE, [1900] 2 [Q. B. 695; 69 L. J. Q. B. 886; 64 J. P. 724; 48 W. R. 685; 83 L. T. 317; 16 T. L. R. 532—Div. Ct.

64. *"Misbehaviour" of Pauper—Removal of Pauper from One Workhouse to Another—Refusal of Pauper — Offence — Poor Relief Act*, 1815 (55 Geo. 3, *c.* 137), *s.* 5.]—The appellant union had an agreement under 12 & 13 Vict. c. 103, s. 14, as amended by 39 & 40 Vict. c. 61, s. 22, with the K. guardians, whereby able-bodied paupers chargeable to the appellant union might be received and maintained in the workhouse of the K. guardians.

The respondent, an able-bodied pauper, was admitted to the appellants' workhouse, and on the following day was ordered to go to the K. workhouse, and an order for admittance was handed to him to take with him. An official of the workhouse was sent with him, but when they were in the street the respondent refused to accompany the official. The respondent again entered the appellants' workhouse two days later, and was charged with misbehaviour under sect. 5 of the Poor Relief Act, 1815.

HELD—that he had not been guilty of such "misbehaviour" as was contemplated by the section, although probably he could be punished

Vagrancy and other Offences—*Continued.*

in another way for "disobedience to lawful orders."

MILE END UNION *v.* SIMS, [1905] 2 K. B. 200; [74 L. J. K. B. 647; 69 J. P. 145; 92 L. T. 238; 21 T. L. R. 241; 3 L. G. R. 349; 20 Cox, C. C. 807—Div. Ct.

65. *Idle and Disorderly Person — Husband "Desert or Wilfully Neglect to Maintain" his Wife—Vagrancy (Ireland) Act*, 1847 (10 & 11 Vict. *c.* 84), *s.* 2—*Vagrancy Act*, 1824 (5 Geo. 4, *c.* 83), *s.* 3.]—Upon a complaint before justices, under the Vagrancy (Ireland) Act, 1847, to commit a husband to prison for deserting and wilfully neglecting to maintain his wife :—

HELD (diss. Ld. O'Brien, L.C.J.) — that the defendant was entitled to adduce evidence to prove the wife's adultery, and such adultery, if substantiated, would afford a good defence.

The English cases on the words, "wilfully refusing or neglecting" to maintain a wife in sect. 3 of the Vagrancy Act, 1824, followed.

PHILLIPS *v.* SOUTH DUBLIN UNION GUARDIANS, [1902] 2 Ir. R. 112—Q. B. Div.

66. *Refusal to Work—Offer of Work—Conditions—Reasonableness of Conditions—Vagrancy Act*, 1824 (5 Geo. 4, *c.* 83), *s.* 3.]—The respondent, who was an able-bodied man, became an inmate of the appellant union. He was taken to and offered work on a farm belonging to the Salvation Army on condition that he signed an agreement, among the terms of which were that he would abstain from all intoxicating drink, that he would not enter any premises where intoxicating drink was sold, and would discourage others from doing so, that he would abstain from the use of all profane and obscene language, that he would attend the Saturday night roll-call meetings in the citadel and any special meetings which might be arranged, and some place of worship once on Sunday. The respondent refused to agree to such conditions and to work under them. He again became chargeable to the union, and was charged upon an information laid under the Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3, with wilfully refusing to maintain himself.

HELD—that the respondent's refusal to work under conditions which, though in themselves reasonable, had no relation to his work, did not amount to a wilful refusal to maintain himself.

POPLAR UNION *v.* MARTIN, [1905] 1 K. B. 728; [74 L. J. K. B. 306; 69 J. P. 146; 53 W. R. 398; 92 L. T. 197; 21 T. L. R. 240; 3 L. G. R. 340; 20 Cox, C. C. 785—Div. Ct.

POOR PRISONERS' DEFENCE ACT, 1903.

See CRIMINAL LAW AND PROCEDURE.

PORT AND PORT DUES.

See SHIPPING AND NAVIGATION.

POST OFFICE.

And see BAILMENT; CRIMINAL LAW 206.

1. *Conveyance of Mails—Powers of Postmaster-General—Selection of Hours for Mail Trains—Conveyance of Mails Act*, 1838 (1 & 2 Vict. *c.* 98), *s.* 1.]—By the Conveyance of Mails Act, 1838, the Postmaster-General may require the conveyance and forwarding of mails by a railway company "at such hours or times in the day or night" as he shall direct.

HELD—that this right is not restricted to the naming of fixed and definite hours for the departure and running of mail trains, but entitles him to name variable times, to be dependent on the time of the arrival of the mails in ordinary course of through transit by rail and sea.

REX *v.* GREAT NORTHERN RY. CO. OF IRELAND, [1907] 2 Ir. R. 242—K. B. Div.

END OF VOL. II.

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